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Why did they do it?  
Moral sensibilities, motivating reasons, and degrees of  
moral blame in culpable homicide

A thesis  
submitted in fulfilment  
of the requirements for the degree  
of

**Doctor of Philosophy in Law**

at

**The University of Waikato**

by

**BRENDA ROSALIE MIDSON**



THE UNIVERSITY OF  
**WAIKATO**  
*Te Whare Wānanga o Waikato*

2018

# Abstract

Humans have a long evolutionary history of violence. The psychological mechanisms underlying aggression can be viewed as “solutions” (albeit undesirable solutions) to any one of a number of adaptive problems that exist in social life. Sometimes that aggression takes the form of the killing of one person by another – in legal parlance this is homicide. This thesis contends that these adaptive “solutions” might explain why people commit homicide in certain circumstances. In this sense, these explanations broadly align with “motives” for certain types of homicide. In some cases, such motives might constitute justifications or excuses; in others, aggravating features.

The criminal justice system in New Zealand is underpinned by an assumption of rationality which is not always supported in individual cases. As a result, the legal mechanisms for apportioning blame in cases of culpable homicide are insufficient to recognise the different degrees of *moral* blame which can exist when one individual kills another. Therefore, the current regime for determining moral blame leads to inconsistent outcomes for factually similar cases, contrary to the rule of law which requires equality before the law. This thesis considers whether changing the definitions of murder and manslaughter will allow courts to legitimately recognise all relevant mitigating (and aggravating) circumstances in determining guilt. It will also consider whether there are other options for reform that might better deliver justice in the round.

If law is to be relevant, it must reflect current knowledge about why people act in the ways that they do. If the law does not reflect science, it moves too far away from the realities of the community. Looking at homicide through a “brain sciences” lens can give us a better understanding of the psychological mechanisms involved in homicide, and allow for the formulation of an evidence-based approach which leads to a better appreciation of the degree of moral blame involved in particular killings. From this it follows that the criminal justice system will be better placed to appropriately respond to those degrees of moral blame.

Three types of cases, in particular, illustrate that presently not all defendants charged with homicide are treated consistently: young defendants who kill; victims of violence who kill their abuser; and defendants who kill children. Defendants within these categories might demonstrate the same degree of moral blame, but the outcomes in case disposition differ wildly; or outcomes may be the same for very different degrees of moral blame. Inconsistency of outcomes means that a fundamental requirement of the rule of law is absent – the requirement of equality before the law. When elements of the rule of law are not upheld, justice is not delivered.

This thesis argues that if our legal system recognises, in its application, different degrees of moral blameworthiness, then it would be as well to be upfront about them: the court’s “commiseration [should be] actually codified in the law”.<sup>1</sup> The thesis therefore recommends a series of statutory amendments to the law of culpable homicide, including the creation of a “degrees of culpable homicide” regime with attendant defences, as well as a range of lesser offences.

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<sup>1</sup> D Barret Broussard “Principles for passion killing: an evolutionary solution to manslaughter mitigation” (2012) 62 Emory LJ 179 at 193.

# Preface and Acknowledgements

Academic research is often born out of personal experience – this thesis is an exception, fortunate as I am to not have been personally affected by homicide. But I do have an abiding interest in the motivations behind criminal behaviour and that, combined with a radar for injustice, has led me here. Sadly, far too many people’s lives *have* been immeasurably and irretrievably affected by homicide – families and friends of direct victims, families and friends of defendants, and defendants themselves. Sometimes victims’ families and defendants’ families are the same people, and sometimes defendants are also victims. Homicide, as with all criminal behaviour, is not a dichotomous event – there is no clear dividing line between victims and defendants. Doing justice to victims does not have to mean injustice for defendants. Justice for all parties can be better achieved, in the context of homicide, by understanding the reasons behind the killing. This is not say that “to know all is to forgive all”. Sometimes the motivating reasons behind a killing make it “unforgivable”. What I have attempted to do here is to suggest ways in which the law could change to make it easier for courts to decide just how forgivable (or unforgivable) the defendant is in the individual case.

There are many people who have blessed me with their support, assistance, wisdom and guidance, many more than I am able to mention specifically here.

I have been honoured to have as my supervisory panel two of New Zealand’s great legal minds – Professor Margaret Wilson and Professor Warren Brookbanks. Margaret, thank you so much for taking on the role of Chief Supervisor. I have really enjoyed and appreciated the long discussions on not only homicide but public policy and the rule of law as well. Thank you also for “getting it” and commiserating in my outrage on some of these cases, and for the gentle nudges when I fell off the PhD wagon. Warren – the criminal law oracle! Thank you for bringing your vast knowledge and expertise to this project. Your attention to detail in reading drafts has been such an asset. Thank you also for reigning me in when my voice became too doctrinaire!

I thank Te Piringa Faculty of Law and Dean Wayne Rumbles for support in the form of leave, conference and other funding, without which this process would have been much more difficult; and for all the collegial support from fellow faculty members. Dr Keaka Hemi and Dr Rogena Sterling, in particular, have been very generous in their advice on the submission process. Former colleague, and current friend, Professor Neil Boister, has also provided great support and guidance.

I am grateful to the following organisations and individuals for assistance in the form of research facilities and accommodation: Edinburgh Law School (Rose Irvine and Dr Chloë Kennedy), Strathclyde Law School (Dr Claire McDiarmid, Professor Mark Poustie and Professor Kenneth Norrie), the Max Planck Institute for Foreign and International Criminal Law (Dr Johanna Rinceanu and Nicole Rätzel) and All Souls College, Oxford (Emeritus Professor Andrew Ashworth).

Over the course of this project I have been fortunate to meet a number of researchers with whom I have had the privilege of exchanging ideas and I thank them for their openness and generosity: Emeritus Professor Andrew Ashworth, Dr Andrew Cornford, Professor Sharon Cowan, Dr Sven Granath, Dr Chloë Kennedy, Dr Claire McDiarmid, Professor Elizabeth Sheehy, Professor Julie Taylor, Professor Graham Virgo and Professor Sandra Walklate.

I would also like to acknowledge and thank Fairfax Media, and in particular Katie Kenny, for some fruitful discussions during the course of the “Faces of Innocents” project, and for giving me access to their database which was invaluable during the drafting of the child homicide chapter.

To my friends: Jacquelin Mackinnon, Ken Mackinnon and Jamie Mackinnon – my Fife family – who have so generously provided me with a beautiful home away from home on numerous occasions; Lynn Walker for all of the respite weekends – walking, music, wine, strident conversations and challenging questions. Thank you all for great and memorable times.

Finally, to Quin and Tabitha – just for being here, and being just the best.

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# Chapter 1: Introduction

## OVERVIEW

This introductory chapter “sets the scene” for the formulation of the following thesis statement:

The criminal justice system in New Zealand is underpinned by an assumption of individual rationality which is not always supported. Thus, the legal regime for apportioning blame in cases of culpable homicide is insufficient to recognise the different degrees of moral blame which can exist when one individual kills another. This leads to inconsistent outcomes for factually similar cases, contrary to the rule of law which requires equality before the law. This thesis will consider the question of whether changing the definitions of murder and manslaughter will allow courts to legitimately recognise all relevant mitigating circumstances in determining guilt, and whether there are other options for reform that might better deliver justice in the round.

This scene-setting exercise includes an overview of the conceptual framework within which the thesis statement will be tested, along with a word of caution about potential limitations and misapplications of that framework. From there I move to a discussion of the current legal regime relating to homicide and its defences, to establish the limitations of that regime. This section is followed by a discussion of several cases which demonstrate how these limitations in the legal landscape have worked in practice to create inconsistent outcomes for defendants. Next, the chapter expands upon the central assumption that this thesis addresses – that the law’s assumption of rationality means it does not always reflect moral blameworthiness – and provides an overview of potential reforms to address this issue. That section also provides the context for the synopsis that follows of the three case studies that this thesis relies upon as reflecting its central argument about degrees of moral blame. These are young defendants who kill, victims of violence or coercion who kill their abusers, and those who commit child homicide.

## SETTING THE SCENE

Juror Vincent Moss ... discussed what he clearly considered an even more pivotal point than the length of sentence: did these ten-year-olds know right from wrong, and could they be considered responsible for their actions? In his opinion they could not be considered responsible in the same sense as a mentally competent adult ... He felt that a jury’s possibilities in an adult trial, murder or manslaughter – was far too restrictive for such a

case. 'We should have gone back into court,' he said, 'and we should have said, 'Yes, we do have a verdict: these boys are in urgent need of social and psychiatric help'.<sup>2</sup>

Vincent Moss was a juror in the trial of ten-year-olds Jon Venables and Robert Thompson for the murder of almost three-year-old James Bulger in England in 1993. Moss's comments reveal the often limited choices available to those tasked with deciding a defendant's liability for culpable homicide. The issue is that a defendant's liability for culpable homicide depends upon an assessment of their *legal* blameworthiness, which does not always reflect their degree of *moral* blameworthiness, in other words the extent to which they had, in some sense, a "bad motive".

As was apparent from the public furore that emerged from the killing of James Bulger, the prosecution and sentencing of killers is a topic that often elicits concerns about whether justice is done in the individual case, particularly when the killing is thought to have been at the more grievous end of the spectrum.<sup>3</sup> These concerns have also been apparent in New Zealand – the palpable outrage,<sup>4</sup> for example, that Clayton Weatherston sparked a decade ago when he claimed (albeit unsuccessfully) that he was provoked by Sophie Elliot, whom he stabbed more than 200 times in an attack that was described by a pathologist as "persistent, focused and determined".<sup>5</sup> Prior to the killing Weatherston and Elliot had been in a relationship. He alleged that, on the day of the killing, she attacked him with some scissors and knocked off his glasses. That, combined with his claim of rejection by her, was alleged by Weatherston to provide a catalyst for the killing.<sup>6</sup>

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<sup>2</sup> Vincent Moss, juror in the trial of Jon Venables and Robert Thompson for the murder of James Bulger, cited in Gitta Sereny *Cries Unheard: The Story of Mary Bell* (Macmillan, London, 1998) at 123.

<sup>3</sup> For a review of the media coverage of the Bulger case, see Bob Franklin and Julian Petley "Killing the Age of Innocence: Newspaper Reporting of the Death of James Bulger" in Jane Pilcher and Stephen Wagg (eds) *Thatcher's Children: Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press, London, 1996). Franklin and Petley refer to the *Daily Star's* report on the guilty verdicts under the heading "How do you feel now you little bastards?" (at 134). Franklin and Petley also compare the reaction to the Bulger case with that relating to the 1994 murder of 5-year-old Norwegian girl, Silje Marie Raedergard. Norwegian press reporting of the case was significantly different to that provided by English media on the Bulger killing. Franklin and Petley observe that the comparisons between the two cases "reveal striking differences ... which illuminate distinctive contemporary attitudes towards children within the different communities" (at 135).

<sup>4</sup> See, for example, Kerre Woodham "Murderous butcher too evil to watch" *The New Zealand Herald* (online ed, 26 July 2009); "Women's Refuge outraged by trial" *Otago Daily Times* (online ed, 22 July 2009); Andrew Koubaridis "Chilling murderer caused nationwide revulsion" *The New Zealand Herald* (online ed, 6 January 2010).

<sup>5</sup> *R v Weatherston* [2009] NZCA 267 at [5].

<sup>6</sup> At [4].

More recently – in 2016 – when the prosecution accepted manslaughter pleas from the killers of 3-year-old Moko Rangitoheri, there was much horrified questioning about why the killers were not prosecuted for murder. Moko had been left in the custody of Tania Shailer and David Haerewa. He died on 10 August 2015, after he was rushed to hospital. The cause of Moko’s death was found to be multiple blunt force injuries, including lacerations and haemorrhages deep inside his stomach. There was older bruising and damage to his bowel, which had caused it to rupture, which in turn led to peritonitis and septic shock. Moko’s brain was swollen, with significant clots and haemorrhages on his brain, which indicated multiple injuries had been inflicted over a period of days. The pathologist suggested that a further possible cause of the brain swelling, and therefore death, was smothering, as there were mouth and face injuries consistent with that conclusion.<sup>7</sup>

Even before these cases, attempts had been made to reform the law of culpable homicide in New Zealand to try to address some of the perceived injustices. In 1996, Brian Neeson introduced a Bill in the House of Representatives, aimed at creating a “degrees of murder” approach in New Zealand.<sup>8</sup> Progress of the Bill was slow, and ultimately it was defeated in 2001. The Hon Margaret Wilson, then Associate Minister of Justice, said that the Bill was “fundamentally misconceived” because, among other things, it attempted to deal with the problems inherent in sentencing and parole by changing the definition of murder.<sup>9</sup> At that time, the Government’s Sentencing and Parole Reform Bill had also been introduced into Parliament, which ultimately resulted in the passage of the Sentencing Act 2002 and the Parole Act 2002, both of which significantly altered the approach to be taken in these respective contexts.

While sentencing and parole processes can take into account different degrees of moral blameworthiness in determining punishment, they have their limitations, much as did England and Wales at the time of the Venables and Thompson trial. As the law currently stands in New Zealand, both murder and manslaughter convictions result in the offender being liable to imprisonment for life.<sup>10</sup> Under s 102 of the Sentencing Act 2002, there is a presumption in favour of life imprisonment for murder, although this will be the maximum rather than mandatory penalty. The presumption in favour of life imprisonment

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<sup>7</sup> *R v Shailer* [2016] NZHC 1414.

<sup>8</sup> Degrees of Murder Bill 1996 (157-1).

<sup>9</sup> (17 October 2001) 596 NZPD 12562.

<sup>10</sup> Crimes Act 1961, ss 172, 177.

is strong — an offender convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, life imprisonment would be manifestly unjust. Unless the three-strikes sentencing provisions<sup>11</sup> apply, the minimum period of imprisonment for murder generally will be ten years.<sup>12</sup> Furthermore, under s 104 of the Sentencing Act 2002, the court must (unless it is satisfied that it would be manifestly unjust to do so) impose a minimum period of 17 years or more, in certain circumstances, including situations where the murder was committed in an attempt to avoid detection, prosecution, or conviction; or involved calculated or lengthy planning, including murder for hire; or was committed as part of a terrorist act; or was committed with a high level of brutality, cruelty, depravity, or callousness; or where the deceased was particularly vulnerable because of his or her age, health, or any other factor; or if the deceased was a member of the police or a prison officer acting in the course of his or her duty.

These sentencing provisions set the limits regarding the extent to which *moral* blameworthiness can be considered post-conviction. More importantly, however, sentencing and parole decisions do not determine the moral culpability of the offender; rather they determine the extent to which they should be punished. The authority to punish an offender arises out of the fact that they have first been found legally blameworthy. At present, in the context of culpable homicide, the only options in relation to findings of legal blameworthiness are (essentially) murder and manslaughter. These two options must cover the extremely wide range of circumstances in which one person kills another. As will be demonstrated in this chapter, there is a failure in the mechanisms that determine legal blameworthiness to accurately reflect *moral* blame. This is problematic because moral blame ought to be the basis for criminalisation – the fundamental assumption underpinning the criminal justice system is that people are rational actors, capable of knowing the difference between “right” and “wrong” and making choices between the two.<sup>13</sup> To be *morally* blameworthy, individuals must have the *capacity* to make moral judgments about

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<sup>11</sup> Sentencing and Parole Reform Act 2010. Justice Minister, Andrew Little, has announced the Government’s intention to repeal the three-strikes sentencing regime sometime in the next year: “Three strikes law not working, says Justice Minister Andrew Little” *The New Zealand Herald* (online ed, Auckland, 1 November 2017).

<sup>12</sup> Sentencing Act 2002, s 103.

<sup>13</sup> Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* (4<sup>th</sup> ed, Thomson Reuters, Sydney, 2017) at 177-178.



their actions.<sup>14</sup> The case of Californian man, Robert Harris, provides a stark example of the injustice that arises as a result of the assumption of rationality. Harris was executed:<sup>15</sup>

... for the brutal and senseless killing of two teen age boys. The trial jury, state appellate courts, and numerous federal courts found that evidence presented at Robert Harris' trial demonstrated his moral culpability for the crimes, thus qualifying him as death-eligible. The courts affirmed his death-eligibility (and ultimately the death sentence itself) despite the fact that he suffered from fetal alcohol syndrome and was subjected to severe physical and psychological abuse by both of his alcoholic parents throughout his childhood — abuse that might have severely impaired the moral sensibilities of most human beings.

Blumoff argues that “[s]ometimes making the right choice is beyond the grasp of many damaged individuals”.<sup>16</sup> While the category of defendants with impaired “moral sensibilities” is so wide that its limits cannot be precisely defined, this thesis will rely upon three case studies that provide particular challenges to the idea of fairness in the context of culpable homicide. These are cases where the killer is a young person; cases in which a victim of violence kills her abuser; and cases involving defendants who kill children.

To support my arguments, I will be relying on various “brain sciences”, including evolutionary biology, evolutionary and other psychologies, and cognitive and developmental neuroscience. As Blumoff suggests, we should review new findings from brain sciences and ask whether they should inform normative discussions about criminal law and punishment.<sup>17</sup> He adds that bringing data from brain science into the conversation will enable the criminal justice system to more fully take account of “the limitations that many among us are condemned to suffer”,<sup>18</sup> which, in turn, should lead to greater understanding and compassion in the criminal law.<sup>19</sup> Blumoff laments the fact that legal systems generally only take these “limitations” into account at the sentencing stage, after conviction, and even then the usefulness of that information can be undermined. Greene and Cohen argue that whenever we know the causes of a person’s bad behaviour, we cease to see them as truly deserving of punishment; an insight expressed by the French proverb, “to know all is to forgive all”.<sup>20</sup> As Greene and Cohen observe, this is something also

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<sup>14</sup> Peter Arenella “Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability” (1992) 39 UCLA L Rev 1511 at 1518.

<sup>15</sup> At 1514.

<sup>16</sup> Theodore Y Blumoff “Foreword: The Brain Sciences and Criminal Law Norms” (2011) 62 Mercer L Rev 705 at 716.

<sup>17</sup> At 706.

<sup>18</sup> At 706.

<sup>19</sup> At 706.

<sup>20</sup> Joshua Greene and Jonathan Cohen “For the law, neuroscience changes nothing and everything” (2004) 359 Phil Trans R Soc Lond B 1775 at 1783.

expressed by Jesus and Buddha, both of whom “preach a message of universal compassion”.<sup>21</sup>

Greene and Cohen argue that “neuroscience will challenge and ultimately reshape our intuitive sense(s) of justice”.<sup>22</sup> They continue:<sup>23</sup>

Cognitive neuroscience, by identifying the specific mechanisms responsible for behaviour, will vividly illustrate what until now could only be appreciated through esoteric theorizing: that there is something fishy about our ordinary conceptions of human action and responsibility, and that, as a result, the legal principles we have devised to reflect these conceptions may be flawed.

Humans have a long evolutionary history of violence.<sup>24</sup> The psychological mechanisms underlying aggression can be seen as “solutions” (albeit not desirable solutions) to any one of a number of adaptive problems that exist in social life.<sup>25</sup> Sometimes that aggression takes the form of the killing of one person by another – homicide, in other words.<sup>26</sup> It is my argument in this thesis that these adaptive “solutions” might explain why people commit homicides in certain circumstances. In this sense, it is suggested that these explanations might broadly align with “motives” (or, in some cases, “justifications”) for certain types of homicide. It is crucial to note that use of the term “solutions” does not imply that the homicide is defensible. In some cases, the homicide is at the top of the list of most morally blameworthy killings, despite the fact that it can be “explained” in terms of evolutionary psychology. In such cases the law rightly says that there is no good reason for acting in that particular way. On the other hand, sometimes the psychological or biological imperative behind a killing *might* mitigate responsibility. As already stated, the criminal justice system is underpinned by the notion that people are rational and capable of making the right choices. But this is simply an assumption – not all individuals are rational,<sup>27</sup> or at least they are not rational all the time or in all circumstances. Thus, the law recognises, in some circumstances, that a defendant is *unable* to make the right choice (their will may have been overridden by the will of another, as in the case of compulsion, for

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<sup>21</sup> At 1783.

<sup>22</sup> At 1775.

<sup>23</sup> At 1775.

<sup>24</sup> DM Buss and TK Shackelford “Human aggression in evolutionary psychological perspective” (1997) 17(8) Clin Psychol Rev 605 at 606.

<sup>25</sup> At 617.

<sup>26</sup> In New Zealand, homicide is defined under s 168 of the Crimes Act 1961 as “the killing of a human being by another, directly or indirectly, by any means whatsoever”, although the means by which the killing is effected do not necessarily need to be “violent”.

<sup>27</sup> Reece Walters and Trevor Bradley *Introduction to Criminological Thought* (Pearson Education New Zealand, Auckland, 2005) at 56.

example). In other circumstances the law may say that a killing by a truly rational actor is *justified* because there *is* a good reason for so acting (self-defence being the most obvious example).

Criminal behaviour is human behaviour and therefore can be explained using the same theories. It is also important to observe that there can be no crime without a law proscribing certain conduct (although some may argue that causing the death of another is a crime against nature). However, there are several circumstances in which killing is not unlawful, such as in the case of withdrawing life-supporting treatment, or indeed, in justifiable self-defence.

This thesis will argue that law of culpable homicide as it currently stands in New Zealand is inconsistent with current knowledge about human behaviour. The thesis will use principles from evolutionary and other psychologies as a framework for examining laws that govern human behaviour (in this context, homicide) to determine how the law ought to operate to regulate that behaviour and determine culpability. If law is to be relevant, it must reflect current knowledge about why people act in the ways that they do. If the law does not reflect science, it moves too far away from the realities of the community. Looking at homicide through a “brain sciences” lens can give us a better understanding of the psychological mechanisms involved in homicide and allow for an evidence-based approach to be formulated which would lead to a better appreciation of the degree of moral blame involved in particular killings, and consequently how the criminal justice system ought to respond to those degrees of moral blame.

#### A NOTE OF CAUTION

There is empirical support for claims that evolutionary psychology has some degree of explanatory power in the context of homicide. At the outset, there are two important points to be made. The first acknowledges the risks associated with employing an evolutionary analysis. As Hanna notes, the linking of crime and biology is a “dangerous intersection”<sup>28</sup>. A biological inquiry, she argues, downplays human autonomy and individualism.<sup>29</sup> Further, an evolutionary approach to crime causation could foster a belief that criminals

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<sup>28</sup> Cheryl Hanna “Can a Biological Inquiry Help Reduce Male Violence Against Females? Or what’s a nice ‘gal’ like me doing at a conference like this?” (1997) 22 Vermont LR 333 at 334.  
<sup>29</sup> At 335.

have genes that are not present in non-criminals and therefore that crime is driven by people with criminal minds, rather than by criminal moments or opportunities.<sup>30</sup> It could lead people to believe that humans act the way animals do in the wild. To manage this risk, it must be clearly stated that employing an evolutionary analysis does not equate to an assertion that crime is a result of biological determinism, or that genes determine behaviour.<sup>31</sup> While genes do play a role in human behaviour, they do not determine it.<sup>32</sup> Evolutionary theory provides information that is probabilistic, not deterministic,<sup>33</sup> and probability is not inevitability. In other words, predispositions do not guarantee any behaviour from any individual.<sup>34</sup> Furthermore, evolutionary analysis tells us about behavioural patterns likely to emerge in a large population. It does not explain why a certain individual acted the way she or he did on a particular occasion. According to Schwartz:<sup>35</sup>

Human nature, like the nature of anything else, is a set of potentials to behave certain ways in given environments, not a nonsocial genetic something that inevitably produces the same result in any environment. To say that existing inequalities are due to genetics, and therefore inalterable, ignores that genetic propensities may be manifested differently in different environments.<sup>36</sup>

Hanna also expresses concern that if a biological inquiry suggested, for example, that men are predisposed to violence, then the “naturalistic fallacy” would lead to a conclusion that such behaviour is acceptable.<sup>37</sup> Evolutionary theory explains behaviour without justifying it.<sup>38</sup> Ultimately, Jones argues that even though biology has been used to justify political, social, and economic agendas, including discriminatory and even genocidal policies, “important roles for biology remain – even in law”.<sup>39</sup> He does note, however, the need for vigilance for “invidious reductionism, determinism, and divisiveness”.<sup>40</sup>

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<sup>30</sup> Owen D Jones “Behavioral Genetics and Crime, in Context” (2006) 69 LCP 81 at 97.

<sup>31</sup> Owen D Jones “Evolutionary Analysis in Law: An introduction and application to child abuse” (1997) 75 NCL Rev 1117 at 1125.

<sup>32</sup> Randolph Roth “Biology and the Deep History of Homicide” (2011) 51 Brit J Criminol 535 at 535.

<sup>33</sup> Owen D Jones “Law and Biology: Toward an Integrated Model of Human Behavior” (1997) 8 J Contemp Legal Issues 167 at 205; Hanna, above n 28, at 338.

<sup>34</sup> Owen D Jones “Time-shifted Rationality and the Law of Law’s Leverage: behavioral economics meets behavioral biology” (2001) 95 NWU L Rev 1141 at 1168.

<sup>35</sup> Rolando Mazariegos “The Frequency of Abuse and Neglect on Stepchildren: evolutionary perspective and biosocial dimensions” (2000) 21 J Juv L 56 at 71.

<sup>36</sup> Justin Schwartz “It Ain’t Necessarily So: the misuse of ‘human nature’ in law and social policy and the bankruptcy of the ‘nature-nurture’ debate” (2012) 21 Texas J Women & L 187 at 188.

<sup>37</sup> Hanna, above n 28, at 335.

<sup>38</sup> Jones “Behavioral Genetics”, above n 30, at 94.

<sup>39</sup> Jones “Evolutionary Analysis”, above n 31, at 1120.

<sup>40</sup> At 1120.

The second point is that an evolutionary approach does not unseat all other theories of the causes of homicide.<sup>41</sup> Most researchers acknowledge that crime is a result of a combination of factors, some biological, some environmental. Justice will be better served by a legal system that considers all possible approaches to a problem.<sup>42</sup> A comprehensive theory will integrate biological, social and cultural influences. Nature and nurture are inseparably intertwined and all biological processes, including normal brain development, ultimately depend upon environmental inputs.<sup>43</sup> The nature-nurture dichotomy is a false one – evolutionary explanations are not alternatives to environmental ones.<sup>44</sup> In addition, what is defined as criminal behaviour varies by culture, time and context<sup>45</sup>, so while evolutionary theories may explain some behaviour, per se, it does not explain why such behaviour is criminal.

## THE LEGAL AND CONTEXTUAL LANDSCAPE

### *Culpable homicide and its defences*

Culpable homicide essentially includes all situations in which there is a degree of *legal* blameworthiness in the circumstances surrounding the death of a person. Culpable homicide involves murder, manslaughter, killing in furtherance of a suicide pact<sup>46</sup> (which is manslaughter) and infanticide.<sup>47</sup> Infanticide is a form of diminished responsibility, in that it provides a partial defence to a murder or manslaughter charge, where a mother who kills a child does so because she has not fully recovered from the effects of giving birth. All forms of culpable homicide are legally blameworthy, although the degree of culpability varies according to the specific charge and the particular circumstances of the death. Culpable homicide covers a wide range of situations in which there is a killing of one person by another, ranging from premeditated killings, to criminally negligent deaths, to the killing of an infant by a mother who suffers from a post-partum mental disorder. Given the wide range of circumstances that meet the legal elements of culpable homicide, there are several factors that the criminal justice system

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<sup>41</sup> Mazariegos, above n 35, at 57; Jones “Evolutionary Analysis”, above n 31, at 1125.

<sup>42</sup> Mazariegos, above n 35, at 57; Hanna, above n 28, at 337.

<sup>43</sup> Jones “Time-shifted Rationality”, above n 34, at 1168.

<sup>44</sup> Martin Daly and Margo Wilson “Discriminative Parental Solicitude: a biological perspective” (1980) 42(2) J Marriage and Fam 277 at 277.

<sup>45</sup> Jones “Behavioral Genetics”, above n 30, at 89.

<sup>46</sup> Crimes Act 1961, s 180.

<sup>47</sup> Crimes Act 1961, s 178.

utilises in determinations of culpability. These include the mens rea (the mental state of the defendant such as intention or recklessness); the actus reus (the criminal act); and any relevant defences. As the law currently stands, even intentional killings can be characterised as not culpable if, for example, the offender acted in self-defence, was insane, or was under the age of ten years.

Despite the wide range of circumstances meeting the legal elements of culpable homicide, there are only limited means by which different degrees in legal culpability can be reflected — in essence, murder, manslaughter or infanticide. This limited range of options is compounded by a similarly narrow range of defences for culpable homicide. Defences generally fall into two categories – justifications and excuses. Justifications exempt a defendant from criminal responsibility because their conduct, which would otherwise be illegal, is morally justified in the circumstances.<sup>48</sup> Self-defence is an example of a justification. Excuses, on the other hand, do not deny the moral blameworthiness of the conduct, but prevent a defendant from being held responsible in circumstances where it would be unfair to punish them.<sup>49</sup> Insanity is an example of an excuse. McDiarmid argues that the provision of defences in the criminal law is the most basic requirement of equality of arms.<sup>50</sup> Likewise, Smith points out that defences have a crucial role in ensuring that criminal responsibility is kept within appropriate bounds.<sup>51</sup>

In terms of the law on culpable homicide in New Zealand, the following discussion illustrates some of its limitations. Self-defence<sup>52</sup> justifies the use of force to protect the defendant or another and by its very nature is limited to situations where the killing is a response to a perceived threat of imminent death or serious violence. Compulsion is statutorily barred from applying to murder<sup>53</sup>; but not manslaughter although it is difficult to conceive of situations in which it will apply in that context. The common law defence of necessity, to the extent that it is preserved by s 20 of the Crimes Act 1961<sup>54</sup>,

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<sup>48</sup> Stephen F Smith “Overcoming overcriminalization” (2012) 102(3) J Crim Law Criminol 537 at 577.  
<sup>49</sup> At 577.

<sup>50</sup> Claire McDiarmid “How Do They Do That? Automatism, Coercion, Necessity, and *Mens Rea* in Scots Criminal Law” in A Reed, M Bohlander, N Wake and E Smith *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate, UK, 2014) at 160.

<sup>51</sup> Smith, above n 48, at 577.

<sup>52</sup> Crimes Act 1961, s 48.

<sup>53</sup> Crimes Act 1961, s 24(2).

<sup>54</sup> Crimes Act 1961, s 20, “General rule as to justifications” provides: “(1)All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any [offence](#),

does not apply to murder. It potentially could apply to manslaughter by an unlawful act, but in New Zealand the law in this area is not settled. Insanity<sup>55</sup> applies to murder and manslaughter (as well as other offences) but the legal meaning of insanity is quite restrictive, requiring the defendant to prove, on the balance of probabilities that they suffered from “natural imbecility” or a “disease of the mind” (which are legal, not medical, constructs) which rendered them incapable:<sup>56</sup>

- (a) Of understanding the nature and quality of the act or omission; or
- (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

Sane automatism, a common law defence (again, to the extent it is preserved by s 20 of the Crimes Act 1961) may apply to murder and manslaughter but the application of the defence is limited to situations in which the defendant acted “without conscious volition”; in other words, they were an automaton.<sup>57</sup> Significantly, the defence of provocation, which *did* provide juries with a way of recognising certain mitigating factors — covering situations in which the defendant was provoked into a loss of self-control that caused them to kill — was repealed with effect from 8 December 2009. While its ultimate repeal was thought to be triggered by the Weatherston case referred to above, and another case thought by many to be unjust,<sup>58</sup> proposals to repeal the defence had been mooted for at least 20 years previously. Arguably, however, the problem was not with the idea that provocation should be a mitigating factor, but with the way in which the defence was constructed in New Zealand. The test provided for by s 169 of the Crimes Act 1961 was notoriously difficult to apply in practice and was notoriously more successful when raised by men who either killed their (allegedly) provocative female partners or men who (allegedly) made sexual advances toward them.

New Zealand’s position can be contrasted with other jurisdictions that offer a wider range of defences to someone charged with culpable homicide. The defence of diminished responsibility which is used in some other jurisdictions (England and Wales,

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whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment. (2) The matters provided for in this Part are hereby declared to be justifications or excuses in the case of all charges to which they are applicable.”

<sup>55</sup> Crimes Act 1961, s 23.

<sup>56</sup> Crimes Act 1961, s 23(2).

<sup>57</sup> See *R v Cottle* [1958] NZLR 999 (CA) at 1011.

<sup>58</sup> *R v Weatherston*, above n 5; in *R v Ambach* HC Auckland CRI-2007-004-27374, 2 July 2009, a Hungarian tourist killed the victim after he had made a sexual advance.

and Scotland, for example) acts as a partial defence that will reduce murder to manslaughter, much in the same way as did New Zealand's defence of provocation. In some United States jurisdictions "diminished capacity" is employed. There are two variants of diminished capacity. The "mens rea" variant relies on evidence of mental abnormality to negate an element of mens rea.<sup>59</sup> The "partial responsibility" variant operates in a similar way to the partial defence of diminished responsibility in Scotland and England and Wales – it relies on evidence of mental abnormality to establish a partial excuse.<sup>60</sup>

In the United States the Model Penal Code employs a doctrine called "extreme mental or emotional disturbance" which reduces murder to manslaughter, but only a small number of states fully adopt this approach.<sup>61</sup> Other jurisdictions employ iterations of self-defence which do not require a threat of imminent harm and better serve defendants who kill in response to ongoing domestic violence or coercive control.<sup>62</sup>

Furthermore, several other jurisdictions (such as the United States) have degrees of murder, in which killings are ranked by seriousness. While there are differences in approach depending upon the particular State, generally first-degree murder can require a specific intent to kill and premeditation and deliberation; or be committed by particular acts such as strangulation, poisoning, or involve lying-in-wait for the victim. Some first-degree murders involve killings committed during a felony, or where a police officer is killed, regardless of the level of premeditation. Second degree murder is usually murder without these aggravating features. Third degree murder is often the same as New Zealand's manslaughter offence.

In New Zealand, in the absence of different degrees of murder and defences such as provocation and diminished responsibility, two people who kill can each be convicted of murder albeit that their moral blameworthiness is vastly different. Even though differences in moral culpability can, to some extent, be considered in sentencing, fairness issues still arise. Many would agree that there is a world of difference between a mother who suffocates her child while suffering from extreme stress or depression and a personality

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<sup>59</sup> Stephen J Morse "Diminished Capacity: A Moral and Legal Conundrum" (1979) 2 Int'l J L & Psychiatry 271 at 275.

<sup>60</sup> At 288.

<sup>61</sup> Paul H Robinson "Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis" (2014) 47 Tex Tech L Rev 19 at 24.

<sup>62</sup> See ch 4.



disorder (see, for example, *R v Harrison-Taylor*<sup>63</sup>) and someone who shoots another at point-blank range during a robbery. Yet the outcome for both could be the stigma of a murder conviction. Many, perhaps, would also agree that a person who causes the death of a child following a long period of abuse and neglect is (at least) as morally blameworthy as someone who intentionally suffocates her child in the same circumstances as the example above. However, as several cases show, defendants charged with child maltreatment deaths are often convicted of manslaughter, rather than murder.<sup>64</sup> As Tadros observes, holding someone criminally responsible (by convicting them) has “enormous symbolic power” as well as practical consequences.<sup>65</sup> The difference between murder and manslaughter, in terms of how the offence is characterised, can be significant. Ulbrick and others, in the context of arguments about defensive homicide and mentally impaired defendants,<sup>66</sup> note how important it is to “advocate for a greater range of legal responses to cover the nuance and complexities of lethal violence”.<sup>67</sup>

### ***Murder versus manslaughter***

The connotation of a murder conviction is that the defendant possessed a “murderous” state of mind. In New Zealand, this includes situations where the defendant intended to kill the victim; or intended to cause the victim bodily injury that the defendant knew was likely to cause death and was reckless as to that result; or intended to kill or cause bodily injury known to be likely to cause death to one person and accidentally or by mistake kills another; or for an unlawful purpose does an act that the defendant knows is likely to cause death and thereby kills the victim.<sup>68</sup> It is also murder if the defendant intends to cause grievous bodily injury to the victim for the purposes of facilitating, or escaping from listed serious offences (what used to be called the felony murder rule).<sup>69</sup> The listed offences include sexual violation, murder, abduction, kidnapping, burglary, and robbery.<sup>70</sup>

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<sup>63</sup> *R v Harrison-Taylor* HC Auckland CRI-2004-092-1510, 12 September 2005.

<sup>64</sup> See for example, *R v Shailer* [2016] NZHC 1414 (Moko Rangitoheriri); *R v Witika* [1993] 2 NZLR 424, (1992) 9 CRNZ 272 (CA) (Delcelia Witika); *R v Leuta*; *R v Rauf* [2002] 1 NZLR 215 (CA) (Liotta Leuta); *R v Tipene* [2001] 2 NZLR 577, (2000) 18 CRNZ 311 (CA) (Mereana Edmonds).

<sup>65</sup> Victor Tadros *Criminal Responsibility* (Oxford University Press, Oxford, 2005) at 1.

<sup>66</sup> See ch 4.

<sup>67</sup> Madeleine Ulbrick, Asher Flynn and Danielle Tyson “The abolition of defensive homicide: a step towards populist punitivism at the expense of mentally impaired offenders” (2016) 40 *Melb Univ Law Rev* 324 at 330.

<sup>68</sup> Crimes Act 1961, s 167.

<sup>69</sup> Crimes Act 1961, s 168.

<sup>70</sup> Crimes Act 1961, s 168(2).

On the other hand, manslaughter is usually characterised as “involuntary” (excepting killing in furtherance of a suicide pact) or “accidental” in the sense that the defendant did not intend death as a result, or foresee death as something that could well happen. The range of manslaughter cases is also very wide. It can include cases involving the infliction serious harm but where the intent to kill or foresight of death cannot be proved beyond reasonable doubt. Manslaughter includes what are referred to as “criminally negligent” killings, including vehicular manslaughter where the defendant’s driving is careless or reckless, or where a child drowns due to lack of supervision, and many other situations where a defendant fails to discharge a duty of care and thereby causes death.

Where a defendant is **charged with murder**, in the absence of a specific justification or excuse, a court must find them guilty of murder if it is satisfied, beyond a reasonable doubt, that all the elements of the offence are present. These are that the defendant committed the actus reus (by causing the death of the victim by an unlawful act<sup>71</sup>), accompanied by any one of the mens rea elements for murder (intention to kill or intention to cause bodily injury that the offender knows is likely to cause death and is reckless as to that result, and so on). If the evidence proves beyond reasonable doubt that intent to kill or recklessness was present, a jury must convict of murder. If a defendant is charged with murder and the court is satisfied that the defendant is responsible for the death but is not satisfied they had the mens rea for murder, it must find the defendant guilty of manslaughter.

Where a defendant is **charged with manslaughter**, and the court is satisfied that the defendant committed the actus reus (that is, they caused the death of the victim by an unlawful act or omission<sup>72</sup>), they must find the defendant guilty of manslaughter if (a) they had the mens rea for the unlawful act (for example, if the unlawful act that caused death was an assault, it must be proved the defendant intended to apply force to the victim); or (b) that their omission to discharge a duty of care was a major departure from the standard of care expected of the reasonable person to whom that duty applies.<sup>73</sup> For example, if the defendant is a parent whose child drowns due to a failure to supervise, the defendant’s omission will be assessed against the standard of care expected of the reasonable parent or

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<sup>71</sup> Crimes Act 1961, s 160(2)(a).

<sup>72</sup> Crimes Act 1961, s 160(2)(b).

<sup>73</sup> Crimes Act 1961, s 150A.

caregiver; a surgeon whose patient dies due to negligent surgery will be assessed against the standard of care expected of the reasonable surgeon.

It follows then that liability for manslaughter can ensue following circumstances in which the defendant made a mistake or was momentarily careless, with a very low degree of *moral* blame. At the other end of the manslaughter spectrum are cases involving prolonged and serious violence, and consequently a high degree of moral blame that might better sit alongside that of some defendants convicted of murder.

Where a defendant is charged with culpable homicide, the role of a jury at trial is to decide on the facts, having been directed on the law. Any sympathy or prejudice the jury may feel in relation to the defendant should not be taken into account in determining culpability. However, as the following cases suggest, this may not be how juries operate in practice.

### ***Contemporary cases***

#### ***R v Apatu***<sup>74</sup>

In 2009, Wilson Apatu shot dead his neighbour, Layden Rameka, following a dispute. He also wounded Rameka's young son. Apatu admitted going to the house with the gun but said he only intended to frighten Rameka and his family. According to Apatu the gun went off four times after Rameka grabbed its barrel.<sup>75</sup> At a second trial, there was a great body of evidence presented about Apatu's mental state at the time of the killing, including that he suffered from anxiety disorder and social phobia, along with mood disturbance and substance dependence. Further, two of Rameka's children had been tormenting Apatu which had caused him significant stress, and which was the catalyst for him confronting Rameka. Indeed, the first time Apatu remonstrated with Rameka about the children, Rameka responded with a "king-hit". Apatu was acquitted of murder, wounding with intent, and aggravated burglary (the latter arising out of post-shooting events). In sentencing Apatu on a charge of unlawfully taking a motor vehicle (also arising out of the aftermath of the shooting) to which he pleaded guilty, Justice Miller noted that the acquittal must

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<sup>74</sup> *R v Apatu* HC CRI 2009-041-003156, 14 October 2010.

<sup>75</sup> "Apatu family weep at not guilty verdict" *The New Zealand Herald* (online ed, Auckland, 23 September 2010).

have reflected the jury's finding that the Crown had not negated, beyond a reasonable doubt, the possibility that the shooting was accidental.<sup>76</sup>

*R v O'Brien*<sup>77</sup> and *Churchward v R*<sup>78</sup>

In *R v O'Brien*, three 14-year-olds had killed a man, Kenneth Pigott, with a view to stealing his car. Evidence was given at trial that suggested that O'Brien thought she was just going to knock the victim out. O'Brien's counsel submitted that because of her limited intellectual capacity there was the reasonable possibility that she did not appreciate the likelihood that death might result from her actions. Regardless, O'Brien was convicted of murder. Similarly, in *Churchward v R* the defendant, along with her younger cousin, killed a 78-year-old man. Churchward was aged 17 at the time of the killing and suffered from mental health issues including depression and post-traumatic stress disorder. She was convicted of murder by a jury, despite the jury hearing evidence of the foregoing issues.

*R v Wickham*<sup>79</sup>

Dale Wickham, a multiple sclerosis sufferer, was charged with murder for killing her abusive and violent husband, John with a single shotgun blast. While the jury rejected Wickham's claim of self-defence, it found her not guilty of murder but guilty of manslaughter on the apparent basis that the killing was accidental. This is even though Wickham first called the police, then went to her bedroom to get the shotgun before returning to the lounge and shooting John.<sup>80</sup> She was sentenced to 12 months' home detention.

*R v Wihongi*<sup>81</sup>

A few months before Wickham killed her husband, a woman called Jacqueline Wihongi fatally stabbed her former partner, Vivian Hirini. As in Wickham's case, there was a history of abuse from Hirini toward Wihongi. On the night of the killing an argument developed

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<sup>76</sup> *R v Apatu*, above n 74.

<sup>77</sup> *R v O'Brien* (2003) 20 CRNZ 572 (CA).

<sup>78</sup> *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

<sup>79</sup> *R v Wickham* HC Auckland CRI-2009-090-010723, 20 December 2010. See ch 4 for a fuller discussion regarding this case.

<sup>80</sup> Edward Gay "Turbulent relationship ends in manslaughter" *The New Zealand Herald* (online ed, Auckland, 15 October 2010).

<sup>81</sup> *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775, (2011) 25 CRNZ 483. See ch 4 for a fuller discussion regarding this case.

between Wihongi and Hirini about money that Hirini was alleged to have taken from Wihongi's Accident Compensation Corporation (ACC) payment. Wihongi also said that Hirini demanded sex, which she refused. Wihongi was convicted of murder (she did not claim self-defence); therefore, the jury must have found that she either intended to kill Hirini or that she intended to cause him an injury that she knew was likely to cause death.<sup>82</sup> At Wihongi's sentencing, the presumptive sentence of life imprisonment for murder was displaced due to her mental impairments, and she was sentenced to eight years' imprisonment. This was uplifted on appeal to 12 years with a minimum non-parole period of four years.

### *R v Scollay*<sup>83</sup>

In 2014, Lucille Scollay was found not guilty of murder, but of manslaughter, for stabbing her husband through his heart. Mr Scollay was depressed and taking antidepressants. He suffered from acute anxiety and rarely left the house. His health and wellbeing had deteriorated over many years and he was unable to work. He had previously been an intravenous drug user and was on the methadone programme. The defendant Scollay was also using methadone and on antidepressant medication. Both husband and wife had hepatitis C for some years.<sup>84</sup>

Scollay admitted stabbing her husband, but denied she intended to kill him. She said she was motivated by a desire to shake her husband out of his deeply depressed state.<sup>85</sup> Regardless, the sentencing Judge observed that Scollay "made a decision to stab [her] husband".<sup>86</sup> Further, she admitted that she had made up her mind to do so while she was walking down the drive to their house after a night out. Scollay was sentenced to six years' imprisonment.

### ***Comment – formulation of thesis statement***

The outcomes in some of these cases *may* be fair if moral blameworthiness were the basis of criminalisation. In the case of *Wickham*, considering the longstanding history of abuse

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<sup>82</sup> Crimes Act 1961, s 167.

<sup>83</sup> *R v Scollay* [2014] NZHC 465.

<sup>84</sup> At [7]-[8].

<sup>85</sup> Kurt Bayer "Scollay trial: Guilty of manslaughter" *The New Zealand Herald* (online ed, Auckland, 13 February 2014).

<sup>86</sup> *R v Scollay*, above n 83, at [3].

coupled with threats to kill her and the fact that she suffered from multiple sclerosis, convicting her of murder for a low degree of moral blameworthiness would be unjust. From an evolutionary perspective, she was acting in self-defence. In *Scollay*, while the evidence points to, at the very least, an intention to cause bodily injury she knew was likely to cause death, *Scollay*'s desperation about her husband's depression and agoraphobia could arguably be factors that mitigate her culpability. However, given that she intentionally stabbed her husband, why was she convicted of manslaughter rather than murder? Why is she less culpable than, for example, *Wihongi*, who also stabbed her *abusive and violent* victim? *Apatu*'s mental condition and the provocation from *Rameka* and his children undisputedly were crucial factors in his acquittal. However, it is questionable whether, absent those features and circumstances, his entry into the premises with a loaded gun, intending to frighten, would have resulted in an acquittal. It must be noted, in contrast to the defendants in *O'Brien* and *Churchward*, that *Apatu* was, at the relevant time, 43 years old, and not a teenager whose brain, and therefore ability to reason and foresee consequences, was continuing to develop.

The fundamental problem with these decisions is that they signal that the outcome for a defendant can depend upon the whim of the jury rather than the application of legal principles. This is contrary to the rule of law which requires equality before the law. This does not mean that all cases should be treated the *same*, but rather that there should be consistent outcomes.

What happened in *Apatu*, *Wickham* and *Scollay* could be instances of what is known as "jury nullification", in which juries depart from the court's legal instructions when giving their verdict. This could be for a variety of reasons including concerns that the conviction or sentence would be too harsh.<sup>87</sup> As Broussard suggests, this allows social prejudices to manifest in decision-making.<sup>88</sup> While jury nullification might lead to just outcomes in the individual case, it is likely to lead to unfairness across the board. Thus, we might ask what actually distinguishes *Wickham* from *Wihongi* to justify such diverse outcomes for the defendants? The answer to this question lies not in the fact that there is a significant difference in moral blameworthiness, in relation to the killings, as between *Wickham* and

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<sup>87</sup> Thom Brooks "A defence of jury nullification" (2004) 10 Res Publica 401.

<sup>88</sup> D Barret Broussard "Principles for passion killing: an evolutionary solution to manslaughter mitigation" (2012) 62 Emory LJ 179 at 192.

Wihongi. Rather it is the jury's application of the law, or lack thereof, in reaching the conclusion that Wickham did not have the relevant intention for murder. There was no evidence of accidental discharge of the gun, so it appears there was no reasonable foundation for their verdict that Wickham did not intend or at least foresee death, when shooting her husband. What are the legal and moral distinctions underpinning Wickham's conviction for manslaughter versus Wihongi's conviction for murder? While undoubtedly there are differences in the material facts between these two cases (the Court of Appeal noted in *Wihongi* that the relationship between the couple was "tempestuous, with both drinking heavily and violence going both ways"<sup>89</sup>), was the moral blameworthiness of the two defendants sufficiently distinct to warrant different verdicts and vastly disparate sentences (12 months home detention versus 12 years' imprisonment)?

As the above cases show, outcomes for defendants can vary wildly depending upon several factors including the exercise of prosecutorial discretion, the range of charging options available, and the particular jury. Other factors such as the quality of legal representation, jury selection, racism and prejudice also play a part, as well as factors such as judicial summing up and directions to juries.<sup>90</sup> However, similar behaviour accompanied by a similar degree of moral blame should attract the same label (murder or manslaughter, or some lesser offence, or even "not guilty", depending upon the precise degree of moral blame). This approach would better reflect the rule of law requirement of "fair labelling" – that the law should be capable of being known in advance, so that compliance is possible. In the current context of culpable homicide in New Zealand, this element of the rule of law is absent – a defendant cannot know in advance the extent to which their actions will be deemed criminal. Further, as Ashworth points out, this principle of fair labelling requires offences to be subdivided and labelled "so as to represent fairly the nature and magnitude of the law-breaking".<sup>91</sup> Tadros also identifies the argument that different forms of violence are morally distinct from each other, and the criminal law ought to reflect those moral distinctions.<sup>92</sup>

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<sup>89</sup> *R v Wihongi*, above n 81, at [19].

<sup>90</sup> See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 38 *Melb Univ Law Rev* 666 at 699-672.

<sup>91</sup> Andrew Ashworth *Principles of Criminal Law* (4<sup>th</sup> ed, OUP, Oxford, 2003) at 89-90 cited in Victor Tadros "The Distinctiveness of Domestic Abuse: A Freedom Based Account" (2005) 65 *La L Rev* 989 at 1003-1004.

<sup>92</sup> Victor Tadros "The Distinctiveness of Domestic Abuse", above n 91, at 989.

Essentially, the argument in this thesis is that if our legal system recognises, in its application, different degrees of moral blameworthiness, then it would be as well to be upfront about them and to apply them consistently – the jury’s “commiseration [should be] actually codified in the law”<sup>93</sup>. As noted at the outset, decision-makers do not have the option of doing this within the current legal framework so are actually not applying the law in all cases. *Wickham*, *Scollay* and *Apatu* are but three illustrations.

Brian Neeson’s Degrees of Murder Bill 1996 proposed to redefine culpable homicide by classifying “murder” as murder in the first, second, or third degree, and sought to redefine manslaughter (as culpable homicide not amounting to murder in the first, second, or third degree). Under cl 3 of the Bill, murder in the first degree would have been constituted by homicides that were “particularly sadistic, heinous, malicious, or inhuman”. Murder in the second degree envisaged the same types of killings as covered by the existing ss 167 and 168 of the Crimes Act 1961. Murder in the third degree covered provoked killings<sup>94</sup> or those committed under the influence of alcohol or drugs (other than prescription medications). The Bill also sought to reform sentencing for murder and manslaughter (including mandatory imprisonment for natural life for murder in the first degree).

There are admittedly problems with the reforms as proposed by the Bill although the detail of these is not within the scope of this thesis. It is sufficient to say that the measures proposed seem to have been driven more by a concern that the existing law was too soft on offenders, than a desire to reflect moral blameworthiness at both ends of the spectrum. However, in light of the cases discussed above, it is timely to reconsider the question of whether changing the definition of murder and manslaughter will allow juries to legitimately recognise mitigating circumstances in determining guilt. In other words, this thesis will question whether a degrees of murder approach is actually “fundamentally misconceived”, and whether there are other options for reform that might better deliver justice in the round.

## DEGREES OR DEFENCES?

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<sup>93</sup> D Barret Broussard, above n 88, at 193.

<sup>94</sup> In 1996, the defence of provocation, as provided by s 169 of the Crimes Act, was still a defence in New Zealand.



One way of better distinguishing moral culpability is by dividing the current offences of murder, manslaughter, and infanticide into a larger range of definitions, or degrees. The Degrees of Murder Bill 1996 may not provide the best template, and it is not necessarily a requirement that a new class of more serious offences is created. However, considering the tendency of juries to make decisions that they perceive to be fair, they ought to be provided with legitimate authority to do so.

The other fair approach in this context is the creation of a new range of defences to culpable homicide. These might include a defence of developmental immaturity in the context of young defendants,<sup>95</sup> or a new defence of coercion in relation to battered defendants<sup>96</sup>. Ultimately, as Bradley and Hoffmann suggest:<sup>97</sup>

Criminal trials represent public, highly visible, morality plays, through which order and balance are restored to a community that has suffered an often grievous loss. However, true restoration can occur only through criminal trials that are perceived to be just and fair.

Bearing in mind that New Zealand has previously rejected a degrees of murder approach, this research will consider the question of whether the current law of culpable homicide allows us to fairly apportion moral blame for killings. This involves questioning whether the law allows for all relevant factors to be considered in determining culpability, including factors relevant to mens rea, actus reus and the existence of a defence.

## CASE STUDIES - OVERVIEW

If the law is to be fair, it must be able to accurately reflect moral culpability. This thesis will examine three case studies that provide specific challenges to the idea of fairness in the context of culpable homicide. They are: cases where young defendants kill; cases where victims of violence kill their abusers; and cases involving child homicide. Further, these case studies will allow for an analysis of whether the law fairly balances the interests of the victim, the defendant, and society generally, given that all of these interests are impacted upon by both the fact and nature of convictions for homicide.

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<sup>95</sup> See chapter 3.

<sup>96</sup> See chapter 4.

<sup>97</sup> Craig M Bradley and Joseph L Hoffmann “Public perception, justice, and the ‘search for truth’ in criminal cases” (1996) 69 S Cal L Rev 1267at 1272.

## *Young defendants*

It is generally accepted that children do not have the same mental capacity and moral competence as adults, which is why most, if not all, jurisdictions have an age of majority for certain purposes, and an age below which a child is deemed incapable of committing an offence. This latter notion underpins the common law doctrine of *doli incapax* – an irrebuttable common law presumption that children under the age of seven are incapable of committing a crime.<sup>98</sup> In New Zealand, this is expressed in s 21 of the Crimes Act 1961 and applies to children under the age of ten years. Section 22 of the same Act contains a rebuttable presumption in respect of children aged between ten and 14, providing that no person within that age range shall be convicted of an offence “unless [they] knew either that the act or omission was wrong or that it was contrary to law”.

Despite these presumptions, in New Zealand a child aged between 10 and 12 can only be prosecuted for murder or manslaughter; and if so, will be tried as if they were an adult. The fact that such children can *only* be tried for murder or manslaughter, suggests that society views the act of killing someone a more serious offence than say, sexually violating them. This is understandable, given the value accorded to the sanctity of human life, but it contradicts the basic principle of criminal responsibility, that criminality is based upon *moral* blameworthiness. In this context, the relative seriousness of the criminal act is more relevant to punishment than it is to culpability.

Recent cases such as *R v Churchward* (discussed above) have seen efforts to present evidence about the development of the human brain in order to support claims that the defendant did not possess the required mens rea for the offence.<sup>99</sup> In *Churchward*, an appeal on the question of the defendant’s intent was supported by evidence from a psychiatrist to the effect that adolescents see risks differently to adults, that they are less able to control their impulsivity, less future-oriented, and more influenced by their peers.

In the United States this type of research has been used to support calls to ban the death penalty for defendants under 18, and in determining competence to stand trial.<sup>100</sup>

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<sup>98</sup> See ch 3 for a fuller discussion of different jurisdictional approaches to this principle.

<sup>99</sup> *R v Churchward*, above n 78. For further discussion see Brenda Midson “Risky Business: Developmental Neuroscience and the Culpability of Young Killers” (2012) 19(5) *Psychiatry Psychol & L* 692; see also ch 3.

<sup>100</sup> See, for example, Elizabeth S Scott and Thomas Grisso “Developmental Incompetence, Due Process, and Juvenile Justice Policy” (2005) 83 *NC L Rev* 793.

The evidence is also relevant to determinations of legal and moral blameworthiness. In establishing mens rea, evidence about the inability to foresee a particular consequence must be relevant to the question of whether the offender actually did foresee that consequence (as is required, for example, in offences involving recklessness where it must be established that the offender had “a conscious appreciation of the risk”<sup>101</sup>).

In a 2015 case,<sup>102</sup> two teenagers faced trial in relation to the death of shop-keeper Arun Kumar who was stabbed to death during a robbery of his dairy. A thirteen-year-old was charged with manslaughter; a fourteen-year-old with murder. According to newspaper reports, the fourteen-year-old had a troubled home life due to a drug-addicted mother. Furthermore, when he was eight he suffered a brain injury after being hit by a car on a pedestrian crossing. Despite evidence that such an injury takes years to recover from, a neuropsychologist told the High Court in Auckland that the young person was discharged early from hospital and was never seen again. The Court also heard that the defendant was addicted to synthetic cannabis supplied to him by his mother.<sup>103</sup> The jury found the 14-year-old not guilty of murder but guilty of manslaughter and acquitted the 13-year-old of any crime. While the unanimous verdicts are undoubtedly consistent with the apparent degree of moral culpability involved, the question that arises is whether the same justice would have been dispensed to similar defendants on similar facts (defendants like Churchward and O’Brien, discussed above, perhaps). It is interesting that the verdicts in the Kumar case were viewed with disapproval by many (as evidenced by comments on social media), who saw the young defendants as having “got off scot-free”. While members of the public who share this view are likely to argue for greater accountability for young defendants, reform of the law can have an educative function. In any event, this thesis does not argue that there ought to be no accountability. As with all of the case studies canvassed here, it is a question of degree.

### ***Victims of violence or coercion***

For several decades, there has been much research dedicated to understanding the psychological and other effects of domestic violence on victims. One of the earliest attempts at a comprehensive theory was that of psychologist Lenore Walker via her

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<sup>101</sup> *R v Harney* [1987] 2 NZLR 576 (CA).

<sup>102</sup> *P v R* [2016] NZCA 128.

<sup>103</sup> Kelly Dennet “Arun Kumar trial: Accused grew up in ‘drug house’” *The New Zealand Herald* (online ed, Auckland, 16 June 2015).

account of “battered woman syndrome”. Subsequently, Walker’s theories have been subjected to criticism,<sup>104</sup> although many commentators agree that violent relationships do have psychological effects on survivors.<sup>105</sup>

Stark argues that while violence is critical in terms of the harm inflicted by abusive partners, most women with whom he has worked who only suffered violence retained autonomy in key areas of their lives.<sup>106</sup> Stark’s model of coercive control is not centred on violence as a tactic of control. He claims that the women he has seen in his practice have been adamant that what their partners do to them is less important than what they prevent them from doing. In other words, the more debilitating tactics of control are the appropriation of the women’s resources, undermining of their relationships with others, and essentially depriving them of autonomy.

Stark’s “coercive control” model assumes that the battered woman’s ability to make rational choices is affected by the coercion she faces from the abuser.<sup>107</sup> The logic of a battered woman’s choice can be located in the dynamics of coercive control.

The availability of defences for people who kill has particular implications for people who kill their abusers. In one of New Zealand’s seminal cases in this regard, *R v Wang*,<sup>108</sup> the defendant killed her abusive husband by stabbing him while he was in a drunken sleep. The Court heard evidence about serious and ongoing abuse by the husband, Jing Wah Li, including threats to kill on the night in question. Wang was not able to avail herself of self-defence because the Court said that she had other options available to her.<sup>109</sup>

This ruling ignores the facts of Wang’s language difficulties and what Walker would have called “learned helplessness”. Walker reasoned that helplessness arises when events in a woman’s life seem uncontrollable.<sup>110</sup> Relying on Seligman’s 1975 experiments with dogs, Walker reasoned that helplessness arises when events in a woman’s life seem

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<sup>104</sup> See, for example, HR Skinazi “Not just a ‘conjured afterthought’: using duress as a defense for battered women who ‘fail to protect’” (1997) 85 Cal L Rev 993 at 1009.

<sup>105</sup> At 1009.

<sup>106</sup> Evan Stark *Coercive control: how men entrap women in personal life* (Oxford University Press, New York, 2007) at 13.

<sup>107</sup> Evan Stark “A failure to protect: Unravelling ‘the Battered Mother’s Dilemma’” (1999-2000) 27 W St U L Rev 29 at 105

<sup>108</sup> *R v Wang* [1990] 2 NZLR 529 (CA).

<sup>109</sup> At 539.

<sup>110</sup> Lenore Walker *The Battered Woman Syndrome* (2<sup>nd</sup> ed, Springer Publishing Company, New York, 1984) at 86.

uncontrollable. Seligman's experiments revealed that dogs who were repeatedly and randomly shocked became unable to escape the shocks even where escape was possible. Walker hypothesised that:<sup>111</sup>

... women's experiences of the non contingent nature of their attempts to control the violence would, over time, produce learned helplessness as the "repeated battering, like electrical shocks, diminish the woman's motivation to respond.

Ultimately Wang was found not guilty of murder, but guilty of manslaughter, on the basis of provocation. With the repeal of that defence, there are even fewer options available to people who find themselves in similar situations.

Notwithstanding the repeal of provocation as a defence, evidence of the psychological effects of violence may be relevant to the existence of self-defence. However, defendants who raise this will often struggle to raise a credible narrative that the force used was necessary or reasonable. Indeed, Wang's claim of self-defence was rejected on the ground that she faced no immediate danger:<sup>112</sup>

There was no immediate danger to render causing [her husband's] death a reasonable course of action.

Therefore, the chances of a battered defendant successfully pleading self-defence are rather low. Where a pre-emptive strike is used, courts are unlikely to consider that there was an honest belief in imminent peril unless the abuser is present, awake, and actively abusive. Further, fatal force is unlikely to be considered reasonable if the court believes that alternative courses of action are available to the defendant. Given the repeal of provocation, if self-defence is unsuccessful then a murder conviction is the only possible outcome if the mens rea for murder is established (in the absence of jury nullification).

The New Zealand Law Commission (NZLC) has recently considered what can be done to assist victims of violence who kill their abusers, releasing an issues paper in November 2015<sup>113</sup> and tabling its final report on 12 May 2016.<sup>114</sup> The NZLC has also addressed strangulation in light of increasing understanding of the role it plays in the context of family

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<sup>111</sup> At 87.

<sup>112</sup> *R v Wang*, above n 108, at 537.

<sup>113</sup> Law Commission *Victims of family violence who commit homicide* (NZLC IP39, 2015).

<sup>114</sup> Law Commission *Understanding family violence: reforming the criminal law relating to homicide* (NZLC R139, 2016).

violence.<sup>115</sup> In addition, New Zealand's Ministry of Justice has undertaken a review of family violence laws, recognising that:<sup>116</sup>

The distinction between a victim and perpetrator is not always clear. Victims of ongoing abuse use a range of strategies to cope that can include violence in retaliation to the abuse.

Ultimately the NZLC decided in favour of amending the Crimes Act 1961 to provide that where a person kills as a response to family violence, s 48 may apply even if the threat to the accused is not "imminent".<sup>117</sup>

### ***Child homicide defendants***

When it comes to child homicide, New Zealand has a poor record compared with other Organization for Economic Cooperation and Development (OECD) countries, sitting in the bottom third.<sup>118</sup> In 2015 and 2016, Fairfax Media, in its series "Faces of Innocents" collected data on just over two hundred cases of child homicide that occurred between 1992 and 2015.<sup>119</sup> Looking more closely at the circumstances of these deaths reveals patterns about the different motivations involved. Other researchers have also attempted to identify a range of "motives" associated with child homicide. Recently Friedman and others<sup>120</sup> identified the following contemporary motives:

1. Fatal child maltreatment, whereby the child dies from abuse, neglect or Munchausen Syndrome by Proxy (MSBP).
2. Spousal revenge, which treats the homicide as an expression of the perpetrator's anger at his or her partner/ex-partner.
3. Where the child is unwanted.
4. Altruistic, where the child is killed in the belief that he or she would be "better off dead". This is common in murder-suicide cases.
5. Where the perpetrator is acutely psychotic.

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<sup>115</sup> Law Commission *Strangulation: The case for a new offence* (NZLC R138, 2016).

<sup>116</sup> Ministry of Justice *Strengthening New Zealand's legislative response to family violence – A public discussion document* (2015) at 11.

<sup>117</sup> Law Commission *Understanding family violence*, above n 114, at [7.39], [7.47].

<sup>118</sup> Organization for Economic Cooperation and Development Better Life Initiative "How's life in New Zealand" (May 2016) at 4; see also Unicef New Zealand "Innocenti Report Card 14" (20 June 2017) in which it was observed that "New Zealand has higher than average child-homicide rate [in comparison with other countries], putting New Zealand 33rd overall" <[www.unicef.org/nz/stories/innocenti-report-card-14](http://www.unicef.org/nz/stories/innocenti-report-card-14)>.

<sup>119</sup> Fairfax Media "Faces of Innocents" (2015-2016) <[www.stuff.co.nz/national/faces-of-innocents](http://www.stuff.co.nz/national/faces-of-innocents)>.

<sup>120</sup> Susan Hatters Friedman, James Cavney and Phillip J Resnick "Child Murder by Parents and Evolutionary Psychology" (2012) 35 *Psychiatr Clin N Am* 781.

The existence of many of these motives is supported by evolutionary theory, as will be demonstrated in chs 2 and 5.

Even at a glance it seems reasonable to suggest that different degrees of moral blameworthiness attach to these motives. A parent who kills their child as an act of revenge against a partner or someone who kills a child after a sustained period of abuse are on a different moral plane to a parent who is psychotic or where the killing is out of a (albeit misguided) sense of altruism – although it is difficult to draw any hard and fast boundaries (this applies in the case of young defendants and victims of violence as well). Current homicide laws are not able to accurately address, in the individual case, higher or lower degrees of moral blame where they are apparent.

In 2005, Sharon Harrison-Taylor was convicted of the murder of Gabriel, one of her eight-month-old twin boys, by a combination of smothering and strangulation. Harrison-Taylor admitted killing Gabriel by hitting him and holding him down in his cot. The defence raised infanticide. It was clear from the evidence that Harrison-Taylor had a history of psychiatric and other problems that impacted upon her state of mind.<sup>121</sup>

Infanticide was not accepted by the jury. The jury also found that the killing was murder and not manslaughter. Harrison-Taylor was sentenced to life imprisonment with a minimum parole period of 12 years.<sup>122</sup>

In 1999, Desiree Wright killed her eight-month-old son, River, by smothering him. She was initially charged with murder but when the Crown obtained expert opinion establishing that Wright suffered from MSBP (now Factitious Disorder Imposed on Another), it accepted Wright's plea of guilty to manslaughter.<sup>123</sup> Munchausen's Syndrome by Proxy is a condition whereby a sufferer fabricates or induces an illness in a child or other person.<sup>124</sup> The syndrome is recognised in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5).

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<sup>121</sup> *R v Harrison-Taylor*, above n 63.

<sup>122</sup> *R v Harrison-Taylor*, above n 63.

<sup>123</sup> *R v Wright* CA478/00, 2 May 2001 at [7].

<sup>124</sup> ES Steelman "A question of revenge: Munchausen's Syndrome by Proxy and a proposed diminished capacity defense for homicidal mothers" (2002) 8 *Cardozo Women's LJ* 261 at 266.

As in Harrison-Taylor's case, the mental disorder suffered by Wright fell short of the legal defence of insanity. However, Wright was convicted of manslaughter and sentenced to four years imprisonment (reduced from seven years on appeal).

We might ask the same question here as that posed in relation to *Wickham* and *Wihongi*: what distinguishes these two cases to justify such diverse outcomes for the defendants?

The disparity is brought into even sharper relief when child maltreatment deaths are brought into the mix. In *Iorangi*, a case in which the accused had killed his 17-month-old son by throwing him across the room for crying during a televised rugby game, the sentencing Judge had noted the "absence of any previous indications of violent offending and the Probation Officer's assessment that the appellant presented an extremely low risk of re-offending".<sup>125</sup> However, the Judge also accepted that there were aggravating circumstances in that the appellant *had* assaulted the child on two previous occasions, including one instance of head-butting the child.<sup>126</sup> Despite these prior assaults, *Iorangi* was sentenced to four-and-a-half years in prison, for manslaughter. Again, this is inconsistent with Harrison-Taylor's sentence of life imprisonment with a minimum parole period of 12 years. Of these two defendants, who had more of a "bad motive"?

It is important to note that what might be argued in this thesis about lower degrees of culpability for particular categories of killings is not intended to be insensitive to the feelings of homicide victims' families. The desire for accountability is understandable. For the most part, this thesis does not argue that there should be no accountability or responsibility for defendants – it is a question of *degree*.

Chapter Two sets out the primary concepts and theories upon which this thesis relies.

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<sup>125</sup> *R v Iorangi* CA533/99 & 534/99, 28 March 2000 at [11].

<sup>126</sup> At [12].



# Chapter 2: Theoretical Foundations

## INTRODUCTION

This chapter sets out the principal concepts and theoretical framework upon which this thesis rests. As set out in ch 1, the thesis statement is as follows:

The criminal justice system in New Zealand is underpinned by an assumption of individual rationality which is not always supported. Thus, the legal regime for apportioning blame in cases of culpable homicide is insufficient to recognise the different degrees of moral blame which can exist when one individual kills another. This leads to inconsistent outcomes for factually similar cases, contrary to the rule of law which requires equality before the law. This thesis will consider the question of whether changing the definitions of murder and manslaughter will allow courts to legitimately recognise all relevant mitigating circumstances in determining guilt, and whether there are other options for reform that might better deliver justice in the round.

The first part of this chapter sets out the research methodology adopted in this thesis before undertaking a closer examination of criminal law and criminal justice theories relevant to homicide and the attendant concepts involved, including notions of responsibility, culpability and moral blame. The final part of this chapter will outline the psychological and biological theories that make up the theoretical framework of the thesis and explain why they are a relevant and useful lens for examining homicide as an element of human behaviour.

## RESEARCH METHODOLOGY

Dobinson and Johns identify two main categories of qualitative legal research: doctrinal and non-doctrinal research.<sup>127</sup> Simply put, doctrinal research considers what the law is in a particular area by reviewing and analysing primary and secondary sources – the principal aim is to describe the law and its application.<sup>128</sup> Non-doctrinal research falls into three sub-categories: problem-, policy- and law reform-based research. As Dobinson and Johns point out:<sup>129</sup>

... all four categories of research, doctrinal, problem, policy and law reform, could be part of a largescale research project. A researcher, for example, could begin by determining the existing law in a particular area (doctrinal). This may then be followed by a consideration of the problems currently affecting the law and the policy underpinning the existing law,

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<sup>127</sup> Ian Dobinson and Francis Johns “Qualitative Legal Research” in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (University of Edinburgh Press, Edinburgh, 2007).

<sup>128</sup> At 19.

<sup>129</sup> At 20.

highlighting, for example, the flaws in such policy. This in turn may lead the researcher to propose changes to the law (law reform).

This paragraph neatly summarises the principal approach taken in this thesis, albeit not in that order. In this thesis, the doctrinal research follows from the identification of the problem: that New Zealand's homicide laws are insufficient to recognise the different degrees of moral blame which can exist when one individual kills another. The formulation of the problem and the doctrinal research that follows identify that the policies underpinning the existing law are what gives rise to the problem: the assumption that all criminal behaviour is the exercise of rational choice. Naturally it follows that the research must employ a law reform approach to identify solutions to the problem – what results is a proposed statutory regime of homicide offences and defences that is set out in ch 6.

There are two more subsidiary methodologies interwoven throughout the thesis. The first is the use of human science/biological science framework to consider the underpinnings of human behaviour. This is because criminal behaviour – homicide in the context of this thesis – is *human* behaviour. The aim of employing an evolutionary psychology analysis is to try and bring the law's assumptions of human behaviour (such as the idea of rational choice) into alignment with the way in which humans actually behave.

The second subsidiary methodology is the use of a comparative approach. While it was not intended that the thesis take a wholly comparative approach, it considers, where relevant, legislation, case law and law reform work in other jurisdictions.<sup>130</sup> The comparative analysis here is an organic process – the choices about what jurisdictions to consider have been dictated by the issues that arise from the doctrinal analysis. For example, the absence of provocation in New Zealand necessitates a consideration of the iterations of diminished responsibility in Scotland and England and Wales; in Australia there had been a great deal of law reform around victims of violence who kill; in Canada there have been some useful cases dealing with self-defence and subsequent changes to legislation; and so on. Reference to United States legislative provisions is a necessary aspect of the law reform process, because the United States federal criminal code and most states adopt a degrees of murder approach, as does the Model Penal Code (MPC). These provisions provide useful templates for the construction of a legal regime that more accurately reflects the varying

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<sup>130</sup> See Geoffrey Wilson “Comparative Legal Scholarship” in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (University of Edinburgh Press, Edinburgh, 2007).

degrees of moral blame apparent in different killings. While it is said that there is a division between common law states and “code states” (states which adopt the MPC) and “common law states”, there is no clear bifurcation. As Walker points out, “[n]o state continues to cling to ancient English common law, nor does any state fully adhere to the MPC”<sup>131</sup>.

## THEORIES OF CRIME AND PUNISHMENT

This thesis contends that the current law of culpable homicide is unfair because it does not always allocate legal responsibility based on moral culpability. This section of the chapter will consider the meaning of some of the key concepts upon which the thesis relies, including notions of “responsibility”, “culpability”, “moral blame”, “fairness” and “justice”.

### *Responsibility and punishment*

The concept of responsibility is of central importance to criminal law, as a defendant can only be subjected to its penalties if they have been found responsible for some breach. In the context of this thesis, I generally use the term “responsibility” to denote a finding by the criminal justice system that a defendant has committed a legal wrong for which they will be punished. Ashworth and Horder observe that the main concern of the criminal law is to prohibit behaviour that constitutes a serious wrong, whether against an individual or some social value or institution.<sup>132</sup> However, those authors also acknowledge that:<sup>133</sup>

There is ... no general dividing line between criminal and non-criminal conduct which corresponds to a distinction between immoral and moral conduct, or between seriously wrongful and other conduct. The boundaries of the criminal law are explicable largely as the result of exercises of political power at particular points in history.

Not everyone who is responsible for some conduct is held *criminally* responsible,<sup>134</sup> so the question arises as to the basis upon which a defendant *ought* to be held criminally responsible. Hart and Honoré note that there are theorists who:<sup>135</sup>

... insist that the decisions of courts on the extent of a wrongdoer’s liability are not and should not be reached by the application of *any* general principles but by the exercise of the sense of judgment, unhampered by legal rules, on the facts of each case... Instead it

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<sup>131</sup> Anders Walker “The New Common Law: Courts, Culture, and the Localization of the Model Penal Code” (2011) 62 *Hastings Law Journal* 1633 at 1634.

<sup>132</sup> Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7<sup>th</sup> ed, OUP, United Kingdom, 2013) at 1.

<sup>133</sup> At 2.

<sup>134</sup> Victor Tadros *Criminal Responsibility* (Oxford University Press, Oxford, 2005) at 1.

<sup>135</sup> HLA Hart and Tony Honoré *Causation in the Law* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 1985) at 291.

should be recognized that the judge, though he may weigh an indefinite number of considerations each with some bearing on the question, decides more or less intuitively what the extent of a wrongdoer's responsibility is to be.

Various theorists have posited general principles as potential answers to the responsibility question; and it is clear that there is no one overriding theory or principle that decides all cases. In many cases, including homicide, responsibility is attributed on the basis of causation – whether the defendant's blameworthy conduct *caused* the criminal result. However, causation by itself is usually an insufficient basis for attributing responsibility – there also must be some mental element attaching to the defendant's conduct. Subjectivist theorists argue against criminal liability unless the defendant intended to or knowingly caused *harm*.<sup>136</sup> This argument is underpinned by a notion of autonomy which itself is based upon a capacity to reason and exercise willpower.<sup>137</sup>

... if a legal system is to claim moral authority over its subjects and to respect their autonomy, it should adhere to rule-of-law principles in its criminal law, by ensuring fair warning, maximum certainty of definition, subjective requirements for criminal liability, and so on.

The alternative theory to subjectivism is objectivism, which locates fault in conduct that a reasonable person would not have undertaken.<sup>138</sup> An awareness of wrongdoing is not essential under an objective approach.<sup>139</sup> As Simester and others point out, subjective and objective approaches are extreme alternatives, and in the criminal law there is often a middle ground.<sup>140</sup>

Lacey suggests that while the criminal law sometimes holds defendants responsible simply for causing harmful or undesirable outcomes, the current “paradigm of culpability” is located in the idea that responsibility is justly attributed to individuals when certain cognitive and volitional capacities are associated with the relevant conduct.<sup>141</sup> Lacey argues that this paradigm replaced “pre-modern” notions of criminal responsibility in which assumptions about, and evaluations of, *character* played a central role in

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<sup>136</sup> Andrew Ashworth “A change of normative position: determining the contours of culpability in criminal law” (2008) 11(2) *New Crim L Rev* 232 at 235.

<sup>137</sup> At 236-237 (footnotes omitted).

<sup>138</sup> AP Simester, JR Spencer, GR Sullivan and GJ Virgo *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing, Oxford, 2010) at 9.

<sup>139</sup> At 9.

<sup>140</sup> At 10. See below at 49-50 for a further discussion of subjective versus objective approaches in the criminal law.

<sup>141</sup> Nicola Lacey “The resurgence of character” in RA Duff and Stuart P Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press, Oxford, 2011) at 152.

attribution.<sup>142</sup> However, according to Lacey, assumptions about character have never wholly been jettisoned from the criminal law’s decisions about responsibility and further, in practice, character-based patterns of attribution are back “in style” both in English and American criminal law systems.<sup>143</sup>

In a similar vein, Tadros rejects the idea that responsibility is necessarily attributed to capacity:<sup>144</sup>

In attributing responsibility to an agent for an action, we are interested not in what an agent had the capacity to do. Nor are we interested in what options that agent had. We are interested in the actual processes of reasoning that were involved in performance of the action. It is those actual processes that connect the action to the agent. Whether there is anything like ‘real’ choice, then, is irrelevant to criminal responsibility, not because the pseudo-choice available in the deterministic world is sufficient to make an agent responsible for his actions, but rather because no choice, pseudo or otherwise is required to ground an agent’s responsibility.

Tadros acknowledges that several “contours” of criminal responsibility exist, but suggests that they are all underpinned by the idea that “an agent is responsible for an action only insofar as that action reflects in the appropriate way on the agent *qua* agent”.<sup>145</sup> Tadros’s theory is a character theory of responsibility because “an action reflects on an agent *qua* agent only to the extent that it reflects on his character”.<sup>146</sup>

Central to this proposition is the idea that the agent accounts for their conduct by way of an explanation - what Tadros refers to as “motivating reasons”: a rational explanation for why the agent acted.<sup>147</sup> Tadros is clear that what he is looking for in terms of rational explanations are psychological states at the level of consciousness, and not “scientific or deep psychological explanation”.<sup>148</sup> According to Tadros, these motivating reasons are the constituents of agency, and ground the agent’s responsibility for the action.<sup>149</sup> So in order to discover whether a defendant is responsible for a wrong, we need to know *why* they did it and whether the motive was truly their own.<sup>150</sup> I would suggest, however, that if Tadros’s idea of motivating reasons grounding responsibility applies (and the argument

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<sup>142</sup> At 152.

<sup>143</sup> At 152-153. Lacey provides examples of this, at 153, in substantive law, including evidential presumptions, detention rules, offender profiling and the admissibility of evidence of bad character. Tadros *Criminal Responsibility*, above n 134, at 69.

<sup>144</sup> At 23.

<sup>145</sup> At 47.

<sup>146</sup> At 28.

<sup>147</sup> At 28.

<sup>148</sup> At 31.

<sup>149</sup> At 30-31.

is plausible), there seems to be no reason why deeper psychological explanations ought not to constitute “motivating reasons”.

Echoing Tadros’s arguments, Nadler and McDonnell observe that the nature and purpose of a defendant’s conduct can be “placeholders for motive, and motive can be a strong signal of moral character”.<sup>151</sup> Nadler and McDonnell distinguish, however, between character theories which attribute responsibility to an inference of flawed character, and motive theories which assess responsibility on the basis of the values expressed by the defendant’s motives.<sup>152</sup> If the defendant’s motives and emotions express values deemed repugnant by decision-makers (such as killing in response to an unwanted homosexual advance) then the defendant’s culpability is unlikely to be mitigated, regardless of whether they had the capacity to control their actions.<sup>153</sup>

Tadros also argues that the nature of agency is not simply constituted by the character of the agent at the time of an action, but as it persists over time. Character theory introduces a temporal aspect to responsibility which considers the agent more broadly than simply at the moment of acting; this is thought to lead to more just punishment.<sup>154</sup>

Punishment is one of the significant goals of the criminal justice system. Some of the criminal justice system’s other goals include the management of crime and those it labels criminal, restitution, and restoration of social harmony. Punishment is, in turn, underpinned by the goals of denunciation and degradation, incapacitation, retribution, rehabilitation, and deterrence.

Simester and others observe that:<sup>155</sup>

If we were to dismantle punishment and its forbidding infrastructure, much of the *raison d’etre* of the criminal law would go with it. Despite its importance, however, the question *why* we punish remains a matter of perennial and irresolvable dispute and has given rise to a vast and challenging literature.

Retributivist theorists, once it is established that a legal verdict is well-founded, justify punishment on the basis that it is *deserved*.<sup>156</sup> Punishment aims to give people what they

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<sup>151</sup> Janice Nadler and Mary-Hunter McDonnell “Moral Character, Motive, and the Psychology of Blame” (2012) 97 Cornell L Rev 255 at 264.

<sup>152</sup> At 266.

<sup>153</sup> At 266.

<sup>154</sup> Tadros *Criminal Responsibility*, above n 134, at 47, citing N Lacey *State Punishment: Political Principles and Community Values* (Routledge, London, 1988) ch 3.

<sup>155</sup> Simester and others *Simester and Sullivan’s Criminal Law*, above n 138, at 16.

<sup>156</sup> At 16.

deserve based upon their past behaviour.<sup>157</sup> Simester and others observe that a “consistent retributivist” will confine punishment to wrongdoing and will usually attribute culpability to the mental state of the defendant rather than the consequences of their actions.<sup>158</sup>

At the other end of the spectrum sits consequentialism, of which utilitarianism is a species.<sup>159</sup> Utilitarianism justifies punishment only if it advances the welfare of society as a whole.<sup>160</sup> Consequentialist justifications are forward-looking – punishment is simply an instrument for promoting future social welfare.<sup>161</sup> According to consequentialist theory, as Simester and others observe, “[a] death remains a death whether it ensues from a brutal killing or a blameless accident”<sup>162</sup> – in other words, the motive or moral element behind the defendant’s actions is irrelevant to the question of whether it is justifiable to punish that defendant.

Critics of consequentialist theories argue that they justify unfair or Draconian penalties: severe penalties such as death for minor wrongs like parking violations would increase collective welfare, but it would simply be wrong to kill someone for, say, double parking.<sup>163</sup> Further, it is actually the threat, rather than the punishment itself, that deters people from wrongdoing, and on that basis, consequentialist theory would justify not punishing serious offenders so long as the public believed that they were punished.<sup>164</sup> Greene and Cohen suggest that consequentialists might argue that this would not happen in the real world for a variety of reasons, such as that it would lead to absurdities in the law, and probable corruption. Greene and Cohen counter that it is wrong to punish innocent people and to not punish guilty people because to do so is *fundamentally unfair*, not because it would lead to bad consequences.<sup>165</sup> They suggest that retributivist theories better apprehend this notion of fundamental unfairness:<sup>166</sup>

... in the absence of mitigating circumstances, people who engage in criminal behaviour *deserve* to be punished, and that is why we punish them. Some would explicate this theory in terms of criminals’ forfeiting rights, others in terms of the rights of the victimized,

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<sup>157</sup> Joshua Greene and Jonathan Cohen “For the law, neuroscience changes nothing and everything” (2004) 359 *Phil Trans R Soc Lond B* 1775 at 1775.

<sup>158</sup> Simester and others *Simester and Sullivan’s Criminal Law*, above n 138, at 16-17.

<sup>159</sup> At 17.

<sup>160</sup> At 17.

<sup>161</sup> Greene and Cohen, above n 157, at 1775.

<sup>162</sup> Simester and others *Simester and Sullivan’s Criminal Law*, above n 138, at 17.

<sup>163</sup> Greene and Cohen, above n 157, at 1776.

<sup>164</sup> At 1776.

<sup>165</sup> At 1776.

<sup>166</sup> At 1776-1777.

whereas others would appeal to the violation of a hypothetical social contract, and so on. Retributivist theories come in many flavours, but ... what is important for our purposes is that retributivism captures the intuitive idea that we legitimately punish to give people what they deserve based on their past actions – in proportion to their ‘internal wickedness’, to use Kant’s (2002) phrase – and not, primarily, to promote social welfare in the future.

Smith argues that the linkage between punishment and blameworthiness is not just a relic from a “bygone retributivist age”.<sup>167</sup> He proposes that while utilitarians would reject the view that moral blameworthiness is the justification for punishment, most would agree that it is an “important limiting principle” for punishment.<sup>168</sup> Smith suggests that the insight to be gleaned from this idea is that there is utility in moral desert:<sup>169</sup>

... a criminal law which distributes punishment according to blameworthiness will more effectively achieve its crime-prevention goals than one that punishes regardless of the moral sentiments of the community.

Simester and von Hirsch note that:<sup>170</sup>

[T]he criminal law is distinctive because of its moral voice. It removes specified activities from the permissible and punishes individuals who venture or stray into its realm. It is a complex, authoritative, censoring device. Conduct is deemed through its criminalisation to be, and is subsequently punished as, *wrongful* behaviour that warrants blame. The official moral condemnation of activity and actor generates a truth-constraint. When labelling conduct as wrongful, and when labelling those it convicts as culpable wrongdoers, the state should get it right.

To this idea Tadros, writing about distinguishing different violent offences, adds:<sup>171</sup>

Wrongs must be distinguished on the basis of characteristics that are significant.

The relevant kind of significance here is *moral* significance. It may be that there are distinctions between instances of wrongdoing that are considered significant socially, but that are not morally significant. It may also be that there is a failure socially to recognize moral differences. Against this, it might be argued that liberal democracies ought to reflect in their policies the views and values of the citizenry. But, liberal democracies must also protect minorities and those without a strong public voice. The fact that states have a responsibility to protect the vulnerable and minorities may constitute a reason to criminalize wrongful conduct directed against those groups ...

Depending upon the particular goals of the criminal justice system, there are different standards for assigning responsibility. Whatever approach is taken to determining culpability and responsibility in homicide (and other crimes), the necessity and

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<sup>167</sup> Stephen F Smith “Overcoming overcriminalization” (2012) 102(3) J Crim Law Criminol 537 at 569.  
<sup>168</sup> At 569 citing Herbert L Packer *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) at 66-67.

<sup>169</sup> At 569.

<sup>170</sup> AP Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart, Oxford, 2011) at 19.

<sup>171</sup> Victor Tadros “The Distinctiveness of Domestic Abuse: A Freedom Based Account” (2005) 65 La L Rev 989 at 1004.



effectiveness of that approach must be driven by the extent to which it achieves one or more of the above-stated goals,<sup>172</sup> if not the overarching goal: justice and fairness.<sup>173</sup>

Lacey sets out to explore “the linkages between particular conceptions of responsibility and the substantive role of criminal law in modern social governance”.<sup>174</sup> She suggests that notions of individual criminal responsibility develop in response to structural problems of legitimation and coordination that arise in criminal law systems. In considering the “interpretive significance of intersecting relationships between different conceptions of responsibility as they shift over space and time”<sup>175</sup>, Lacey gives an account of several conceptions of responsibility. To summarise these conceptions, two are founded in the idea of capacity, two in ideas of character, and one based upon causation. In terms of capacity principles, the first is the idea that a person is responsible for conduct which he or she chooses.<sup>176</sup> The second asks the question whether the defendant had a fair opportunity to avoid the thing they did.<sup>177</sup> In terms of character principles, the first – the overall character principle – attributes responsibility based upon a judgement that the defendant’s conduct is evidence of a wrongful or bad character trait, such as a disregard for human life.<sup>178</sup> The second character principle asks whether the defendant’s conduct expresses a settled disposition of hostility or indifference to the relevant criminal law norm.<sup>179</sup> Lacey’s fifth principle of attribution, with reference to the work of Honoré, suggests that being the cause of an outcome may ground an attribution of responsibility.<sup>180</sup> Lacey notes that criminalisation does operate with multiple conceptions of responsibility rather than a unitary approach.<sup>181</sup> While that is true, and probably necessary taking the goals of the criminal justice system into account, questions arise as to the fairness of applying different models to similar types of behaviour; and, in the context of culpable homicide, whether the correct conception is being applied to particular types of defendants. For example, it might

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<sup>172</sup> See above at 34.

<sup>173</sup> Craig M Bradley and Joseph L Hoffmann “Public perception, justice, and the ‘search for truth’ in criminal cases” (1996) 69 S Cal L Rev 1267 at 1281.

<sup>174</sup> Nicola Lacey “Space, time and function: intersecting principles of responsibility across the terrain of criminal justice” (2007) 1 Crim Law and Philos 233 at 235.

<sup>175</sup> At 235.

<sup>176</sup> At 236.

<sup>177</sup> At 237.

<sup>178</sup> At 238.

<sup>179</sup> At 239.

<sup>180</sup> T Honoré “Responsibility and luck: The moral basis of strict liability” (1988) *Law Quarterly Review* 104 at 530, reprinted in Tony Honoré *Responsibility and fault* (Hart Publishing, USA, 1999) at 14 cited in Lacey, above n 174, at 239-240.

<sup>181</sup> Lacey, above n 174, at 246.

be argued that with regard to young people who kill, it is a capacity model which *ought* to be applied: did the young person, taking into account their stage of development, have a fair opportunity to avoid the conduct that led to the victim's death? However, I suggest that in New Zealand at least, and probably elsewhere, it is not a capacity model but a character model of responsibility attribution that is being applied. The demonisation of children is a recurring theme in the media, particularly evident following high-profile cases in which children or young people are charged with serious crimes (the killing of James Bulger by two ten-year-olds being just one example). Stereotypical images of offenders and their behaviour encourage the public (including potential judges and juries) to see events in simplistic terms and characterise the victims as good and the offenders as evil. This then means that young defendants automatically are defined as deviant outsiders.<sup>182</sup> According to Rutherford, there is widespread evidence of demonisation of children, primarily adolescent males, who are often referred to as “monsters”, “gang-bangers” or “super-predators”.<sup>183</sup> The super-predator label is especially damaging. Moriearty refers to the “superpredator” discourse of 1990s America, noting that while the discourse had receded by the early 21<sup>st</sup> century, the juvenile justice system was irreversibly altered.<sup>184</sup> This super-predator discourse distorted reality in several ways. It overemphasised violent crime;<sup>185</sup> it ignored any cognitive or sociological perspective on causes of juvenile crime;<sup>186</sup> and it overemphasised the link between race and violent crime.<sup>187</sup> Regardless of national crime rates declining, opinion polls revealed the American public's fear of violent juvenile offenders.<sup>188</sup> For example, in a 1997 Los Angeles Times poll, 80 per cent of respondents said that media portrayals of violent crime increased their fear of being a victim of crime.<sup>189</sup> Furthermore in a 1999 poll, 62 per cent of respondents believed that juvenile crime rates were increasing. In reality, juvenile crime rates were decreasing at that time.<sup>190</sup> Similar responses to young offenders are observable in New Zealand as well. New Zealand's criminal justice policy is driven by a perception that the public want a tougher stance taken

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<sup>182</sup> John Muncie *Youth and Crime*. (3<sup>rd</sup> ed, Sage Publications Ltd, London, 2009) at 12.

<sup>183</sup> J Rutherford “Juvenile justice caught between The Exorcist and A Clockwork Orange” (2002) 51 DePaul L Rev 715 at 720.

<sup>184</sup> Perry L Moriearty “Framing Justice: Media, Bias, and Legal Decisionmaking” (2010) 69 Md L Rev 849 at 852.

<sup>185</sup> At 868.

<sup>186</sup> At 869.

<sup>187</sup> At 870.

<sup>188</sup> At 871.

<sup>189</sup> At 871.

<sup>190</sup> At 852.

on crime in general. In relation to young offenders, the approach is evidenced by, for example, the 2006 Young Offenders (Serious Crimes) Bill which claimed that:<sup>191</sup>

Young offenders, in some cases only children, have been responsible for a recent spate of very serious and shocking crimes... There is a clear perception that the youth justice system is too lenient towards such offenders, and that the system is not working.

This quote undoubtedly references highly publicised killings in New Zealand such as that of Michael Choy by a group of young people, including 12-year-old Kurariki, and that of Kenneth Piggot by three 14-year-old girls, including O'Brien.<sup>192</sup> While the Young Offenders (Serious Crimes) Bill was defeated in May 2008, some of its intended results were achieved by the Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010, namely lowering the age of criminal responsibility for 'serious offences' or where the child is defined as a 'previous offender'. Arguably, then, New Zealand's criminal justice system attributes responsibility to young defendants, to use Lacey's words, based upon a judgement that the defendant's conduct is evidence of a wrongful or bad character trait, such as a disregard for human life; or that the defendant's conduct expresses a settled disposition of hostility or indifference to criminal law norms. Young people who kill are seen as "others" – a different category of young person. By killing someone, they have broken the social contract that defines young people as innocent and vulnerable. When young people act outside of this role, by killing someone for example, they are often characterised as evil, super-predators, or monsters; they are of bad *character*. Further, the age at which criminal responsibility is set means that the legal outcome for such young people is a change in status from vulnerable youth in need of care and protection to adult, and the corresponding attribution of full responsibility that goes along with it. In this respect it is interesting to observe the recent views of Jordan Nelson who, at the age of 13, shot and killed his caregiver, Rosemaree Kurth, because he mistakenly believed she had stopped him from visiting his mother.<sup>193</sup> Nelson recently appeared before the Parole Board and told it that the "best explanation" he had for killing Kurth was that he had not previously been disciplined. Nelson said that he went from living in a situation with no boundaries to living with Kurth and her partner, who had tried to set limits, which he objected to. The Parole Board's report said that Nelson admitted that at the time he did not think about the consequences of his actions but is now aware of the

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<sup>191</sup> Young Offenders (Serious Crimes) Bill 2006 (28-1) (explanatory note).

<sup>192</sup> See ch 1.

<sup>193</sup> *R v Nelson* [2012] NZHC 3570. See ch 3.

ongoing effect of his offending on the victims and their families. The report says that Nelson has achieved many accomplishments during his incarceration including being part of an award-winning team involved in the Youth Enterprise programme; achieving a bronze Duke of Edinburgh award and working towards a silver; and has attained NCEA levels one and two. He can speak fluent te reo Māori and is an accomplished carver. Importantly, Nelson accepts he is not ready for parole.<sup>194</sup> What all this seems to confirm is the idea that Nelson, undoubtedly like many other young killers, is not of bad character; rather he did not have the capacity at the time of the killing to make a rational choice.

### *Classicist and positivist theories of responsibility*

The classical liberal model of criminal responsibility presumes that defendants have mental capacity and it attributes guilt without reference to the defendant's individual qualities.<sup>195</sup> This reflects one of the central concepts of classicist legal theory – egalitarianism, or equality before the law.<sup>196</sup> The classical model is still embodied in the general legal principles of criminal responsibility administered by courts in New Zealand and other common law countries, whereby the authority to punish an individual depends upon that individual committing prohibited conduct while possessing a particular state of mind (such as intention).<sup>197</sup> This, of course, assumes that everyone has the capacity to make a rational choice. This idea corresponds with the first of Lacey's capacity principles,<sup>198</sup> that a person is responsible for conduct that they choose.

Because of the unreasonableness of classical theory's assumption that everyone is rational, neo-classicism introduced the possibility of mitigating circumstances which, in some cases

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<sup>194</sup> Deena Coster "Parole hearing offers new insights on of one of NZ's youngest killers", 27 April 2018, <[www.stuff.co.nz/national/crime/103439667/parole-hearing-offers-new-insights-on-of-one-of-nzs-youngest-killers](http://www.stuff.co.nz/national/crime/103439667/parole-hearing-offers-new-insights-on-of-one-of-nzs-youngest-killers)>.

<sup>195</sup> Russell Hogg "The causes of crime and the boundaries of criminal justice" in Julia Tolmie & Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) at 82.

<sup>196</sup> Reece Walters and Trevor Bradley *Introduction to Criminological Thought* (Pearson Education New Zealand, Auckland, 2005) at 52.

<sup>197</sup> Thus, the criminal law should punish certain types of behaviour, not certain types of people: Russell Hogg, above n 195, at 82. This is, at least, the theory. In reality, however, it is often impossible to separate the behaviour from the person – they are intrinsically linked. Many cases demonstrate that jury decision-making is as much about the type of defendant as it is about what they have done. Wihongi is a case in point. It is hard to justify her conviction for murder when compared to the case of Wickham. It is at least arguable that other factors, such as Wihongi's ethnicity and background played a role in her conviction. Further, as Lacey argues, sometimes responsibility in a legal sense is apportioned on the basis of a character principle: Lacey, above n 174.

<sup>198</sup> See above at 37-38.

can partially, or wholly, reduce responsibility.<sup>199</sup> Neo-classicist theory pays closer attention to the idea that the criminal law should only convict those who are culpable in some way and we should only label someone a “criminal” if they are morally blameworthy. Accordingly, if a person is not morally at fault, the reproach of the criminal law is not appropriate.<sup>200</sup> This proposition applies in degrees.

When compared with classicist theories, positivist theories that purport to explain crime focus on the actor, rather than the act,<sup>201</sup> and recognise that often crime is the result of factors beyond the control of the individual,<sup>202</sup> which reduce the individual’s moral responsibility.<sup>203</sup> These factors can be embedded in social conditions (the focus of sociological positivism) or in the individual (the focus of individual positivism) and can be seen, to varying degrees, as overriding the will of the individual, meaning that the notion of free will cannot explain all crime. The divergence between classical and positivist approaches to crime can be demonstrated by the ordinary judicial responses to people who kill. The case of Harris, referred to in ch 1, is but one example. As noted, Harris was executed for killing two teenagers. He was found morally blameworthy despite suffering from foetal alcohol syndrome and having been subjected throughout his childhood to severe abuse (physical and psychological) by his alcoholic parents.<sup>204</sup>

Homicide laws, like many others, have developed from classicist theory, including its presumption that individuals are rational actors, but they also incorporate neo-classicist ideas of mitigating circumstances. The question that this thesis raises is, do neo-classicist concessions go far enough in recognising different degrees of moral blame? As observed in ch 1, the question is also raised about the adequacy of existing defences to homicide.

As is apparent from the cases discussed in ch 1, where a strict and non-contextual application of the law does not support findings of self-defence, a victim of violence who kills her abuser will be liable for murder. Where a jury does not consider the developmental state of an adolescent’s reasoning processes, the adolescent could be liable for murder or

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<sup>199</sup> Walters and Bradley, above n 196, at 56.

<sup>200</sup> AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Brookers, Wellington, 2012) at 8.

<sup>201</sup> Walters and Bradley, above n 196, at 61.

<sup>202</sup> At 62.

<sup>203</sup> Suzanne D Strater “The Juvenile Death Penalty: In the Best Interests of the Child?” (1995) 26 *Loy U Chi LJ* 147 at 163.

<sup>204</sup> Peter Arenella “Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability” (1992) 39 *UCLA L Rev* 1511 at 1514.

manslaughter rather than a lesser, or even no, offence.<sup>205</sup> These outcomes reflect the law's assumption of rationality. Yet many such defendants are in a similar predicament to Robert Harris, in which it is arguable that severe physical and psychological abuse "might have severely impaired the moral sensibilities of most human beings"<sup>206</sup> (*Wihongi* is an instructive case here<sup>207</sup>) or, in the case of young people, that their age has not allowed them to develop the moral sensibilities of adults.

In relation to young defendants, victims of violence who kill their abusers, and some child homicide defendants, legitimate concerns exist about their abilities to make rational decisions or to act in accordance with rational decisions, in the circumstances in which they are placed. It is not enough to assert that these circumstances can be adequately addressed in sentencing. In some cases, the degree of moral culpability may be so low that the censure of the criminal law is inappropriate; in which case, there is no authority for the state to punish the offender at all.

This thesis will consider the extent to which neo-classicism mitigates the harshness of the classical egalitarian principle of the criminal law in the context of culpable homicide. Is a neo-classicist approach sufficient to reflect the reality that not all are capable of rational judgement in all circumstances? If not, will positivist approaches to criminal responsibility, acknowledging as they do the role of factors beyond individual control, offer more just outcomes?

It is important to note at this point that there are few situations of homicide in which there will be no legal responsibility at all (although the proposals set out in ch 6 do provide for some exceptions to that general rule). The argument is that not all defendants ought to be held to the same standard – there are *degrees* of moral blame, in other words, and therefore *degrees of responsibility*.

### ***Culpability***

Dictionary definitions of the term "culpability" include guilt, blameworthiness, responsibility, liability, and fault. Often within the criminal law culpability is used in all of

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<sup>205</sup> See ch 3.

<sup>206</sup> Arenella, above n 204, at 1514.

<sup>207</sup> See ch 4 for a fuller discussion of this case.

these senses.<sup>208</sup> Culpable homicide, for instance, is homicide that the law sees as blameworthy, for which one may be found guilty, to be at fault, or that one may be legally responsible or liable for. As Feinberg notes, different language is often used to express the same idea:<sup>209</sup>

An equivalent way of saying that some result is a man's fault is to say that he is to *blame* for it. Precisely the same thing can also be said in the language of *responsibility*. Of course, to be responsible for something (after the fact) may also mean that one did it, or caused it, or now stands answerable, or accountable, or liable to unfavourable responses from others for it. One can be responsible for a result in all those senses without being to blame for it. One can be held liable for a result either because it is one's fault or for some quite different kind of reason and one can be to blame for an occurrence and yet escape all liability for it.

It can be seen, therefore, that moral blameworthiness and legal blameworthiness do not always coincide. Consistent with retributivist theory, moral blameworthiness is imbued with notions of desert – does the defendant *deserve* to be punished for their behaviour? Central to this idea is that the defendant has the capacity to reason; the ability to make a choice between one course of action and another. The way in which the criminal justice system usually determines this in the individual case is to require some element of intention or foresight of harm and recklessness. Although in the context of tortious liability, Lord Atkin's words in *Donoghue v Stevenson* are instructive:<sup>210</sup>

The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a *general public sentiment of moral wrongdoing* for which the offender must pay.

However, as was observed by Sir Owen Woodhouse, also in the context of tortious liability, the extent of liability often depends upon the *results* of the defendant's conduct, not by the quality of it:<sup>211</sup>

Reprehensible conduct can be followed by feather blows while a moment's inadvertence could call down the heavens.

This is particularly true in the case of homicide where, for liability to ensue, a death must result from a defendant's conduct. As the quote above from Feinberg acknowledges, one can be held responsible for an event without being blameworthy (as generally understood). Absolute liability offences, in which the prosecution does not need to prove the defendant

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<sup>208</sup> In this thesis, the words "culpability" and "blameworthiness" and their derivatives, are used interchangeably.

<sup>209</sup> Joel Feinberg "Sua Culpa" (1970) in Joel Feinberg and Hyman Gross *Philosophy of Law* (3rd ed, Wadsworth Publishing Company, California, 1986) at 513.

<sup>210</sup> *Donoghue v Stevenson* (1932) AC 562 (HL) at 580 per Lord Atkin, emphasis added.

<sup>211</sup> Owen Woodhouse Royal Commission to Inquire into and Report upon Workers Compensation *Compensation for personal injury in New Zealand. Report of the Royal Commission of Inquiry* (1967).

acted with fault, are an example. The reverse is also true: an actor can be blameworthy yet not responsible. An example of this occurs when one assaults a victim causing a bodily injury, but some intervening event (a *novus actus interveniens*) causes a more severe bodily injury leading to death. As noted above, in the context of culpable homicide, as with some other offences, the notion of causation becomes crucial to determinations of liability. Person A kills person B if A's actions are a substantial cause and an operating cause of B's death.<sup>212</sup> If, between A's act and B's death, there is some other cause which operates as a substantial cause upon B, such that A's act can be said to be merely part of the historical setting in which B's death occurred, A is not responsible for B's death.<sup>213</sup>

Despite the urging of Mill that the only limitation on individual freedom ought to be to prevent harm to others,<sup>214</sup> there has always been a moral component to the criminal law. Even where the restriction of individual freedom *is* to prevent harm to others, as in the context of homicide, for example, different degrees of **moral blame** can be identified. However, while the criminal law is concerned with assigning responsibility for harms, it is not *always* concerned with moral blameworthiness, since not all offences require mens rea in the sense of intention or foresight of harm to be proved (as in absolute liability offences described above). Other offences can be established by an objective assessment of fault, such as negligence. Sometimes the circumstances also mitigate responsibility, despite the presence of intention (self-defence, for example).

The attribution of moral blame is not simply about intention (or foresight or any other mens rea state as generally understood). Moral blame evokes questions about motives, excuses and justifications, and capacity. These concepts are broader than questions about mens rea. An offender may have intended to kill, yet not be morally blameworthy for doing so. Moral blame is, to use Lord Atkin's words in *Donoghue v Stevenson*, above, based upon a general public sentiment of moral wrongdoing.

Greene and Cohen consider the notion of moral blame another way: "for centuries, many legal issues have turned on the question: "what was he [or she] thinking?"<sup>215</sup> If what the defendant was thinking was truly an exercise of free will then generally speaking, they will

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<sup>212</sup> *R v Smith* [1959] 2 QB 35 (CMACt).

<sup>213</sup> *R v Smith*, above n 212.

<sup>214</sup> John Stuart Mill *On Liberty* (2<sup>nd</sup> ed, Ticknor & Fields, Boston, 1863) at 22.

<sup>215</sup> Greene and Cohen, above n 157, at 1775.



be morally blameworthy. At the centre of neoliberalism – the jurisprudential phase in which we currently exist – is the idea of individuals as “rational utility maximisers” or “profit and loss calculators”. These ideas are the linchpins for economic policy which is then translated into social policy; hence the law’s assumption that people do have a general capacity for rational choice.<sup>216</sup>

This question – “what was the defendant thinking?” – can be expressed in different ways: was it the defendant or their upbringing? Was it the defendant or their genetic makeup? Was it the defendant or their circumstances?<sup>217</sup> Greene and Cohen argue that there is no “defendant” independent of these other things.<sup>218</sup> In other words, the mind and the brain are not two separate entities. What is more, they argue, is that:

... we have little reason to doubt that (i) the state of the universe 10 000 years ago, (ii) the laws of physics, and (iii) the outcomes of random quantum mechanical events are together sufficient to determine everything that happens nowadays, including our own actions.

In this sense, Greene and Cohen argue, the combined effects of genes and environment *determine* all of our actions.<sup>219</sup> This, as Greene and Cohen admit, is a controversial opinion.<sup>220</sup> However, they suggest that neuroscience can assist in explaining the mechanical nature of human action in a way that avoids complicated arguments. Their explanation is that rather than the *mind* being a black box, which presumably cannot be penetrated to discover the causes of behaviour, the *brain* is a “transparent bottleneck” for all the forces that affect who we are and what we do.<sup>221</sup> These forces include those which are critical for moral and legal responsibility. And because of advances in neuroscience, we may soon be able to gain far more insight into those forces than ever before.<sup>222</sup> Greene and Cohen speculate that in a world when the “mechanical nature of human decision-making”<sup>223</sup> might be fully appreciated by everyone, it would still be necessary that the law punish lawbreakers, because the maintenance of order relies upon it. Greene and Cohen argue, however, that distinguishing those who are truly blameworthy from those who are victims of circumstance will become pointless.<sup>224</sup> This is because, from a deterministic

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216 At 1778.

217 At 1778-1779.

218 At 1779.

219 At 1780.

220 At 1781; see also the note of caution in ch 1.

221 At 1781.

222 At 1781.

223 At 1781.

224 At 1781.

perspective, everyone is essentially a victim of circumstance. This is a highly contested view, but even if we assume, simply for the sake of argument, that deterministic theory is correct (that is, that free will *is* a fiction), the law still needs to distinguish between the moral blameworthiness of certain types of behaviour. The maintenance of social order depends upon on the idea that human agents do possess decision-making capacity and may be held legally accountable for their actions, regardless of the neuroscientific evidence to the contrary. I will argue that some “victims of circumstance” (in the context of this thesis, defendants charged with culpable homicide) are worthier of compassion than others. Some categories of defendants who may be more deserving of compassion than moral censure are already recognised by the law. The extent to which insanity and infancy bear upon the actions of defendants are examples. The defence of self-defence, which recognises that a threat of death or serious bodily injury affects a defendant’s behaviour, is another. And, as Nussbaum points out, compassion already plays a role in sentencing:<sup>225</sup>

It is natural to consider the defendant’s life at this time, and to adjust the penalty if we think that a specific history – for example a history of childhood sexual abuse – might have destabilized the personality, making criminal conduct more understandable and to that extent less heinous, even if it does not give rise to a successful plea of diminished capacity ...

This thesis argues, however, that the existing “compassionate” circumstances to which we do not apportion moral blame (or at least, the highest degree of moral blame) do not go far enough in recognising the different factors which undermine the assumption of rationality.

What makes some killings worse, more heinous, or more morally blameworthy, than others? At first glance we could say that certain features of the killing automatically make it more morally repugnant. Malicious premeditation, killings committed during the commission of other serious crimes, torturous killings, and the killing of society’s more vulnerable and defenceless people, are some features that might be thought to invoke a higher than usual degree of moral blame. At the other end of the spectrum we might include killings where a defendant acts with a genuinely altruistic motive (to end a loved one’s suffering, for example); where the killing is provoked by the conduct of the victim; and circumstances where the defendant’s capacity was impaired in ways which fall outside existing defences. These are just some examples.

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<sup>225</sup> Martha Nussbaum *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press, Princeton NJ, 2004) at 49.

As noted, some of these aggravating and mitigating factors are considered in sentencing, but not always. And in any event, sentencing decisions flow from decisions about responsibility. Further, the killing of a vulnerable person is not always (highly) morally blameworthy if, for example, the defendant is also a vulnerable person. Similarly, not all premeditated killings are (highly) morally blameworthy. Sometimes killing a child by abuse, or possibly even neglect, can be more morally blameworthy than intending to kill them (compare defendants Iorangi and Harrison-Taylor, referred to in ch 1, for example). In other cases, factors individual to the defendant make the killing more blameworthy than other cases. Compare a forty-year-old defendant with no psychological issues who recklessly kills a victim, with a fourteen-year-old who does the same. Both these defendants, under our current system, are held to the same standard, usually by people (judges and juries) who have more in common with the forty-year-old than the fourteen-year-old.

It might be argued that cases that are at the lower end of the moral blameworthiness spectrum are those with which we, as fellow humans, may empathise. As noted above, euthanasia provides a good example: many would empathise with a defendant who assisted the suicide of a terminally ill and suffering family member. We could imagine being in this position ourselves and possibly, if we were in that defendant's position, we feel we may have done the same thing. Relevantly, at the time of writing, David Seymour's End of Life Bill 2017 (269-1) is before the Select Committee. As set out in the Explanatory Note, the purpose of the Bill is to give:<sup>226</sup>

... people with a terminal illness or a grievous and irremediable medical condition the option of requesting assisted dying. The motivation for this Bill is compassion. It allows people who so choose, and are eligible under this Bill, to end their lives in peace and dignity, surrounded by loved ones.

The Bill carefully defines those eligible for assisted dying, details a comprehensive set of provisions to ensure this is a free choice, made without coercion, and outlines a stringent series of steps to ensure the person is mentally capable of understanding the nature and consequences of assisted dying.

It is interesting to note that while that Bill has been in progress, Wellington woman, Susan Austen, has been acquitted of aiding the suicide of another woman.<sup>227</sup> Austen was, however, found guilty on two charges of specific importations of pentobarbitone, a

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<sup>226</sup> End of Life Bill 2017 (269-1) (explanatory note).

<sup>227</sup> "Susan Austen trial verdict: not guilty of aiding suicide" (23 February 2018) <[www.stuff.co.nz/national/crime/101701053/susan-austen-trial-verdict-not-guilty-of-aiding-suicide](http://www.stuff.co.nz/national/crime/101701053/susan-austen-trial-verdict-not-guilty-of-aiding-suicide)>.

barbiturate. Austen was co-ordinator of the Wellington branch of Exit International, and chaired Wellington End-of-Life Choice group. Her acquittal on the aiding suicide charge may reflect the jury's sympathy for both the defendant's and the victim's position, despite having been told that they must put aside their views on euthanasia in coming to their decision.<sup>228</sup> The Bill passed its first reading in 2017 with a vote of 76 to 44. The timetable for the Select Committee's report on the Bill has now been extended given that a record 35,000 submissions were received.<sup>229</sup>

Another example of cases where compassion may be easier to find are those where a child dies from a failure to supervise or some other omission with which we can relate. The phenomenon of babies dying in hot cars is apposite. The mother of Mace Caldwell pleaded guilty to manslaughter following the death of her son, who she left in her car on a hot Friday in January 2015. It was said to be the first New Zealand case of "forgotten baby syndrome", in which a break in usual routines can create a "false memory" of doing something one intended to do (such as drop the child at daycare). It is believed that Mace's father usually drove him to daycare on Fridays but was unable to do so that day.<sup>230</sup> Again, many can empathise with the defendant in this type of case. They may think, "there but for the grace of God go I" and not wish to stigmatise the defendant with a conviction for culpable homicide.

Some of the options that the criminal justice system currently employs to denote culpability, and therefore responsibility, include notions of causation or fault. In terms of the latter, this includes subjective mens rea which dominates as a basis for attributing responsibility. However, mens rea and other fault standards do not always reflect moral blame. Particularly in the case of culpable homicide, mens rea is a very blunt instrument for recognising moral blame, as some of the cases referred to in ch 1 attest. This is, at least in part, a reflection of a punitive turn in criminal justice policy and practice, observable in New Zealand, and elsewhere, in the last twenty or so years. This has been evidenced by legislation such as the Sentencing and Parole Reform Act 2010 which created the three-

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<sup>228</sup> "Austen trial: Put aside views on assisted dying, jury told" (23 February 2018) <[www.stuff.co.nz/national/crime/101635018/austen-trial-put-aside-views-on-assisted-dying-jury-told](http://www.stuff.co.nz/national/crime/101635018/austen-trial-put-aside-views-on-assisted-dying-jury-told)>.

<sup>229</sup> Henry Cooke "Euthanasia bill timetable extended as record 35,000 submissions received" (21 May 2018) <[www.stuff.co.nz/national/politics/104063025/euthanasia-bill-timetable-extended-as-record-35000-submissions-received](http://www.stuff.co.nz/national/politics/104063025/euthanasia-bill-timetable-extended-as-record-35000-submissions-received)>.

<sup>230</sup> Nikki Papatsoumas "Forgotten Baby Syndrome 'extremely rare'— expert" *The New Zealand Herald* (online ed, Auckland, 22 January 2015).

strikes sentencing regime but also prior to that, the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002. These Acts, according to Oleson “were legislative expressions of penal populism” whereby politicians respond to the punitive sentiment of the public<sup>231</sup> – “popular punitivism”, in other words. Popular punitivism has been defined by Monterosso as “[t]he interplay in late modern society between the media, public opinion and politicians that generates a backdrop to the formulation and implementation of both criminal justice and penal policy”.<sup>232</sup> What this punitive turn has also done in New Zealand is to expand categories of mens rea or fault standards to include, more than ever before, states of mind such as knowledge, failure to inquire, failure to protect and so on. It is possible to be convicted of manslaughter for, essentially, making a mistake – the “forgotten baby” cases are but one example.

Additionally, tests for mens rea have become increasingly objective, rendering someone liable for not knowing or foreseeing (for example) what a reasonable person would have known or foreseen. Examples of this in the New Zealand context include the operation of s 66(2) of the Crimes Act 1961, where a secondary party is charged with culpable homicide in cases where the principal is charged with murder under s 168 of the same Act; the secondary party (as well as the principal) could be liable for murder in the absence of foresight of death.<sup>233</sup> This is inconsistent with New Zealand’s long history of requiring a subjective assessment of mens rea. Smith, writing in 2012, acknowledged the “wide consensus that overcriminalization is a serious problem”.<sup>234</sup> Smith lays part of the blame for this at the door of inadequate mens rea requirements in statutory offences. He observes that drafters are at pains to identify the actus reus elements of an offence but often ascribe no, or inadequate, mens rea requirements.<sup>235</sup> Smith finds this “troubling because mens rea requirements are an essential safeguard against unjust convictions and disproportionate punishment”.<sup>236</sup> The role of mens rea in criminal law is to exempt from punishment those who are not “blameworthy in mind”.<sup>237</sup>

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<sup>231</sup> James C Oleson “Habitual criminal legislation in New Zealand: Three years of three-strikes” (2015) 48(2) Aust NZ J Criminol 277 at 282.

<sup>232</sup> Stephen Monterosso “Punitive criminal justice and policy in contemporary society” (2009) 9(1) QUTLJ 13 at 14.

<sup>233</sup> See below at 50-51 and see also ch 3 and the discussion of *R v Rapira* [2003] 3 NZLR 794, (2003) 20 CRNZ 396 (CA).

<sup>234</sup> Smith, above n 167, at 537.

<sup>235</sup> At 568.

<sup>236</sup> At 568.

<sup>237</sup> At 569 citing *Morissette v United States* 342 US 246 (1952) at 252.

As noted above, the punitive approach in the criminal law is seen in common purpose or joint enterprise liability. In *Edmonds v R*<sup>238</sup> the Supreme Court noted the concern that rigorous application of joint enterprise liability rules has a tendency to over-criminalise the conduct of secondary parties. Common purpose liability is particularly pernicious in relation to young defendants, who often engage in risky behaviour in groups. If a principal offender is charged with murder under s 168 of the Crimes Act, which deals with felony-murder offences, a secondary party can be liable for murder or manslaughter even if they did not foresee death. This was precisely what happened in the case of Kurariki, who was convicted of manslaughter for acting as a decoy in the planned robbery of a pizza delivery worker, which took place when Kurariki was aged just 12 years.<sup>239</sup>

The over-criminalisation problem is compounded by the fact that defences to homicide are “few in number and framed incredibly narrowly”.<sup>240</sup> As noted in ch 1, Smith points out that defences have a crucial role in ensuring that criminal responsibility is kept within appropriate bounds.<sup>241</sup>

Green suggests, however, that governments in Britain and the United States fail to improve the means of public consultation to ensure that the public voice is properly assessed before it is invoked to justify penal policy – instead they rely upon “a monolithically and unqualifiedly punitive public to justify punitive policies”.<sup>242</sup> Arguably the same applies in New Zealand. However, Green observes that researchers have long established that when the public is better informed, it is less punitive than politicians assert and are highly ambivalent about crime and punishment issues. Accordingly, the public want “both to execute criminals *and* rehabilitate them; to blame individuals for their offending *and* blame the social circumstances; to ‘let them rot in jail’ *and* prevent them from reoffending”.<sup>243</sup>

As the foregoing discussion demonstrates, New Zealand’s current regime for apportioning blame in culpable homicide results in much over-criminalisation, and not just in relation to young defendants. The problem is also seen in cases where (usually) women who are

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<sup>238</sup> *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445, (2011) 25 CRNZ 503.

<sup>239</sup> See ch 3.

<sup>240</sup> Smith, above n 167, at 576, talking more generally about defences to criminal liability, not just homicide.

<sup>241</sup> At 577.

<sup>242</sup> David A Green “Public opinion versus public judgments about crime: correcting the ‘Comedy of Errors’” (2006) 46(1) *Brit J Criminol* 131 at 132.

<sup>243</sup> At 132.

victims of abuse, including violence and coercion, respond to the abuse with lethal force. There is potential under-criminalisation in other contexts, for example, where manslaughter convictions denote a lower degree of moral blame for defendants who fatally mistreat children.<sup>244</sup>

A number of cases illustrate that not all defendants are treated in the same way.<sup>245</sup> That is, they might demonstrate the same degree of moral blame, but the outcomes in case disposition differ wildly. The inconsistency of outcomes means that a fundamental requirement of the rule of law is absent – the requirement of equality before the law. When elements of the rule of law are not upheld, justice is not delivered. Nadler and McDonnell contend that people harbour “a generalized social preference to inculcate people with bad characters”<sup>246</sup> which is at the heart of the phenomenon they refer to as “motivated inculcation: if we have *any* reason to infer that a defendant has a bad moral character, we will be more likely to construe that defendant’s actions as criminally culpable”<sup>247</sup>. Using a series of experiments, Nadler and McDonnell tested the hypothesis that:<sup>248</sup>

... when a fact finder judges a harmful action performed by a ‘bad’ defendant or performed with a bad motive, the defendant is perceived as more responsible, and the act as more causal and intentional, than when a fact finder judges an identical harmful action conducted by a ‘good’ defendant or with a good motive.

The results of the experiments suggest two things: (a) that a defendant’s motive (with its implications about moral character) strongly influence *inferences* about causation, intention and blame; and (b) that moral character, inferred *independently* from a defendant’s motive for creating harm can influence *judgments* about causation, intent, and blame.<sup>249</sup> These implications appear to readily explain the different outcomes in the *Wickham* and *Wihongi* cases. *Wickham* suffered from multiple sclerosis, had no antecedent criminal or violent behaviour, and appeared to come from a middle-class background. *Wihongi* had a troubled past, including alcohol and painkiller abuse, and she had been violent to her victim on other occasions (none of which were actually relevant to whether she was acting in self-defence at the time of the killing).

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<sup>244</sup> See ch 5.

<sup>245</sup> See the discussion in ch 1, and in particular *R v Wickham* and *R v Wihongi*; see also chs 4 and 5.

<sup>246</sup> Nadler and McDonnell, above n 151, at 271.

<sup>247</sup> At 272.

<sup>248</sup> At 272.

<sup>249</sup> At 292.

## *Fairness and justice*

What do we understand the concepts of fairness and justice to mean? Wright, in a footnote to his discourse on the principles of justice, says:<sup>250</sup>

The concept of justice is narrower than the concept of fairness with which it is sometimes confused. While a broad array of actions and situations are said to be unfair, it is not common to describe them as unjust unless they also involve [interpersonal relations... that are properly subject to regulation through legal rights and duties].

On this definition, justice has a legal element which fairness does not necessarily entail. However, common understandings of fairness by members of a society are likely to promote the delivery of justice in that legal sense. While unfair outcomes are not always in breach of the rule of law, if the legislature and courts (judges and juries) agree that certain outcomes in decisions about culpable homicide are unfair, then we are on the path to a more just approach.

## *The evolution of justice?*

Recently much research has been devoted to the idea of social justice in animals, with the implication that the research reveals much about human understandings of justice. One study revealed that capuchin monkeys demonstrate a sense of fairness, by changing their behaviour when they perceive other monkeys are getting an advantage that they themselves are not.<sup>251</sup> The study involved the monkeys exchanging tokens with a human experimenter. If one monkey received a grape for a token and a second monkey received cucumber (to capuchins, cucumber is far less desirable than grape), the second monkey eventually refused to participate in the exchanges. The researchers recorded two types of incomplete exchanges: either failing to hand back the token or failure to accept or eat the cucumber. Both types of incomplete exchange often involved the capuchins actively rejecting the cucumber by, for example, tossing it out of the test chamber.<sup>252</sup> In a newspaper interview about the study, de Waal was quoted as saying this self-righteous indignation in a primate suggests that “human behaviour has very old evolutionary roots”.<sup>253</sup> The irrational nature of this reaction suggested that there was no other basis for the behaviour except to complain about the unfairness: “[t]he cucumber-holding monkey,

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<sup>250</sup> Richard W Wright “The principles of justice” (2000) 75(5) *Notre Dame L Rev* 1859 at 1872, n 63.

<sup>251</sup> SF Brosnan and FBM de Waal “Monkeys reject unequal pay” (2003) 425 *Nature* 297.

<sup>252</sup> At 298.

<sup>253</sup> “There’s more to fair play than monkeying around” *The New Zealand Herald* (29 September 2003) A15.



after all, gave up a reward for no apparent reason other than to demonstrate disgust at being badly treated”.<sup>254</sup> This is not to suggest that a biological link exists between capuchin monkeys and humans sufficient to amount to a causal factor. Rather it seems that notions of fairness are deep drivers of behaviour across all species so perhaps we ought to pay closer attention to them.

There has been more recent research on concepts of fairness in other animals. Bekoff and Pierce, in their book *Wild Justice*<sup>255</sup> look, with varying degrees of depth, at social behaviour in gorillas, baboons, chimpanzees, elephants, bats, wolves, wolverines, monkeys, whales, foxes, bears, dogs and cats. A special issue of the journal *Social Justice Research* was published in 2012, in an effort to bring together what was then known about social justice in animals. In their contribution to that issue, Pierce and Bekoff referred to their proposition first outlined in *Wild Justice*, that justice behaviours form one of three major clusters of moral behaviour in animals. Justice behaviours include behaviours relating to expectations about what an individual deserves and how they ought to be treated relative to others. “Fairness” is a specific type of justice behaviour and it relates to how costs and benefits are distributed across the group. Fairness involves notions of equity and equality.<sup>256</sup> The cluster of justice behaviours also includes, or has overlaps with, notions of reciprocity, collaboration, punishment, reconciliation, spite, fair play, sharing, retribution and forgiveness, as well as emotional responses to injustice and justice such as anger and indignation, or pleasure, gratitude and trust.<sup>257</sup> What these kinds of research show us is that concepts of fairness or justice may not be limited to humans, as once was thought. Rather, as Brosnan and de Waal demonstrated from their study on capuchin monkeys, these concepts may have deep evolutionary roots. Why is this important? The law (in this context, criminal law) must keep abreast with current knowledge. As noted in ch 1, if the law is to remain relevant it must reflect what is known about mental states. If the law does not reflect relevant science, it moves too far away from the reality of the community. Understanding the scientific underpinnings of behaviour leads to a better appreciation of why people kill, and this may impact upon our understandings of how this affects their

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<sup>254</sup> Above n 253.

<sup>255</sup> Marc Bekoff and Jessica Pierce *Wild Justice: the Moral Lives of Animals* (The University of Chicago Press, USA, 2009).

<sup>256</sup> Jessica Pierce and Marc Bekoff “Wild Justice Redux: What We Know About Social Justice in Animals and Why It Matters” (2012) 25 Soc Jus Res 122 at 125.

<sup>257</sup> At 125.

moral blame – either by reducing it or compounding it. This thesis argues that the law of homicide ought to be reformed in a way that supports and promotes society’s deeply held notions of justice and fairness. If a defendant’s actions have deep evolutionary roots, then so do decision-makers’ sense of a just outcome. In other words, perhaps we ought to change the law so that it aligns with our sympathies – so that courts can legitimately come to a just conclusion. If the law says a particular type of killing is not as morally blameworthy as another, our empathies may evolve in that direction.

Just as notions of fairness and justice may have an evolutionary basis, so too do notions of forgiveness and revenge. McCullough, Kurzban and Tabak suggest that revenge and forgiveness are both psychological adaptations.<sup>258</sup> They propose that revenge is designed to deter harm and forgiveness is designed to preserve valuable relationships.<sup>259</sup> In that sense, both revenge and forgiveness solve adaptive problems. In the case of revenge, it changes the wrongdoer’s incentive to emit benefits instead of costs upon the victim.<sup>260</sup> Forgiveness, in terms of an adaptive solution, can reduce the costs associated with revenge.<sup>261</sup> Revenge can cause an aggressor and their allies to engage in counter-revenge.<sup>262</sup> Forgiveness works to inhibit this counter-revenge when the costs of revenge outweigh its deterrent benefits.<sup>263</sup> A deeper understanding of the biological sciences can help us to understand these behaviours, and more. It may, for instance, help us to understand the moral judgements made by non-defendants, in other words, other parties who play a role in the administration of justice such as police prosecutors, defence counsel, juries and judges. For example, studies have shown that normal decision-making is more emotional and less reasoned than many have believed.<sup>264</sup> In a quest to discover answers to questions such as “how do we decide that someone else has done something wrong?”, psychologists Greene and Haidt reviewed neuroimaging studies on moral psychology which point to the conclusion that emotion is a significant driving force in moral

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<sup>258</sup> Michael E McCullough, Robert Kurzban and Benjamin A Tabak “Cognitive systems for revenge and forgiveness” (2013) 36 *Behav Brain Sci* 1 at 2. See below at 56-60 for a fuller discussion of adaptive behaviour.

<sup>259</sup>

At 2.

<sup>260</sup>

At 3.

<sup>261</sup>

At 11.

<sup>262</sup>

At 11.

<sup>263</sup>

At 11.

<sup>264</sup>

Joshua Greene and Jonathan Haidt “How (and where) does moral judgment work?” (2002) 6(12) *Trends Cogn Sci* 517.

judgment.<sup>265</sup> This kind of research clearly has implications for the criminal justice system, which requires reasoned, rather than emotional, decision-making. However, it should be noted that there is not actually a clear-cut separation between the two, and this is not to say that reasoning does not also play an important role in moral judgments. Perhaps, however, we have traditionally underestimated the extent to which emotion plays a part.

Haidt, together with Rozin, has looked at the emotion of disgust and its evolutionary and cultural bases.<sup>266</sup> They posit that elicitors of disgust have evolved over time from a food rejection system driven by pathogen avoidance to avoidance of reminders of human's animal nature, especially death.<sup>267</sup> Nussbaum states that "[s]hame and disgust are prominent in the law, as they are in our daily lives".<sup>268</sup> She observes that throughout history, disgust has been a powerful weapon in social exclusion:<sup>269</sup>

So powerful is the desire to cordon ourselves off from our animality that we often don't stop at feces, cockroaches, and slimy animals. We need a group of humans to bound ourselves against, who will come to exemplify the boundary line between the truly human and the basely animal. If those quasi-animals stand between us and our own animality, then we are one step further away from being animal and mortal ourselves.

The traditional focus of much of this "projected disgust" is the female body,<sup>270</sup> but Nussbaum notes the "central locus of disgust" in more modern United States society, which is the male loathing of male homosexuals.<sup>271</sup> Aligned with these ideas is the reality that particular types of killing evoke more disgust than others. To what extent do these emotions factor in to our moral judgments about particular defendants' behaviour?

It is of course true that there are other deeply rooted bases for notions of revenge and forgiveness and so on that are equally as powerful and historically grounded as biological drivers. The analysis presented here is not intended to preclude consideration of those bases. Rather, I submit that for the most part, the criminal law has failed to pay due attention to biological explanations for human behaviour, including those involved in the evaluation of criminal culpability.

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<sup>265</sup> At 522.

<sup>266</sup> Paul Rozin and Jonathan Haidt "The domains of disgust and their origins: contrasting biological and cultural evolutionary accounts" (2013) 17(8) Trends Cogn Sci 367.

<sup>267</sup> At 367.

<sup>268</sup> Martha Nussbaum, above n 255, at 2.

<sup>269</sup> At 107.

<sup>270</sup> At 111.

<sup>271</sup> At 113.

## THE BIOLOGY OF HUMAN BEHAVIOUR

The next section of this chapter looks more closely at the biological lenses through which we can view the phenomenon of culpable homicide, and in particular, the different degrees of moral blame that we might associate with different types of killings. This thesis suggests that a finding of free will is not always supported by the facts but we, as a society, accept that proposition more readily in some cases than others. The following discussion will examine the biological processes involved in guiding behaviour and will provide a basis to extrapolate different degrees of moral blame associated with that behaviour.

At this juncture it is important to re-emphasise the note of caution contained in ch 1 about the following analysis, relying as it does on a view of human action which is open to contest. In particular, it should be noted that this thesis rejects the view of all human behaviour as mechanistic. Rather the thesis seeks to demonstrate that a broader understanding of *all of* the causes of human behaviour (including not just that of defendants but also other actors in the criminal justice system) can potentially pave the way for a more just regime for considering moral culpability in the context of homicide. As Gowaty, a “Darwinian feminist”<sup>272</sup> observes:<sup>273</sup>

There are multiple levels or foci of analysis in the modern biological study of behavior (including social behavior and social organization of both humans and nonhuman animals). We ask questions about neuronal causation (How do sensory signals contribute to “cause” behavior?), hormonal causation (How do hormonal signals “cause” behavior?). How do cognitive processes “cause” behavior? How do genes cause behavior? How do conditioning and other psychological processes cause behavior? How do emotions or feelings cause behavior? None of these levels or foci of analysis are alternative to one another, meaning that each of these levels of causation or foci of analysis might (probably) simultaneously work to “cause” the expression of this or that behavior ...

A better way of explaining the relevance of evolutionary theory may be to avoid the use of the language of causation, or at least to talk about potentials instead. Perhaps the relationship between evolution and present behaviour can be best explained by reference to self-defence. It cannot be disputed that self-preservation is a deep driver of human behaviour. Sometimes homicide results as a response to a threat to one’s own safety. We could say that homicide in the context of self-defence is fitness-enhancing – as Blumoff

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<sup>272</sup> Patricia Adair Gowaty “Introduction: Darwinian Feminists and Feminist Evolutionists” in Patricia Adair Gowaty (ed) *Feminism and evolutionary biology* (Chapman & Hall, New York, 1997) at 5.

<sup>273</sup> At 3-4.

puts it, it reflects “the natural desire in all of us to flourish and reproduce”.<sup>274</sup> In other words, self-defensive reactions are adaptive.<sup>275</sup> The process of natural selection gives rise to a homicidal potential (the realisation of which is highly contingent). However, clearly this does not mean the killing is pre-determined or that a person who kills in self-defence is predisposed to kill.

## ***Evolutionary theory***

### *Key concepts and processes in evolutionary theory*

While Darwin is considered the father of evolution, it was Mendel who discovered the precise mechanism by which inheritance occurs. Darwin had thought that inherited traits were a result of blending of the qualities of two parents. Instead, Mendel discovered that each parent’s qualities were passed to offspring intact in packets, or units of heredity, called **genes**.<sup>276</sup> One of the fundamental principles underpinning evolutionary explanations for human behaviour is that evolution causes individuals to be born with a patterned set of emotional and intellectual responses that are encoded into our genes.<sup>277</sup> The gene is the *agent* of evolution.<sup>278</sup>

The *object* of evolution, from the standpoint of any individual member of a species, is to have equal or greater “**reproductive success**” than other members of the same species. Because resources are limited, the process of evolution is naturally competitive.<sup>279</sup> The process by which evolution occurs is **natural selection** – whereby differential reproduction occurs due to inherited design differences<sup>280</sup> and is the result of a combination of three characteristics of the living world: heredity, variation and differential reproduction.<sup>281</sup> Thus, reproductive success is linked to the process of natural selection. When an adaptive (advantageous), heritable trait increases an individual’s reproductive success, relative to

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<sup>274</sup> Theodore Y Blumoff “The neuropsychology of justifications and excuses: some problematic cases of self-defense, duress, and provocation” (2010) 50(3) *Jurimetrics* 391 at 393.

<sup>275</sup> At 421.

<sup>276</sup> David M Buss *Evolutionary Psychology: the new science of the mind* (Pearson, Harlow, UK, 2008) at 10.

<sup>277</sup> Cheryl Hanna “Can a Biological Inquiry Help Reduce Male Violence Against Females? Or what’s a nice ‘gal’ like me doing at a conference like this?” (1997) 22 *Vermont LR* 333 at 340.

<sup>278</sup> Bailey Kuklin “Peril Invites Rescue: an evolutionary perspective” (2006) 35 *Hofstra L Rev* 171 at 178.

<sup>279</sup> Owen D Jones “Evolutionary Analysis in Law: An introduction and application to child abuse” (1997) 75 *NCL Rev* 1117 at 1132.

<sup>280</sup> Buss, above n 276, at 38.

<sup>281</sup> Jones “Evolutionary Analysis”, above n 279, at 1136.

that of the individual's contemporaries (differential reproduction) then that trait will increase in prevalence in successive generations of a population.<sup>282</sup> The converse also applies in relation to maladaptive traits – such traits will decrease or die out.<sup>283</sup> These traits are called **adaptations** – mechanisms produced by natural selection to solve specific problems encountered by ancestral populations during the course of a species' evolution.<sup>284</sup> In other words, an adaptation is an attribute which is effectively organised as a result of natural selection to achieve some useful function, such as respiration or the defeating of rivals.<sup>285</sup> An organism's set of adaptations was designed to exploit the environment in which it evolved and to solve the problems posed by that environment – called the **environment of evolutionary adaptedness (EEA)**.<sup>286</sup>

Reproductive success is measured not just in terms of the number of an individual's offspring, since relatives other than offspring (parents, siblings, aunts, nephews and so on) have shared genes. Therefore, the reproductive successes of relatives *other than* offspring also contribute to an individual's reproductive success. The concept of “**inclusive fitness**”, proposed by Hamilton in 1964, refers to the extent to which an individual increases the reproductive success of its relatives.<sup>287</sup> Inclusive fitness is the sum of an individual's own reproductive success (referred to as classical fitness) plus the effects the individual's actions have on the reproductive success of his or her genetic relatives.<sup>288</sup> Another term for inclusive fitness is “kin selection”.<sup>289</sup>

Also of relevance to the issue of reproductive success is the process of **sexual selection**, by which sexual organisms compete for mating opportunities.<sup>290</sup> Darwin's theory of sexual selection was developed in response to his observation that some evolved features of the living world seemed to have nothing to do with survival. On closer inspection, however, he realised that these are adaptations that make an organism more successful or competitive

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282 At 1137.

283 At 1137.

284 John Tooby and Leda Cosmides “Psychological Foundations of Culture” in Jerome H Barkow, John Tooby and Leda Cosmides (eds) *The Adapted Mind: Evolutionary Psychology and the Generation of Culture* (Oxford University Press, UK, 1992) at 62.

285 Martin Daly and Margo Wilson “Family Violence: an evolutionary psychological perspective” (2000) 8 Va J Soc Poly & L 77 at 85-86.

286 Tooby and Cosmides, above n 284, at 69.

287 Buss, above n 276, at 13; Jones “Evolutionary Analysis”, above n 279, at 1134-135.

288 Buss, above n 276, at 13.

289 Kuklin, above n 278, at 182.

290 At 194-195.

in mating. Under sexual selection, features evolve that make an organism more attractive to sexual partners (intersexual selection) or more intimidating to competitors (intrasexual selection).<sup>291</sup> The peacock's tail is one example of the former; stags locking horns in combat an example of the latter.<sup>292</sup>

### *Evolutionary psychology*

At the heart of an evolutionary approach to behaviour is the idea that in changeable environments natural selection favours organisms that can detect changes in the environment and respond with behaviour that promotes reproductive success. Evolutionary psychology relies upon principles from evolutionary biology to understand the way in which the human mind works. According to evolutionary psychology, the human mind involves specialised information-processing circuits that have evolved via the process of natural selection to solve adaptive problems that were faced by our ancestors.<sup>293</sup>

Jones argues that brains are subject to the same causal processes that shaped the rest of the natural world.<sup>294</sup> The human mind consists of a set of evolved information-processing mechanisms which predispose it to process particular kinds of information which in turn produce non-random behavioural patterns.<sup>295</sup> Theories of behaviour are theories about the human brain.<sup>296</sup> Behaviour is the principal output of the brain, therefore behaviour reflects evolutionary processes.<sup>297</sup> Daly and Wilson suggest that if an aspect of human nature is complexly organised, of cross-cultural and pan-historical sweep, then it is likely to be a biological adaptation. For example, mate-guarding<sup>298</sup> in birds is behaviour that has paternity assurance as its fitness-promoting function.<sup>299</sup> Paternity assurance is the process by which the male of a species guarantees that he is not investing valuable resources in offspring that are not his own. Concerns about paternity lead males to act in proprietary

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<sup>291</sup> Buss, above n 276, at 6-7.

<sup>292</sup> At 7.

<sup>293</sup> Elizabeth M Hill, Deana Grabel and Robert McCurren "Impairment in family caregiving: a biological perspective" (2003) 61(2) *Med Hypotheses* 248 at 250.

<sup>294</sup> Owen D Jones "Law and Biology: Toward an Integrated Model of Human Behavior" (1997) 8 *J Contemp Legal Issues* 167 at 170.

<sup>295</sup> At 171.

<sup>296</sup> Owen D Jones "Time-shifted Rationality and the Law of Law's Leverage: behavioral economics meets behavioral biology" (2001) 95 *NWU L Rev* 1141 at 1143.

<sup>297</sup> At 1165.

<sup>298</sup> Mate-guarding is post-copulatory behaviour to prevent access to the mate by other males.

<sup>299</sup> Daly and Wilson "Family Violence", above n 285, at 85-87.

ways in respect of their female partners.<sup>300</sup> According to Daly and Wilson, hypotheses about these kinds of adaptive functions can direct the research endeavour.<sup>301</sup> Evolutionary theory can be of assistance in formulating psychological hypotheses which, if proved, help to predict when people will behave both adaptively and maladaptively.<sup>302</sup>

However, as already noted, evolutionary causes of behaviour are not sole causes. The environment, which includes all the unique non-genetic experiences each individual encounters, affects the way genes work and causes some genes to switch other genes on and off.<sup>303</sup> Two individuals may have roughly the same genome (genetic makeup) but different experiences cause them to have different expectations. One individual's brain may be better structured to some tasks than others, simply because of his or her experience in that task.<sup>304</sup> Daly and Wilson suggest that people are not passive recipients of environmental factors but are active interpreters.<sup>305</sup>

Daly and Wilson suggest that criminological theory often relies upon behavioural models which are unexamined and sometimes even outdated.<sup>306</sup> Jones also asserts that law uses an outdated model of human behaviour<sup>307</sup> – what Tooby and Cosmides call the Standard Social Science Model (SSSM) of behaviour<sup>308</sup> – as the SSSM does not reflect an understanding of the brain as an evolving physical structure.<sup>309</sup> One of the aims of an evolutionary psychology analysis is to bring law's model of human behaviour into alignment with the way in which individuals actually behave, and the reasons for such behaviour.<sup>310</sup>

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<sup>300</sup> Molly J Walker Wilson "An Evolutionary Perspective on Male Domestic Violence: practical and policy implications" (2005) 32 Am J Crim L 291 at 298.

<sup>301</sup> Daly and Wilson "Family Violence, above n 285, at 86.

<sup>302</sup> At 120.

<sup>303</sup> Theodore Y Blumoff "On the Nature of the Action-Omission Network" (2008) 24 Ga St U L Rev 1003 at 1021.

<sup>304</sup> At 1028.

<sup>305</sup> Martin Daly and Margo Wilson "Crime and Conflict: homicide in evolutionary psychological perspective" (1997) 22 Crime Justice 51 at 52.

<sup>306</sup> At 51-52.

<sup>307</sup> Jones "Law and Biology", above n 294, at 168.

<sup>308</sup> Tooby and Cosmides, above n 284.

<sup>309</sup> Jones "Law and Biology", above n 294, at 172.

<sup>310</sup> Blumoff "Action-Omission Network", above n 303, at 1017.



## *The evolution of adolescence*

Until relatively recently, most of the research on cognitive functioning during adolescence has been conducted via psychological studies.<sup>311</sup> Cognitive neuroscience or developmental neuroscience has recently begun to highlight the neural underpinnings of psychological development through adolescence and into adulthood.<sup>312</sup> Cognitive neuroscience is an investigational discipline that seeks to understand how, among other things, human sensory systems, higher cognitive functions, emotions and consciousness arise from the structure and function of the brain.<sup>313</sup> The advent of magnetic resonance imaging (MRI) has had a profound effect on cognitive neuroscience. It is able to provide detailed information about the anatomy and physiology of the brain without using harmful radiation,<sup>314</sup> permitting observation of brain changes during development in living people.<sup>315</sup>

The overarching conclusion reached by cognitive neuroscience is that adolescence is a developmental stage, during which the brain is still under construction.<sup>316</sup> Significantly, the prefrontal cortex is the last region of the brain to fully develop, and this process extends well beyond adolescence.<sup>317</sup> In particular, the regions of the brain that are responsible for impulse control, risk assessment, decision-making and emotion take the longest to mature.<sup>318</sup> This challenges long held assumptions that the brain had largely finished developing by puberty.<sup>319</sup> The frontal lobes (which control “executive functions” such as planning, working memory, and impulse control) are among the last areas of the brain to mature and are not fully formed until at least the mid-20s.<sup>320</sup> Lenroot and Giedd state:<sup>321</sup>

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<sup>311</sup> Laurence Steinberg “Adolescent Development and Juvenile Justice” (2009) 5 *Annu Rev Clin Psychol* 459 at 465.

<sup>312</sup> At 465.

<sup>313</sup> O Carter Snead “Neuroimaging and the ‘Complexity’ of Capital Punishment” (2007) 82 *NYU L Rev* 1265 at 1273.

<sup>314</sup> Jay N Giedd “The Teen Brain: Insights from Neuroimaging” (2008) 42 *J Adolesc Health* 335 at 343.

<sup>315</sup> Rhoshel K Lenroot and Jay N Giedd “Brain development in children and adolescents: Insights from anatomical magnetic resonance imaging” (2006) 30 *Neurosci Biobehav Rev* 718 at 719.

<sup>316</sup> Wisconsin Council on Children and Families *Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System* (2006) at 13.

<sup>317</sup> Robert M Sapolsky “The frontal cortex and the criminal justice system” (2004) 359 *Philos Trans R Soc Lond B Biol Sci* 1787 at 1792.

<sup>318</sup> Jay D Aronson “Neuroscience and Juvenile Justice” (2009) 42 *Akron L Rev* 917 at 923.

<sup>319</sup> Sara B Johnson, Robert W Blum and Jay N Giedd “Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy” (2009) 45 *J Adolesc Health* 216 at 216.

<sup>320</sup> At 216.

<sup>321</sup> Lenroot and Giedd, above n 315, at 723.

Notably late to reach adult levels of cortical thickness is the dorsolateral prefrontal cortex, involved in circuitry subserving control of impulses, judgment, and decision-making.

This means that even though teenagers may be fully capable in some areas, they do not always reason as well as adults.<sup>322</sup> Brain researchers also distinguish between “cold cognition” and “hot cognition”. The term “cold cognition” describes thought processes that occur in situations of low emotional intensity and “hot cognition” describes those that occur in situations of high emotional intensity.<sup>323</sup> As Johnson and others define it:<sup>324</sup>

Hot cognition refers to conditions of high emotional arousal or conflict; this is often the case for the riskiest of adolescent behaviors.

Research suggests that adolescent behaviour in situations of high emotional intensity (hot cognition) is characterised by risk-taking and sensation-seeking. In cold cognition teenagers are better able to foresee the consequences of their actions.<sup>325</sup> Under cold cognition, by the age of 16, adolescents’ abilities to reason are generally the same as adults.<sup>326</sup>

There are several areas of the brain that are particularly important to considerations of criminal responsibility. Sapolsky identifies the prefrontal cortex as particularly significant in terms of impulse control.<sup>327</sup> He draws a distinction between having knowledge of something, and being able to control one’s conduct.<sup>328</sup> Simply put, the prefrontal cortex controls the individual’s conscious conduct, as compared with conduct that is already learned, or implicit.<sup>329</sup> As Sapolsky puts it, the prefrontal cortex “provides the metaphorical cerebral backbone needed to keep the prior, easier task from intruding.”<sup>330</sup> In short, it helps to suppress impulsive behaviour.<sup>331</sup>

There are also developmental *processes* that impact on behaviour. Myelination is the process by which a layer of fatty tissue deposits itself around nerve fibres, which provides

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<sup>322</sup> Adam Ortiz “Adolescence, Brain Development and Legal Culpability” Juvenile Justice Center, American Bar Association (2004).

<sup>323</sup> Praveen Kambam and Christopher Thompson, ‘The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants’ (2009) 27 Behav Sci Law 173 at 175.

<sup>324</sup> Johnson and others, above n 319, at 218.

<sup>325</sup> Wisconsin Council on Children and Families, above n 316, at 11-12.

<sup>326</sup> Aronson, above n 318, at 921.

<sup>327</sup> Sapolsky, above n 317, at 1790.

<sup>328</sup> At 1790.

<sup>329</sup> At 1790.

<sup>330</sup> At 1790.

<sup>331</sup> At 1791.

the insulation necessary to efficiently transmit electrical signals between neurons.<sup>332</sup> Pruning refers to the pruning of neural connections, which is necessary to remove lesser-used connections so that the ones remaining are more efficient. These two processes – myelination and pruning – continue through adolescence and well into adulthood.<sup>333</sup> As a result there are improvements over the course of adolescence in a number of aspects of executive function including response inhibition, planning, and weighing risks and rewards.<sup>334</sup>

These results are largely extrapolated from structural studies of the anatomy of the brain. Researchers have also used functional MRI (fMRI), which tracks changes in blood flow in the brain as subjects are tested, either by being exposed to stimuli or performing tasks.<sup>335</sup> The blood flow is taken to represent brain activity. One such study was on the activation of the amygdala, a part of the limbic system which is involved in interpreting emotion, and in particular in determining the presence of threat.<sup>336</sup> This study found that in adolescents the amygdala became very active during facial recognition activities and that adolescents were susceptible to misreading fearful facial expressions, classifying them instead as angry, confused, surprised, and happy.<sup>337</sup> Functional MRI results support the finding of an increasing shift from limbic activity to frontal activity for a variety of cognitive tasks.<sup>338</sup> What this demonstrates is that the parts of the brain responsible for conscious conduct are still developing through adolescence.

Developmental neuroscience is particularly useful when it comes to assessing recklessness within the context of criminal culpability. As Zimring observes:<sup>339</sup>

The immaturity of an actor has a pervasive influence on a large number of subjective elements of the offense, including cognition, volition, and the appreciation that behavior such as setting a fire can produce results like the death of a person.

Steinberg says that risky behaviour in adolescence results from the interaction between changes in two separate neurobiological systems. One is a socioemotional system which is localised in limbic and paralimbic areas of the brain, including, among other structures,

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<sup>332</sup> Aronson, above n 318, at 922.

<sup>333</sup> At 922.

<sup>334</sup> Steinberg “Adolescent Development”, above n 311, at 466.

<sup>335</sup> Aronson, above n 318, at 924.

<sup>336</sup> At 924.

<sup>337</sup> At 924-925.

<sup>338</sup> Giedd, above n 314, at 340.

<sup>339</sup> Franklin E Zimring “The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts” (1999) 6 Va J Soc Poly & L 437 at 441.

the amygdala and medial prefrontal cortex. The other is a cognitive control system which is mainly made up of the lateral prefrontal and parietal cortices and interconnected parts of the anterior cingulate cortex.<sup>340</sup> Rapid and dramatic increase of a particular neurotransmitter within the socioemotional system occurs around the time of puberty, and this is presumed to lead to increases in reward-seeking. At the same time, the cognitive control system and its connections to the socioemotional system are insufficiently mature. More simply:<sup>341</sup>

The temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence.

Dahl suggests that the process is similar to “starting the engines without a skilled driver behind the wheel”.<sup>342</sup>

The three behaviour changes that are most often noted in teens across cultures are increased novelty seeking; increased risk taking; and a shift toward peer-based interactions.<sup>343</sup> Advances in neuroimaging technology have been instrumental in studying the link between these behavioural changes and the brain.<sup>344</sup> Functional MRI studies have been able to assist with tracing behaviour to distinct processes and structures within the brain. For instance, *fMRI* reveals that neurotransmitter changes related to the onset of puberty impact upon sensation-seeking changes in behaviour, whereas maturational changes in the frontal lobe impact on impulse control.<sup>345</sup>

This information is also relevant to the question of whether an offender knows right from wrong, as is required in rebutting the *doli incapax* presumption. *Doli incapax* is an irrebuttable common law presumption that children under the age of seven are incapable of committing a crime.<sup>346</sup> Between the ages of seven and thirteen the presumption was rebuttable. The prosecution could rebut the presumption by proving that the child was of normal mental capacity and could distinguish between right and wrong.<sup>347</sup> Psychologists

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<sup>340</sup> Steinberg “Adolescent Development”, above n 311, at 466.

<sup>341</sup> Laurence Steinberg “A social neuroscience perspective on adolescent risk-taking” (2008) 28 *Dev Rev* 78 cited in Steinberg “Adolescent Development”, above n 311, at 466.

<sup>342</sup> R Dahl “Affect regulation, brain development, and behavioural/emotional health in adolescence” (2001) 6 *CNS Specr* 1 cited in Steinberg “Adolescent Development”, above n 311, at 466.

<sup>343</sup> Johnson and others, above n 319, at 218.

<sup>344</sup> At 218.

<sup>345</sup> At 218.

<sup>346</sup> See ch 3 for a fuller discussion of different jurisdictional approaches to this principle.

<sup>347</sup> Lisa Micucci “Responsibility and the Young Person” (1998) 11 *Can J Law Jurisprud* 277 at 281.

suggest that although adolescents may know right from wrong and be capable of making informed decisions (in situations requiring cold cognition), they access different areas of their brain than adults do, largely relying on emotions and gut instinct.<sup>348</sup>

There is also a correlation between age, risk-taking and peer influence. One study found that risk-taking increased among both adolescents and college students, but not adults, when they were in groups.<sup>349</sup> The results of these kinds of studies have obvious implications for young persons charged with homicide as a secondary party.

### ***Violence against women, and their responses***

Evolutionary psychology, as summarised above,<sup>350</sup> is a useful theoretical tool for understanding male violence against women. Gowaty explains:<sup>351</sup>

As Darwin pointed out, sexual selection includes within- and between-sex behavioural processes. Some of the many behavioral processes that may mediate the gametic contest include female-female competition or cooperation, male-male competition or cooperation, female choice, male choice, and other behavioral mechanisms we might call anti-female choice and anti-male choice. For example, Smuts and Smuts (1992) describe a type of sexually selected, anti-female choice behavior that they call 'intersexual coercion,' which is defined as 'the use of force, or the threat of the use of force, by a member of one sex (A) that functions to increase the probability that a member of the other sex (B) will mate with A and/or decrease the probability that B will mate with a rival of A's.'

Further, Gowaty adds that because female access to resources is fundamental, selective drivers of behaviour include *resistance* by females to coercive control.<sup>352</sup> The killing of an abuser may be at the extreme end of the range of behavioural mechanisms.

### ***Sexual proprietariness***

Wilson and Daly propose that sexual proprietariness is "a psychological adaptation of the human male".<sup>353</sup> By this they mean that men are motivated to lay claim to particular women, which involves an element of entitlement.<sup>354</sup> For males, sexual selection involves the ever-present risk of "cuckoldry" – unwittingly investing resources in biologically

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<sup>348</sup> Tracy Rightmer "Arrested Development: Juveniles' Immature Brains Make them Less Culpable than Adults" (2005) 9 Quinnipiac Health L 1 at 18.

<sup>349</sup> L Steinberg "Risk Taking in Adolescence: What Changes and Why?" (2004) 1021 Annals NY Acad Sci 51 cited in Rightmer, above n 348, at 20.

<sup>350</sup> See above at 59-60.

<sup>351</sup> Patricia Adair Gowaty "Evolutionary biology and feminism" (1992) 3 Human Nature 217 at 233.  
<sup>352</sup> At 234.

<sup>353</sup> Margo Wilson and Martin Daly "An Evolutionary Psychological Perspective on Male Sexual Proprietariness and Violence Against Wives" (1993) 8(3) Violence Vict 271 at 276.

<sup>354</sup> At 276.

unrelated children.<sup>355</sup> A corresponding threat to a female's fitness is not that she would be cuckolded, but that her mate would divert resources to another female. Men's proprietary feelings toward mates are more likely to be about sexual fidelity per se, whereas women would be more concerned about allocations of the mate's resources and attentions.<sup>356</sup>

Wilson and Daly observe that male sexual proprietariness can be discerned from:<sup>357</sup>

... numerous phenomena which are culturally diverse in detail but monotonously alike in the abstract: socially recognized marriage, the valuation of female fidelity, the equation of the 'protection' of women with protection from sexual contact, the conception of adultery as a property violation, and the special potency of wifely infidelity as a provocation to violence.

Johnson argues that it is now "an accepted truth that male sexual jealousy and possessiveness are leading correlates of lethal and nonlethal violence against female intimate partners cross-culturally".<sup>358</sup> Relevantly, Daly and Wilson suggest that:

In addition to jealous arousal, sexual proprietariness encompasses motives and actions that may be effective in the prevention of a threat of trespass or usurpation, as well as responses thereto.<sup>359</sup>

Johnson notes that indicators of sexually proprietary and controlling behaviours are frequently used in prevalence surveys to understand why men use violence towards partners. Some of the types of information sought in these surveys include whether the respondent's partner: gets angry if she speaks with other men; tries to limit her contact with family and friends; follows her or otherwise monitors her whereabouts in a controlling or frightening way; damages or destroys her property; is constantly suspicious that she has been unfaithful; harms or threatens to harm her children.<sup>360</sup> Daly and Wilson observe that the "most direct testimony" to the linkage between the psychology of jealousy and violent action is to be found in homicides.<sup>361</sup> Their review of studies of the motives and circumstances of wife-killings from a variety of societies found that the majority of cases involved suspected or actual infidelity on the part of the victim and/or the wife's decision to leave the marriage.<sup>362</sup>

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<sup>355</sup> At 278.

<sup>356</sup> At 278.

<sup>357</sup> At 277.

<sup>358</sup> Holly Johnson "When Feminism Meets Evolutionary Psychology: The Enduring Legacy of Margo Wilson" (2012) 16(4) *Homicide Stud* 332 at 334.

<sup>359</sup> Wilson and Daly "Male Sexual Proprietariness", above n 353, at 278.

<sup>360</sup> Johnson, above n 358, at 338.

<sup>361</sup> Wilson and Daly "Male Sexual Proprietariness", above n 353, at 279.

<sup>362</sup> M Daly & M Wilson *Homicide* (Aldine de Gruyter, Hawthorne NY, 1988) cited in Wilson and Daly "Male Sexual Proprietariness", above n 353, at 279.

### *'Battered Woman Syndrome'*

For several decades there has been much research dedicated to understanding the psychological and other effects of domestic violence on victims. One of the earliest attempts at a comprehensive theory was that of psychologist Lenore Walker in her 1979 book, *The Battered Woman*. In 1984 she published a follow-up book, *The Battered Woman Syndrome* which detailed a study carried out with 400 battered women. There are two main elements in Walker's account of battered woman syndrome (BWS): the "cycle theory of violence" (cycle theory) and "learned helplessness". The cycle theory encompasses three phases: tension building; an acute battering incident; and loving contrition.<sup>363</sup>

In the tension building phase there is:<sup>364</sup>

... a gradual escalation of tension displayed by discrete acts causing increased friction such as name-calling, other mean intentional behaviours, and/or physical abuse. The batterer expresses dissatisfaction and hostility but not in an extreme or maximally explosive form. The woman attempts to placate the batterer, doing what she thinks might please him, calm him down, or at least, what will not further aggravate him.

However, the acute battering incident cannot be averted indefinitely, and this is then followed by the third phase of the cycle. The third phase consists of kind, loving, and remorseful behaviour on the part of the abuser, which reinforces the cycle.<sup>365</sup> He may even believe himself that he will never be violent again.<sup>366</sup>

The cycle theory purports to explain why women stay in abusive relationships. The loving contrition phase compensates for the acute abusive incidents. Walker's study also showed that in many cases the third phase of the cycle could be characterised by an absence of tension and violence, with no observable loving-contrition, and still be reinforcing for the woman.<sup>367</sup>

Walker's theory of learned helplessness also explains why women find it difficult to leave abusive relationships. Relying on Seligman's (1975) experiments with dogs, Walker reasoned that helplessness arises when events in a woman's life seem uncontrollable. Seligman's experiments revealed that dogs who were repeatedly and randomly shocked

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<sup>363</sup> Lenore Walker *The Battered Woman Syndrome* (2<sup>nd</sup> ed, Springer Publishing Company, New York, 1984) at 2.

<sup>364</sup> At 95.

<sup>365</sup> At 2.

<sup>366</sup> At 96.

<sup>367</sup> At 96.

became unable to escape the shocks even where escape was possible.<sup>368</sup> Seligman and other researchers later became “disenchanted with the adequacy of theoretical constructs originating in animal helplessness for understanding helplessness in humans”.<sup>369</sup> Nonetheless, Walker hypothesised that:<sup>370</sup>

... women’s experiences of the non contingent nature of their attempts to control the violence would, over time, produce learned helplessness as the ‘repeated battering, like electrical shocks, diminish the woman’s motivation to respond’.

It is important to note that Walker’s theories do not describe all abusive relationships. Further, Walker’s theories have been subjected to much criticism. Skinazi observes that neither Walker’s own findings nor subsequent studies support a conclusion that learned helplessness is a *common* consequence of violent relationships. However, many commentators agree that violent relationships do have psychological effects on survivors.<sup>371</sup>

### *Traumatic bonding*

Dutton and Painter’s theory of “traumatic bonding” posits that strong emotional attachments develop from two features of abusive relationships – power imbalances and intermittent good-bad treatment.<sup>372</sup> As power imbalances increase in an abusive relationship, the subjugated party becomes less capable of fending for herself, and therefore perceives herself as increasingly in need of the dominator.<sup>373</sup> Dutton and Painter also argue, drawing a link with Walker’s contrition phase, that a series of positive behaviours on the part of the abuser offsets abusive episodes. The alternating aversive and positive conditions produce persistent patterns of behaviour that are difficult to extinguish, and in experiments produces strong emotional bonds.<sup>374</sup> When physical punishment is intermittent, and interspersed with friendly contact, traumatic bonding is most powerful.<sup>375</sup> This emotional bond interferes with leaving, and staying out of, an abusive relationship.<sup>376</sup>

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<sup>368</sup> At 86.

<sup>369</sup> Lyn Y Abramson, Martin EP Seligman and John D Teasdale “Learned Helplessness in Humans: Critique and Reformulation” (1978) 87(1) J Abnorm Psychol 49 at 50.

<sup>370</sup> Walker, above n 363, at 87.

<sup>371</sup> HR Skinazi “Not just a ‘conjured afterthought’: using duress as a defense for battered women who ‘fail to protect’” (1997) 85 Cal L Rev 993 at 1009.

<sup>372</sup> DG Dutton and S Painter “Emotional attachments in abusive relationships: a test of traumatic bonding theory” (1993) 8(2) Violence Vict 105 at 105.

<sup>373</sup> At 107.

<sup>374</sup> At 107.

<sup>375</sup> At 108.

<sup>376</sup> At 109.



### *Coercive controlling violence*

Johnson, with other researchers, has differentiated among types of domestic violence.<sup>377</sup> Of particular relevance here is coercive controlling violence (previously referred to by Johnson and others as patriarchal terrorism and intimate terrorism), a term applied to “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners”.<sup>378</sup> This pattern is embodied in Pence and Paymar’s Power and Control Wheel<sup>379</sup> and many women’s advocates, when using the term “domestic violence”, refer to this pattern.<sup>380</sup> The central idea of coercive control is that even nonviolent control tactics, such as isolation, economic abuse and so on, take on a violent meaning that they would not otherwise have.<sup>381</sup> Coercive controlling violence can be distinguished from situational couple violence, a pattern of violence that is not grounded in the dynamic of power and control. Situational couple violence occurs when specific conflict situations escalate to violence.<sup>382</sup> Distinguishing between these two patterns resolves the gender symmetry debate over whether women perpetrate violence against male partners as frequently as men do against women. Johnson’s analysis shows that situational couple violence in heterosexual relationships is committed fairly equally by men and women, whereas coercive controlling violence is committed almost entirely by men.<sup>383</sup>

Furthermore, there are different consequences for the victim of each of these types of violence. Johnson and Leone report that women subjected to coercive controlling violence are more likely to: be injured; display more symptoms of posttraumatic stress syndrome; use painkillers, tranquilizers or antidepressants; miss work; leave their partners and to do so more frequently.<sup>384</sup> Despite this latter finding, such women are less likely to achieve and maintain self-sufficiency.<sup>385</sup>

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<sup>377</sup> See for example JB Kelly and MP Johnson “Differentiation among types of intimate partner violence: research update and implications for interventions” (2008) 46 Fam Court Rev 476; MP Johnson and JM Leone “The differential effects of intimate terrorism and situational couple violence: findings from the National Violence Against Women Survey” (2005) 26(3) J Fam Issues 322.

<sup>378</sup> Kelly and Johnson, above n 377, at 478.

<sup>379</sup> Ellen Pence and Michael Paymar *Education Groups for Men Who Batter* (Springer, New York, 1993) cited in Kelly and Johnson, above n 377, at 478.

<sup>380</sup> Kelly and Johnson, above n 377, at 478.

<sup>381</sup> Johnson and Leone, above n 377, at 323-324.

<sup>382</sup> At 324.

<sup>383</sup> At 325.

<sup>384</sup> At 344.

<sup>385</sup> At 346.

## *Coercive control*

Stark argues that while violence is critical in terms of the harm inflicted by abusive partners, most women with whom he has worked who *only* suffered violence retained autonomy in key areas of their lives.<sup>386</sup> Stark's model of coercive control is not centred around violence as a tactic of control. He claims that the women he has seen in his practice have been adamant that:<sup>387</sup>

...what is done to them is less important than what their partners have prevented them from doing for themselves by appropriating their resources; undermining their social support; subverting their rights to privacy, self-respect, and autonomy; and depriving them of substantive equality.

Stark's "coercive control" model assumes that the battered woman is psychologically "normal" and possesses an average level of competence, but this competence is affected by the coercion she faces from the abuser.<sup>388</sup>

Stark's model of coercive control is centred on the broad pattern of behaviour designed to destroy the victim's autonomy.<sup>389</sup> As Hanna observes, Stark's coercive control model provides a theory of interpersonal violence that is more complex and accurate than the accounts on which the law currently relies.<sup>390</sup> At present, the law responds to harm on an "incident" basis, such as an assault. Such a response fails to capture the broad and continuous behaviours involved in coercive control.<sup>391</sup> As our understanding of domestic violence has evolved, a clearer picture has emerged of the causal factors at play when a victim of abuse responds by killing. Stark has sought to reframe<sup>392</sup>

... woman battering from the standpoint of its survivors as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control.

While Stark notes that assault can be an essential part of this strategy, the primary harm is the deprivation of rights and resources.<sup>393</sup>

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<sup>386</sup> Evan Stark *Coercive control: how men entrap women in personal life* (Oxford University Press, New York, 2007) at 13.

<sup>387</sup> At 13.

<sup>388</sup> Evan Stark "A failure to protect: Unravelling 'the Battered Mother's Dilemma'" (1999-2000) 27 W St U L Rev 29 at 105. See ch 4.

<sup>389</sup> Stark *Coercive control*, above n 386, at 13.

<sup>390</sup> Cheryl Hanna "The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women (2009) 15(2) Violence Against Women 1458 at 1459.

<sup>391</sup> At 1461.

<sup>392</sup> Stark *Coercive control*, above n 386, at 5.

<sup>393</sup> At 5.

Stark also uses the term “intimidation” to refer to a range of tactics that supplement violence and are designed to induce fear and humiliation, such as threats, stalking and the destruction of personal property.<sup>394</sup> At the extreme end of the scale, victims of coercive control may be left with no capacity for independent thought.

### ***The evolution of child homicide***

Schwartz and Isser observe that while cultural mores, economic development and scientific advances have provided more favourable and nurturing family environments than ever before, child homicide remains a problem.<sup>395</sup>

One of the aims of an evolutionary psychology analysis is to bring law’s model of human behaviour into alignment with the way in which individuals actually behave, and the reasons for such behaviour.<sup>396</sup> In the context of child abuse, we can then consider strategies for child protection which may have a greater chance of success. What is more, for the purposes of this thesis we can identify, across the wide variety of child homicide cases, those killings which are more, or less, morally blameworthy.

Since genetic relatives are the vehicles of inclusive fitness,<sup>397</sup> the basic appetites and motives of any species have been shaped by natural selection to produce behaviour that is nepotistic, promoting the persistence of the actor’s genes in future generations by contributing to survival and reproduction of genetic relatives.<sup>398</sup> Natural selection operates on behavioural predispositions that influence the way in which organisms treat their young. Generating offspring and supporting their reproduction is one of the main processes by which genes replicate.<sup>399</sup> However, mistreatment of the young, including killing them, is not limited to humans and occurs throughout the animal kingdom, in circumstances similar to those found in many cases of human child abuse and neglect.<sup>400</sup> In this section of the chapter I will discuss some of the reproductive strategies that have evolved to increase

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<sup>394</sup> At 221.

<sup>395</sup> Lita Linzer Schwartz and Natalie K Isser *Endangered Children: Neonaticide, Infanticide, and Filicide* (CRC Press, Boca Raton, 2000) at 39.

<sup>396</sup> Blumoff “Action-Omission Network”, above n 303, at 1017.

<sup>397</sup> Daly and Wilson “Family Violence”, above n 285, at 79.

<sup>398</sup> Daly and Wilson “Crime and Conflict”, above n 305, at 66.

<sup>399</sup> Jones “Law and Biology”, above n 294, at 175.

<sup>400</sup> Martin Daly and Margo Wilson “Discriminative Parental Solicitude: a biological perspective” (1980) 42(2) *J Marriage and Fam* 277.

reproductive success and consider their implications for child abuse and, particularly, child homicide.

Hrdy identified, in nonhuman primates, four classes of infanticide which she suggests are adaptive for the primate doing the killing. The Exploitation Theory attributes some infanticides to cases in which an individual directly benefits from an infant's death by exploiting the infant for food or as some form of tool, for example as a human shield.<sup>401</sup> The Resource Competition Model applies to competition between individuals for physical resources and attributes some infanticides to instances whereby an individual kills unrelated infants and appropriates the resources for itself or his or her own offspring.<sup>402</sup>

In humans, Exploitation Theory and Resource Competition Model could potentially only explain intentional infanticides. Intentional infanticide has been present in humans for centuries: “[h]omo sapiens sapiens, like other primates, has long been a highly infanticidal species”.<sup>403</sup> In many cases, the biological mother has either committed the killing or has been implicated in it. Contrary to popular discourse, mothers can, and do, act in ways that are inconsistent with the nurturing role ascribed to them. However, we can distinguish between intentional killings, and what might be referred to as “child abuse homicides” where a child dies after a (or several) battering incidents. These killings are sometimes (depending upon the jurisdiction) classified as manslaughter because the intent to kill cannot be proved. Theories that are, *prima facie*, of more direct salience in the context of these child abuse deaths are Discriminative Parental Solicitude and Reproductive Access theories.

Central to strategies that increase the reproductive success of any organism is the concept of parental investment. Parental investment refers to any investment by a parent that increases the offspring's chance of surviving and reproducing at the cost of the parent's ability to invest in other offspring.<sup>404</sup> One way of investing in children is seen in species in which there is a long gestation period.<sup>405</sup> Trivers argued that the sex that invests greater resources in its offspring (often the female) will evolve to be more choosy and

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<sup>401</sup> Sarah Blaffer Hrdy “Infanticide among animals: A review, classification, and examination of the implications for the reproductive strategies for females” (1979) 1 *Ethol Sociobiol* 13 at 14.

<sup>402</sup> At 15.

<sup>403</sup> Jones “Evolutionary Analysis”, above n 279, at 1193.

<sup>404</sup> Robert Trivers *Natural Selection and Social Theory: Selected Papers of Robert Trivers* (Oxford University Press 2002) at 67.

<sup>405</sup> Jones “Evolutionary Analysis”, above n 279, at 1142.

discriminating in selecting a mate, and the other sex (usually males) will have to compete with other males to mate with females. On this basis Trivers concluded that sexual selection is driven by parental investment.<sup>406</sup>

Simply maximising the number of offspring produced is not necessarily a dominant reproductive strategy. Because an offspring will only contribute to an individual's reproductive success if it reaches adulthood and also reproduces (or assists its relatives to do so), not all offspring give the same return on the parental investment afforded to them. Increasing the number of offspring necessarily reduces the parental investment per offspring.<sup>407</sup>

So, the processes of natural selection and sexual selection have favoured heritable predispositions to invest in offspring who show indicators of their potential contribution to the parent's reproductive success. This results in the phenomenon known as Discriminative Parental Solicitude<sup>408</sup> (DPS), whereby parental solicitude evolved to be discriminative in relation to predictors of the offspring's probable contribution to the parent's genetic posterity.<sup>409</sup> According to this theory, parents increase their reproductive success by investing greater resources in a more promising offspring at the expense of another, or by abandoning offspring who are sick, weak, or deformed and investing the freed resources in other offspring, even future ones.<sup>410</sup>

DPS predicts that parents will act as if they value a particular infant in direct proportion to its probable contribution to the parent's reproductive success.<sup>411</sup> Some of the factors that are relevant to determining which infants will or will not receive solicitousness include the degree of relatedness between parent and child, the presence of observable characteristics indicative of low return *vis-à-vis* investment (such as health and age), and the existence of alternative recipients of parental investment.<sup>412</sup> It should be assumed that the processes involved in weighing the costs and benefits of investment are unconscious for most individuals.<sup>413</sup> Furthermore, opportunity costs for continued investment are higher for

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<sup>406</sup> Trivers, above n 404, at 67.

<sup>407</sup> Jones "Evolutionary Analysis", above n 279, at 1141.

<sup>408</sup> Daly and Wilson "Discriminative Parental Solicitude", above n 400.

<sup>409</sup> Martin Daly and Margo Wilson "Evolutionary Social Psychology and Family Homicide" (1988) 242 *Science* 519 at 520.

<sup>410</sup> Jones "Evolutionary Analysis", above n 279, at 1149.

<sup>411</sup> At 1177.

<sup>412</sup> At 1177.

<sup>413</sup> Hrdy "Infanticide", above n 401, at 251.

males, and males can make smaller investments and yet reap the same returns in terms of reproductive success as females. On this basis, males may be more likely than females to end their investment in any given infant.<sup>414</sup>

DPS theory would therefore suggest that the following factors are relevant to predicting child abuse: youth of infant and signs of health; youth of mother; and availability of resources (including absence of partner that may also invest in the infant).<sup>415</sup>

Trivers' theory of parental investment and sexual selection led him to suggest that as a product of sexual selection, male-male competition may lead a male to kill unrelated infants in order to hasten a female partner's ovulation.<sup>416</sup> Reproductive Access (RA) theory predicts that infanticide may be committed if it affords an individual increased access to the reproductive investment of a member of the opposite sex. Because breastfeeding impedes conception, killing an unrelated and unweaned infant can be adaptive for a male.<sup>417</sup> Application of the RA theory would give rise to the following predictors of child abuse: an infant is more likely to be killed by an unrelated male; the infant is more likely to be unweaned; an infant is more likely to be killed by someone with recent access to the mother; the perpetrator has impregnated the mother earlier than would have occurred if the infant had not been killed; unrelated males are less infanticidal one gestation period after gaining access to the mother; and females will exhibit counter-strategies to stop invading males from killing infants.<sup>418</sup> Hrdy does suggest, however, that sexual selection may not be explanatory in terms of human infanticide. She points out that there is no reliable evidence to suggest that human males have adapted to murder infants to decrease the reproductive success of their competitors or increase their own. On that basis, the majority of human cases fall into Hrdy's category of parental manipulation, whereby parents themselves terminate investment in a child.<sup>419</sup> In any event, the question arises whether RA theory would apply to child abuse homicides, as distinct from intentional killings.

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<sup>414</sup> Jones "Evolutionary Analysis", above n 279, at 1178.

<sup>415</sup> At 1182.

<sup>416</sup> Trivers, above n 404, at 88.

<sup>417</sup> Jones "Evolutionary Analysis", above n 279, at 1178-179.

<sup>418</sup> Jones "Evolutionary Analysis" above n 279, at 1183.

<sup>419</sup> Hrdy "Infanticide", above n 401, at 19.

It is important to note, as stated in ch 1, that an evolutionary perspective does not explain individual behaviour. In other words, an individual's behaviour in specific situations cannot be seen as attempts to increase the individual's own reproductive success. Rather than asking whether or not a particular behaviour contributes to an individual's reproductive success, evolutionary perspective asks:<sup>420</sup>

'What is the underlying panhuman psychological architecture that leads to this behavior in certain specified circumstances?' and 'What are the design features of this architecture—if any—that regulate the relevant behavior in such a way that it would have constituted functional solutions to the adaptive problems that regularly occurred in the Pleistocene?'

### *Adaptations or maladaptations?*

All creatures do maladaptive things. These 'mistakes' are products of evolved psychological processes and mechanisms as much as 'successes'.<sup>421</sup> However, not all behaviours are adaptive.<sup>422</sup> The inclination to invest discriminately is arguably an evolved psychological adaptation but specifically homicidal motives are not – rather they are "maladaptive byproduct of the evolved psyche".<sup>423</sup>

While Hrdy's research suggests that in primates, infanticide can be seen as an adaptation rather than a pathology, Daly and Wilson state that it is implausible that killing a step-child would have promoted an assailant's fitness in the EEA. However, a preference for one's own offspring *would* have been adaptive.<sup>424</sup> Hrdy notes Daly and Wilson's finding that in North America child homicide is 70 times more likely to occur when an unrelated male or step-father lives in the home, but adds that the similarities between this phenomenon and sexually selected infanticide does not mean that child abuse is adaptive.<sup>425</sup> What has evolved, she argues, is "a high threshold for responding in a solicitous way toward an offspring not likely to be genetically related".<sup>426</sup>

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<sup>420</sup> Tooby and Cosmides, above n 284, at 55.

<sup>421</sup> Daly and Wilson "Family Violence", above n 285, at 120.

<sup>422</sup> At 120.

<sup>423</sup> At 120.

<sup>424</sup> Martin Daly and Margo Wilson "Is the Cinderella Effect Controversial? A case study of evolution-minded research and critiques thereof" in C Crawford and D Krebs *Foundations of Evolutionary Psychology* (Lawrence Erlbaum, New York, 2007) at 385.

<sup>425</sup> Sarah Blaffer Hrdy *Mother Nature: A History of Mothers, Infants and Natural Selection* (Pantheon Books, United States, 1999) at 236.

<sup>426</sup> At 236-237.

### *Abuse by non-relatives*

When applied to the phenomenon of child abuse, DPS would predict that biological parents would eliminate offspring when the minimum parental investment required would have a greater yield in terms of reproductive success, if it were directed to another offspring.<sup>427</sup> Natural selection favours individuals that are disposed to trade in one offspring for another that is better placed to contribute to the individual's reproductive success.<sup>428</sup> Likewise, unrelated infants cannot contribute to an individual's reproductive success so they do not evoke the same solicitousness as a genetic relative.<sup>429</sup>

Step-parenting is found across cultures and is not peculiar to humans. Helping to raise a new mate's young is an element of "mating effort" in species in which suitable mates are scarce and couples often stay together beyond a single breeding attempt. So, step-parenting can actually be favoured by natural selection.<sup>430</sup> Trivers posits that an organism deserted by its mate after copulation can, as one of its choices, try to induce another organism to help raise the young. This, Trivers argues, is adaptive for the deserted organism, but it requires the helper to do something contrary to its own interests. On that basis, we would expect adaptations to evolve to protect organisms from such tasks.<sup>431</sup> Also, step-parental effort will not result in a greater benefit to the step-parent's reproductive success as will a biological child, so we can expect that step-parents will not, on the whole, be as self-sacrificing as we might expect biological parents to be.<sup>432</sup>

Generally, genetic relatedness is a predictor of reduced conflict and enhanced cooperation.<sup>433</sup> Parental love evolved to enhance the welfare and reproductive prospects of one's descendants, so parental psyches that treat others' children as one's own would have been evolutionarily unstable.<sup>434</sup> The hypothesis that step-parents love their charges less than genetic parents and are less likely to care for them is supported by data on both child abuse and homicide.<sup>435</sup> Bearing in mind that definitional issues arise regarding terms

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<sup>427</sup> Jones "Evolutionary Analysis", above n 279, at 1177-178.

<sup>428</sup> At 1178.

<sup>429</sup> At 1177-178.

<sup>430</sup> Daly and Wilson "Cinderella Effect", above n 424, at 384.

<sup>431</sup> Trivers, above n 404, at 75-76.

<sup>432</sup> Daly and Wilson "Cinderella Effect", above n 424, at 385.

<sup>433</sup> Daly and Wilson "Evolutionary Social Psychology" above n 409.

<sup>434</sup> Daly and Wilson "Family Violence", above n 285, at 81.

<sup>435</sup> At 81.



such as “step-parents”<sup>436</sup>, Daly and Wilson’s research shows that fatal baby batterings are up to 100 times more likely to be at the hand of a step-parent in Australia, Britain, Canada and the United States.<sup>437</sup> While statistics suggest that parents are the most likely perpetrators of child homicide, the data does not always distinguish between genetic and non-genetic parents. However, a 2007 British study on the murder of children by fathers did make such a distinction.<sup>438</sup> Of the 26 fatal child abuse cases<sup>439</sup> in which the victim was aged between 3 weeks and 4 years, 62 per cent were step-children of the perpetrator and 38 per cent were birth children. Further, the study took into account the nature of the intimate relationship between the perpetrator and the victim’s mother, distinguishing between legal marriages (15 per cent), cohabitations (81 per cent) and dating relationships (4 per cent). Of the 21 cohabitations, 71 per cent of the perpetrators were step-fathers and 29 per cent were birth fathers. There was also a correlation between the age of the victim and the relationship of victim to perpetrator. Of the 10 birth fathers, 60 per cent killed children under six months of age, compared with six per cent of the 16 step-fathers.<sup>440</sup>

Research suggests that while children are probably at greater risk of being killed by biological mothers and fathers, these killings are often intentional and motivated by different factors than those that are present in step-parental homicide:<sup>441</sup>

Of course, biologically related fathers do kill their children. However, their motives seem different from those of stepfathers who kill. Biologically related fathers who kill their children are often deeply depressed, and many commit suicide upon taking the lives of their children. In Canada, forty-four of 155 men who killed their preschool-aged children committed suicide immediately afterwards, as opposed to only one of sixty-six stepfathers. Furthermore, stepfathers kill in more brutal ways. Eighty-two percent of stepfathers who kill, beat their stepchildren to death, whereas fewer than half of genetic fathers who kill use such an assaultive means. In one Canadian study, stepfathers were 120 times more likely to beat their stepchildren to death, rather than using other, less aggressive means.

Excess risk from step-mothers (relative to genetic mothers) is similar to that from step-fathers (relative to genetic fathers) but step-mothers are often absent from data because very young children reside with them so infrequently that cases of child abuse or homicide

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<sup>436</sup> See the discussion below at 77-78.

<sup>437</sup> Daly and Wilson “Family Violence”, above n 285, at 81.

<sup>438</sup> Kate Cavanagh, R Emerson Dobash and Russell P Dobash “The murder of children by fathers in the context of child abuse” (2007) 31 *Child Abuse Negl* 731.

<sup>439</sup> Fatal child abuse was defined in this study as “cases involving the murder of a child by a birth or de facto father to eliminate a disturbing behavior where the child was the primary target of the perpetrator’s actions”: Cavanagh and others, above n 438, at 736.

<sup>440</sup> At 736-737.

<sup>441</sup> Wilson, above n 300, at 313.

are few.<sup>442</sup> Daly and Wilson found no distinction between step-fathers or mother's boyfriends (in the sense of de facto husbands or cohabitantes) in that abuse occurs regardless of marital status.<sup>443</sup> However a question does arise, not in relation to the marital status of the offender, but in terms of his status as a person acting in *loco parentis*. In other words, is there a correlation between the rate of child homicide and the role the perpetrator plays within the family? There is a whole spectrum of potential relationships that exist between child victims and non-related adults living in the same home. Some of the factors that might be relevant to the question of child abuse include whether or not the perpetrator assumed a parental role. There is a vast difference between someone acting as a step-father, and a mother's boyfriend living in the same home but not parenting the child. Does this difference matter?

In her article entitled "Child Abuse by Mother's Boyfriends: Why the Overrepresentation?" Margolin distinguishes between boyfriends and step-fathers or cohabitantes. Her research was drawn from interviews with "single mothers". In an examination of interactions preceding abusive episodes, she refers to a continuum of family relationships with "families with mothers' boyfriends at one extreme, stepfamilies in the middle, and families with both genetic parents at the other extreme".<sup>444</sup> She asks the question: how important is absence of genetic relatedness versus the absence of a long shared history with the child as a predictor of boyfriends' abuse?<sup>445</sup>

It is of course clear, as frequently observed by critics of Daly and Wilson's research, that the overwhelming majority of step-parents do not abuse or kill their charges. It ought to also be observed that the great majority of men are not rapists but that does not mean we should not be concerned about men who do rape. Further, the fact that the absence of a genetic relationship may explain some abuse does not mean that there is no explanation for why most step-parents do not abuse their charges. The positive disposition of most step-parents toward their charges could be explained by reciprocity with the genetic parent<sup>446</sup>, or by one of a number of other factors.

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<sup>442</sup> Daly and Wilson "Cinderella Effect", above n 424, at 387.

<sup>443</sup> At 387.

<sup>444</sup> Leslie Margolin "Child abuse by mothers' boyfriends: why the overrepresentation?" (1992) 16 Child Abuse Negl 541 at 549.

<sup>445</sup> At 549.

<sup>446</sup> Daly and Wilson "Evolutionary Social Psychology", above n 409, at 520.

### *The failure to protect*

Failure to protect can lead to a manslaughter charge on the basis of criminal negligence so it is important to examine this phenomenon more closely. While evolutionary psychology can serve to explain the overrepresentation of step-parents (or at least mothers' boyfriends) as perpetrators in child abuse data, the question posed here is whether it also explains the failure by some mothers to protect their children from the abuse perpetrated by step-fathers. As noted above, while risk from step-mothers may be just as great as from step-fathers, far more young children live with their biological mothers and step-fathers than with biological fathers and step-mothers.<sup>447</sup>

There are a number of ways in which a parent can fail her child, but for most legal purposes, failures occur where there is knowledge of a risk of abuse to the child and a failure to notify authorities or remove the child from the risk or seek other forms of help for the child such as medical treatment. What does evolutionary psychology tell us about failure to protect as a form of "criminal" behaviour?

The law has long distinguished between acts and omissions, and in general terms liability only arises when the defendant is under some legal duty to act and fails to do so. The distinction between acts and omissions has given rise to considerable debate especially with regard to the extent to which one should be held liable for failing to rescue someone in peril. However, the law has almost always imposed duties requiring action when there are status relationships involving power, trust or knowledge imbalances. For example, a duty arises where there is a close kinship relationship which requires the superior party to aid the weaker party to ensure its survival.<sup>448</sup> In New Zealand, as with most jurisdictions, a parent owes a duty to protect her child. The duty extends to protecting the child from the violence of another.<sup>449</sup> Failure to do so renders a parent liable if the omission is voluntary. The duty has also been extended by statute to require members of a victim's household to take reasonable steps to protect the victim.<sup>450</sup>

At first glance, a mother's failure to protect is counter-intuitive and inconsistent with Discriminative Parental Solicitude. However, "protecting" an infant is one way of

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<sup>447</sup> Daly and Wilson "Cinderella Effect", above n 424, at 387.

<sup>448</sup> Blumoff "Action-Omission Network", above n 303, at 1009.

<sup>449</sup> *R v Lunt* [2004] 1 NZLR 498, [2004] NZFLR 154, (2003) 20 CRNZ 681 (CA).

<sup>450</sup> Crimes Act 1961, s 195A.

investing in that infant, and such investment, or solicitude, is discriminative. On that basis, DPS can explain failure to protect. The question is what are the circumstances in which a mother reduces her investment in a particular infant?

Sympathies with humankind are evinced in ways consistent with kinship selection. Individuals cooperate with biologically close kin to advance inclusive fitness.<sup>451</sup> Duties that may have existed in the human evolutionary past were probably related to the need of all individuals to help themselves and their kin survive and reproduce.<sup>452</sup> Blumoff refers to the classic “bystander” case of Kitty Genovese, a New York woman murdered while a number of neighbours heard and witnessed parts of the attack but did nothing. The case was relevant to a burgeoning awareness of the “bystander effect” whereby people are less likely to effect a rescue if other people are present. Blumoff poses the question why no one came to Genovese’s aid, and concludes the reason is that precisely because she was a stranger. In other words, she had no kinship relationship to the bystanders.<sup>453</sup> Blumoff suggests that the duty to aid a stranger does not come naturally.<sup>454</sup> One of the reasons for the general reticence in imposing duties to act is that in ancestral environments, where all of one’s sensibilities were consumed with staying alive, human interactions extending beyond the nuclear community would have been unfathomable.<sup>455</sup>

On that basis, it could be suggested that the failure of parents to come to the aid of their genetic offspring might occur in circumstances that resemble conditions in the EEA. Did such behaviour evolve in circumstances where, as Blumoff suggests, the need to survive displaced all other duties, including to one’s offspring? In other words, are mothers who fail their children also fighting for survival? Daly and Wilson refer to a study in which women with children fathered by former partners are about five times more likely to use women’s shelters than mothers whose children were solely from their current partner. There was an even greater risk of homicide.<sup>456</sup> What does this tell us about the effects of violence on failure to protect?

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<sup>451</sup> Blumoff “Action-Omission Network”, above n 303, at 1005.

<sup>452</sup> At 1014.

<sup>453</sup> At 1039.

<sup>454</sup> At 1014.

<sup>455</sup> At 1014.

<sup>456</sup> Daly and Wilson “Family Violence”, above n 285, at 103-104.

The evolutionary concept of conflict is largely a matter of resource competition.<sup>457</sup> Elicitors of violence are usually threats to survival and reproduction.<sup>458</sup> According to Daly and Wilson, disproportionate numbers of violent offenders are drawn from groups lacking access to opportunities and protection from the state, so they find themselves in self-help circumstances like our human ancestors.<sup>459</sup> The human genotype came into being to solve problems which, for most of us, are no longer a matter of survival.<sup>460</sup>

Evolved adaptations can be expected to be reproductively effective only in environments that are not crucially different from those in which the relevant history of natural selection took place.<sup>461</sup> This hypothesis finds support in Jones's concept of time-shifted rationality. Jones hypothesises that cognitive processes that appear to lead to irrational behaviour are actually designed, rather than the result of defects.<sup>462</sup> If irrationalities were the result of defects they would not be patterned.<sup>463</sup> Jones posits the concept of "time-shifted rationality" as explaining any trait that results from evolutionary processes on the brain that increased the probability of adaptive behaviour in the ancestral past, but which leads to irrational or maladaptive behaviour in the present. In other words, seemingly irrational behaviour sometimes results from using old techniques to solve new problems.<sup>464</sup> For example, a powerful predisposition to pursue sweets was once rational, or "adaptive". This is because natural selection favoured nervous systems that associated pleasure with the intake of foods that were high in calories. Ingesting food with a high calorific value enhanced survival and reproduction. However, the sweet foods available in the EEA did not carry concentrations high enough to lead to obesity so there was never a need for a counter-adaptation against the eating of sweet things. In modern environments where refined sugar (which contributes to obesity) abounds, we are left with a brain that was shaped to crave sweet things. A substantively rational predisposition has been obsolesced by events.<sup>465</sup>

Humans are "cooperative breeders", whereby children are raised not only by mothers but by fathers and others who act in parental roles as needed.<sup>466</sup> When conditions are poor

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<sup>457</sup> Daly and Wilson "Crime and Conflict", above n 305, at 54.

<sup>458</sup> At 57.

<sup>459</sup> At 58-59.

<sup>460</sup> Blumoff "Action-Omission Network", above n 303, at 1019.

<sup>461</sup> Daly and Wilson "Crime and Conflict", above n 305, at 60.

<sup>462</sup> Jones "Time-shifted Rationality", above n 296, at 1168-169.

<sup>463</sup> At 1171.

<sup>464</sup> At 1172.

<sup>465</sup> At 1175.

<sup>466</sup> Randolph Roth "Biology and the Deep History of Homicide" (2011) 51 *Brit J Criminol* 535 at 537.

(lack of resources, low support) then choices sometimes are made about which children to invest resources in.<sup>467</sup> Mothers are not designed to provide for all their children under all circumstances but rather have adapted to make choices about their investment in their offspring.<sup>468</sup> Adoption, fostering, abandonment and neglect, abuse and homicide are all within the range of possible behaviours when conditions are unfavourable.<sup>469</sup> Roth notes that:<sup>470</sup>

... the evidence gathered thus far shows that, under stress from a lack of social support, economic reversals or disruption in their intimate relationships, women are less likely to conceive children, more likely to miscarry and less likely to bond with their children emotionally and care for them attentively. These are exactly the facultative adaptations we would expect for cooperative breeders facing adverse conditions.

In general terms, children who are born at the wrong time, in the wrong number, with disabilities, or the “wrong” gender (in the sense of contrary to parental expectations) can be at risk.<sup>471</sup> How to budget the reproductive effort each parent must expend involves several decisions such as how many children to have at one time, how to space them, and so on.<sup>472</sup> On this basis we might predict that multiple births might be at increased risk. This prediction is borne out by research establishing that indeed, twins and other multiple births are at a greater risk of infanticide or infliction of traumatic brain injury.<sup>473</sup> There are a few New Zealand cases which are on point here, including that of Christopher and Cru Kahui, twin boys who died from head injuries at three months old. Their father, Chris, was charged but found not guilty of the murders.<sup>474</sup> Hinekawa Topia was a triplet killed by her father, Thomas McGregor, when she was two months old. McGregor pleaded guilty to murder and wounding with reckless disregard in relation to another triplet. He was sentenced to life imprisonment with a minimum non-parole period of 17 years. Following the triplets discharge from hospital after their birth, Hinekawa had spent significant periods of time with other family members to give her parents a break. She returned to their care the day

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<sup>467</sup> At 538.

<sup>468</sup> At 538.

<sup>469</sup> At 538.

<sup>470</sup> At 539.

<sup>471</sup> Hrdy *Mother Nature*, above n 425.

<sup>472</sup> Daly and Wilson “Discriminative Parental Solicitude”, above n 400, at 278.

<sup>473</sup> See, for example, Jessie R Groothuis and others “Increased child abuse in families with twins” (1982) 70(5) *Pediatrics* 769; Helen L Ball and Catherine M Hill “Reevaluating ‘Twin Infanticide’” (1996) 37(5) *Curr Anthropol* 856; Heather T Keenan and others “A population-based study of inflicted traumatic brain injury in young children” (2003) 290(5) *JAMA* 621.

<sup>474</sup> Edward Gay “No charges against Kahui twins’ mother – police” *The New Zealand Herald* (online ed, Auckland, 23 May 2008).

of the killing.<sup>475</sup> Cassius Takiari, one of 8-month-old twins, was killed by his father, Charlie Lackner. Cassius was diagnosed with a massive brain injury, with swelling and bleeding to his brain, and his retinas had become detached. Lackner was sentenced to life imprisonment with a minimum non-parole period of 15 years. The sentencing Judge considered it would be manifestly unjust to sentence Lackner to a minimum non-parole period of 17 years. His appeal against sentence was dismissed.<sup>476</sup> There is also the case of Harrison-Taylor, discussed in ch 1.<sup>477</sup> She was convicted of the murder of Gabriel, one of her eight-month-old twin boys, by a combination of smothering and strangulation. She was convicted of murder. As in *Lackner v R*, the Judge considered that a 17-year term would be manifestly unjust and Harrison-Taylor was sentenced to life imprisonment with a minimum parole period of 12 years.<sup>478</sup> What these cases suggest is that while step-parenting is a risk factor for child abuse, this is not the only relationship-specific risk facing children. Many millions of infant deaths can be attributed, at least indirectly, to a maternal strategy to mitigate the high cost of rearing the infants. Such strategies include abandonment, which is the default mode for a mother terminating investment.<sup>479</sup> In the context of child abuse deaths, it is arguable that failure to protect can simply be seen as part of a range of behaviours that constitute abandonment and neglect.

## SUMMARY

One of the goals of the criminal justice system is to punish wrongdoers. Two different theories, in particular, attempt to explain why this is so – one based upon the notion of desert and the other upon the basis of deterrence. While the notion of “moral blameworthiness” may not be a *requirement* for punishment, it does play an important role in the management of crime on the (at least arguable) basis that people are more likely to be dissuaded from acts that offend against the community sense of what is right. If the law has no moral basis then it may have no power to demand compliance with it.

If a defendant is found culpable, or blameworthy, in respect of an offence, they are held to be responsible for it,<sup>480</sup> and punished accordingly. A defendant ought only to be held

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<sup>475</sup> “Father admits murder” *The New Zealand Herald* (online ed, Auckland, 22 October 2013).

<sup>476</sup> *Lackner v R* [2016] NZCA 29.

<sup>477</sup> See also ch 5.

<sup>478</sup> *R v Harrison-Taylor* HC Auckland CRI-2004-092-1510, 12 September 2005.

<sup>479</sup> *Hrdy Mother Nature*, above n 425, at 297.

<sup>480</sup> Culpability can, however, be mitigated by the existence of a defence.

responsible to the extent to which they had the capacity to freely choose to act in the way they did. In New Zealand, as well as elsewhere, the system for apportioning responsibility assumes that they did. This is reflected, in New Zealand, by the presumption contained in s 23 of the Crimes Act 1961, that the defendant is sane. However, legitimate concerns exist about this assumption of sanity or rationality. In reality, there are the sane and the insane, the rational and irrational, and a whole range of degrees of (in)capacity in between. There are a vast number of circumstances and factors that impact upon human behaviour, including evolutionary and developmental processes and environmental factors such as abuse, violence and coercion. The current one-size-fits-all approach to culpability does not allow all these factors to be taken into account and therefore offends against the principle of equality of justice. This chapter provides a backdrop to the three case studies that follow in chs 3, 4 and 5. In particular, the theories and concepts discussed here are intended to provide a framework within which potential degrees of moral blame attendant upon particular types of killings can be identified.



# Chapter 3: Young defendants

## INTRODUCTION

Whatarangi Rawiri, Phillip Kaukasi, Alexander Peihopa, Riki Rapira, and Joseph Kaukasi – these names are likely to be unfamiliar to most New Zealanders. Bailey Kurariki is more likely to ring a few bells. All of the foregoing were convicted for their part in the 2001 killing of pizza delivery worker Michael Choy. However, Kurariki, the youngest defendant at the age of 12 at the time, is the only one usually associated with the killing even though he did not strike any blows to the victim.

Chapter 2 referred to the demonisation of young defendants and how this informs the way in which responsibility is attributed to them on the basis of character rather than capacity.<sup>481</sup> The result of such characterisation is that increasingly punitive and controlling measures are taken to protect the public from these “demons”. In England and Wales, the period following the killing of James Bulger by two ten-year-old boys<sup>482</sup> saw numerous measures designed to control young offenders. Of special relevance are the Criminal Justice and Public Order Act 1994 (UK) and the Crime and Disorder Act 1998 (UK). The latter provides for a judge to issue an Anti-social Behaviour Order (ASBO) if it appears that any person aged ten or over has acted in an anti-social manner and that such an order is necessary to protect others from further anti-social acts. “Anti-social behaviour” has a wide definition and includes graffiti, abusive and intimidating language, excessive noise, littering, drunken behaviour and drug activity. Further, the Police Reform Act 2002 (UK) amended the Crime and Disorder Act 1998<sup>483</sup> (UK) to provide that a court may make a Criminal Anti-social Behaviour Order (CRASBO), after a person has been convicted of an offence. Breaches of ASBOs can lead to imprisonment for a maximum term of six months. Breaches of CRASBOs could lead to imprisonment for a maximum term of five years. While ASBOs and CRASBOs did not expressly target “young people”, research suggests there was a clear association in the minds of the public. Despite the Home Office’s original

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<sup>481</sup> See Lacey’s conceptions of responsibility, discussed in ch 2.

<sup>482</sup> See chs 1 and 2 for further reference to the James Bulger killing.

<sup>483</sup> Subsequently amended by the Anti-social Behaviour Act 2003 (UK).

intention that ASBOs would not ordinarily be made against those aged under 18, the figures for ASBOs issued to young people ranged between 43 and 58 per cent.<sup>484</sup> CRASBOs made up 70 per cent of all ASBOs issued. Further, despite the assumption that ASBOs would be used only where necessary to curb serious instances of anti-social behaviour, they were handed out regularly for very minor infractions. Cumulatively, the result of these measures was that:<sup>485</sup>

Anti-social behaviour became a virtual metaphor for the condition of contemporary Britain, particularly its youth, manifesting itself almost everywhere as rudeness, loutishness, intolerance and selfishness, disrespect, drunkenness and violence.

ASBOs have now been superseded by Injunctions and Criminal Behaviour Orders under the Anti-Social Behaviour, Crime and Policing Act 2014 (UK).

Two New Zealand cases bring into sharp relief the paradox of the so-called youth crime epidemic. On 8 September 2007 17-year-old Augustine Borrell was stabbed to death outside a party. A few days later *The New Zealand Herald* ran the headline “Police: ‘Wanna-be’<sup>486</sup> gang killed teen”.<sup>487</sup> At that stage, no-one had been charged, or indeed apprehended, in relation to the death. Yet under the subheading “Killed on the streets: youth gang victims” the article listed the names of ten other people also allegedly killed by “youth gangs”. Just what the links were to street gangs was not stated in the article. Clearly, the fact that a perpetrator might be a gang member, or a teenager, or both does not necessarily mean the same thing as “killed by youth gang”, and yet in the minds of the public an association is formed between young people and serious, violent crime. Later the same day, an arrest was made in relation to Augustine’s killing, with *The New Zealand Herald’s* online version reporting that the police did not believe that the man charged was part of a gang.<sup>488</sup> Haiden Davis, aged eighteen at the time of the offence, was later

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<sup>484</sup> See Peter Squires “New Labour and the politics of antisocial behaviour” (2006) 26 Crit Soc Policy 144; Stuart Macdonald “A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of ‘Anti-Social Behaviour’” (2006) 69(2) MLR 183; S Jassi and A Stevens “A Holistic Approach to Young People & Anti-Social Behaviour: The Signpost Project” (paper presented to the 4<sup>th</sup> Annual Youth Justice Conference, Edinburgh, 22 June 2006).

<sup>485</sup> Squires, above n 484, at 151.

<sup>486</sup> A report by the Ministry of Social Development says “Wannabes” “are best viewed as collectives of youths or simply as groups of friends” (at 21) and states that there is no greater incidence of petty crime amongst Wannabes than any other adolescent group (at 20); Ministry of Social Development “From Wannabe to Youth Offenders: Youth Gangs in Counties Manukau” Research Report (2006).

<sup>487</sup> Beck Vass and Patrick Gower “Police: ‘Wanna-be’ gang killed teen” *The New Zealand Herald* (11 September 2007) A1.

<sup>488</sup> Elizabeth Binning and Beck Vass “Extra charge for party death accused” *The New Zealand Herald* (online ed, Auckland, 12 September 2007).

convicted of Augustine's murder. There was never any suggestion that he was acting in concert with any other person.

In the second case, 15-year-old Pihema Cameron was stabbed to death on 26 January 2008. A 50-year-old businessman was charged with murder following the stabbing, which occurred after Cameron and a friend were caught tagging fences.<sup>489</sup> Cameron's death therefore flagged tagging, rather than homicide, as a cause for great public concern. In the following days Prime Minister Helen Clark announced the Government's strategy to deal with the problem, which included banning sales of spray cans to those aged under 18, fines of up to \$2000 for those caught tagging, and making taggers clean up their own work.<sup>490</sup> The issue was given even greater attention due to a degree of public support for the *defendant*, including comments made by Christchurch city councillor Barry Corbett, to the effect that if Cameron had not been tagging, he would not have been killed.<sup>491</sup> Although charged with murder, Cameron's killer, Bruce Emery, was convicted of manslaughter and was sentenced to four years and three months in jail. He was granted parole in November 2010, having served less than two years of that sentence.<sup>492</sup> It is important to observe, in the context of an analysis of moral blame, that Emery took a knife from his house and chased Cameron and his friend before stabbing Cameron.<sup>493</sup>

The media portrayals of these two incidents inform public beliefs in the murderous criminality of young people despite that, in both these cases, young people were the *victims*. The reality that these cases highlight is that young people are more likely to be the victims of violent crimes than perpetrators.<sup>494</sup> Yet in a newspaper report, the Sensible Sentencing Trust spokesman, Garth McVicar, is reported to have said, in relation to Pihema Cameron:<sup>495</sup>

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<sup>489</sup> *R v Emery* HC Auckland CRI-2008-092-001285, 13 February 2009.

<sup>490</sup> C Trevett "Opponents tag bill an electioneering stunt" *The New Zealand Herald* (online ed, Auckland, 22 February 2008).

<sup>491</sup> "Councillor would let alleged murderer 'get away' with crime" *The New Zealand Herald* (online ed, Auckland, 30 January 2008).

<sup>492</sup> C Meng-Yee "Fury at Emery's release" *The New Zealand Herald* (online ed, Auckland, 28 November 2010).

<sup>493</sup> *R v Emery*, above n 489, at [3].

<sup>494</sup> JM Hartless and others "More sinned against than sinning: a study of young teenagers' experience of crime" (1995) 35(1) *Brit J Criminol* 114; A Morris and J Reilly "New Zealand National Survey of Crime Victims 2001" Ministry of Justice (2003) <[www.justice.govt.nz/pubs/reports/2003/victims-survey/index.html](http://www.justice.govt.nz/pubs/reports/2003/victims-survey/index.html)>.

<sup>495</sup> K Irvine and L Tan "Tagger's killer goes free after 2yrs in jail" *The New Zealand Herald* (online ed, Auckland, 27 November 2010) (emphasis added).

That young *offender*... had been doing graffiti before and Emery had been becoming extremely frustrated with it.

That the victim in that case was characterised as an offender in such a blatant way is a striking example of the type of character assassination that takes place when young people are suspected of criminal offending. When young people are charged with culpable homicide, the consequences of such character-blackening can be far more severe, as some of the cases canvassed in this thesis demonstrate. This may result in the over-criminalisation of some young defendants who do not have the sort of guilty mind that the law requires. In some ways, many of the young defendants who are charged with culpable homicide are victims themselves – vulnerable because of social and economic circumstances as well as their developmental immaturity.

## YOUNG PEOPLE AND THE CRIMINAL LAW

Anyone who has ever parented, taught, or spent much time around adolescents knows that they are impulsive, influenced by their peers and have trouble foreseeing the long-term consequences of their actions.<sup>496</sup>

Sometimes such adolescent behaviour results in breaches of the criminal law. As a general principle, the criminal law strives to punish those who violate rules of lawful conduct.<sup>497</sup> As observed in chs 1 and 2, this principle is underpinned by the idea that people are rational actors, capable of knowing the difference between right and wrong and making a choice between the two.<sup>498</sup> As noted previously, on this basis, the criminal law should only convict and label as criminal those who are morally blameworthy in some way. If a person is not to blame for some harm, the reproach of the criminal law is not appropriate.<sup>499</sup>

So moral responsibility is necessary for criminal liability<sup>500</sup> and for this reason legal systems generally treat young defendants differently from adult defendants, although precisely how differently varies from one jurisdiction to the next.<sup>501</sup> There is considerable debate, in many jurisdictions, as to when children ought to be old enough to face the

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<sup>496</sup> Mark Soler, Dana Shoenberg and Marc Schindler “Juvenile Justice: Lessons for a New Era” (2009) 16 *Geo J on Poverty L & Pol’y* 483 at 492.

<sup>497</sup> Lisa Micucci “Responsibility and the Young Person” (1998) 11 *Can J Law Jurisprud* 277 at 278.

<sup>498</sup> Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* (4<sup>th</sup> ed, Thomson Reuters, Sydney, 2017) at 177-178.

<sup>499</sup> AP Simester and WJ Brookbanks *Principles of Criminal Law* (4<sup>th</sup> ed, Thomson Brookers, Wellington, 2012) at 8.

<sup>500</sup> Micucci, above n 497, at 285.

<sup>501</sup> Anthony N Doob and Michael Tonry “Varieties of Youth Justice” (2004) 31 *Crime Justice* 1 at 3.

consequences of criminal offending,<sup>502</sup> and as to what processes should be adopted to deal with young defendants. Doob and Tonry suggest that approaches to youth justice are sometimes characterised as falling at different points along a continuum, at one end of which is a welfare model and at the other a criminal law or punishment model.<sup>503</sup> They explain:<sup>504</sup>

Although this is an oversimplification, the tension that exists between responding to youths who have offended in terms of their social or psychological needs, and punishing them for what they have done, is part of the story of youth justice in many jurisdictions.

Doob and Tonry also note that there has been a decline in the overall importance attached to the welfare of the child in Western juvenile justice systems, suggesting that one reason may be the politicising of youth justice in many countries. In other words, the public's belief in an increasing youth crime rate puts pressure on governments to do something about it.<sup>505</sup> This public perception, driven largely by the media, certainly seems to be that serious offences are being committed at an increasingly young age.<sup>506</sup> This perception is at least in part the result of high-profile cases in which children, sometimes as young as ten, have killed.<sup>507</sup> When young people commit serious crimes, such as homicide, the facts are usually widely publicised. In cases where there is no doubt as to the identity of the perpetrator, there will likely be opposition to the "lack of capacity" defences.<sup>508</sup> As Taylor-Thompson notes:<sup>509</sup>

No group more conspicuously challenges conventional views about the innocence of childhood and the vulnerability of adolescence than juveniles who kill.

Similarly, Zimring suggests that teenagers charged with homicide are the worst cases that can confront a system that wants to protect young defendants and allow them to develop normally into adulthood.<sup>510</sup> In light of this, this chapter considers how the criminal justice

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<sup>502</sup> See, for example, Andrew Becroft "Youth Justice – The New Zealand Experience: Past Lessons and Future Challenges" (paper presented to the Australian Institute of Criminology/NSW Department of Juvenile Justice Conference, 1-2 December 2003).

<sup>503</sup> Doob and Tonry, above n 501, at 2.

<sup>504</sup> At 2.

<sup>505</sup> At 15.

<sup>506</sup> Micucci, above n 497, at 277.

<sup>507</sup> See, for example, Caroline Ball "Youth Justice? Half a century of responses to youth offending" (2004) *Crim LR* 167 at 168, in relation to the murder of Jamie Bulger by two ten-year-olds; Micucci, above n 477, at 277.

<sup>508</sup> Claire McDiarmid "After the age of criminal responsibility: a defence for children who offend" (2016) 67(3) *NILQ* 327 at 328.

<sup>509</sup> Kim Taylor-Thompson "States of Mind/States of Development" (2003) 14 *Stan L & Pol'y Rev* 143 at 144.

<sup>510</sup> Franklin E Zimring "The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts" (1999) 6 *Va J Soc Pol'y & L* 437 at 437.

system ought to deal with children and young people who kill, taking into account current research which shows that the brain is not fully developed until at least the early 20s. This research has particular implications in the context of murder because of the specific mens rea requirements that must be proved. At the very least, in New Zealand, a conviction for murder requires recklessness – a conscious appreciation of a real risk of death. This chapter will suggest that the criminal justice system can adapt to recent advances in knowledge – outlined in ch 2 – by using such knowledge to support specific defences of diminished responsibility, or by allowing evidence of general adolescent brain development to support defence arguments that a young defendant did not form the mens rea required for murder.

### THE AGE OF CRIMINAL RESPONSIBILITY

The age at which criminal responsibility begins varies from one country to the next. It is generally accepted that children do not have the same mental capacity and moral competence as adults,<sup>511</sup> which is why most, if not all, criminal justice systems have an age below which a child is deemed incapable of committing an offence. This notion underpins the common law doctrine of *doli incapax* – an irrebuttable presumption that children under the age of seven were incapable of committing a crime. Between the ages of seven and thirteen the presumption was rebuttable. The prosecution could rebut the presumption by proving that the child was of normal mental capacity and could distinguish between right and wrong.<sup>512</sup>

In New Zealand, the irrebuttable presumption of *doli incapax* is provided for by s 21 of the Crimes Act 1961 and applies to children under the age of ten years. Section 22 of the same Act provides a rebuttable presumption in respect of children aged between ten and 14. The section states that no person within that age range shall be convicted of an offence “unless he knew either that the act or omission was wrong or that it was contrary to law”.<sup>513</sup> However, there is a distinction between the age of criminal responsibility provided for by ss 21 and 22 of the Crimes Act, and the age of *prosecution*.<sup>514</sup> Section 272 of the Oranga

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<sup>511</sup> Stewart Asquith “Justice, Retribution and Children” in Allison Morris and Henri Giller (eds) *Providing Criminal Justice for Children* (Edward Arnold, London, 1983) at 14 cited in Micucci, above n 497, at 278.

<sup>512</sup> Micucci, above n 497, at 281.

<sup>513</sup> Crimes Act 1961, s 22.

<sup>514</sup> Allison Morris “Youth Justice in New Zealand” (2004) 31 *Crime Justice* 243 at 260.

Tamariki Act 1989<sup>515</sup> mandates that children (of or over the age of 10 but under the age of 12) shall not have proceedings commenced against them for any offence other than murder or manslaughter. It should be noted that the upper age limit was reduced from 14 to 12 from 1 October 2010. In summary, children aged ten and up to 12 can *only* be prosecuted for murder or manslaughter and for them to be convicted it must be proved that they knew their act or omission was wrong or contrary to law. Young people – those aged 14 to under-17 – can be prosecuted for any offence whatsoever. Under the amended law, 12 and 13-year olds are now liable to prosecution where the offence is one (other than murder or manslaughter) for which the maximum penalty available is or includes imprisonment for life or for at least 14 years, or the child is a “previous offender”<sup>516</sup> under subs (1A) or (1B), and the offence is one (other than murder or manslaughter) for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years.

In Australia, the age of criminal responsibility is ten in all jurisdictions, and each State or territory retains some form of rebuttable presumption for children aged ten to fourteen, either by virtue of legislation or as part of the common law.<sup>517</sup> In England and Wales, under s 34 of the Crime and Disorder Act 1998 (UK), the rebuttable presumption of *doli incapax* for children between the ages of 10 and 14 has been abolished, rendering children criminally responsible from the time they turn 10 years old.<sup>518</sup> In the United States, the

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<sup>515</sup> Formerly Children, Young Persons and Their Families Act 1989.

<sup>516</sup> Section 272 of the Oranga Tamariki Act 1989 provides: “(1A) A child is a previous offender under this subsection for the purposes of subsection (1)(c) if— a child is defined as a previous offender if “(a)an application is made to [the Family Court] under [section 67](#) for a declaration that the child is in need of care or protection on the ground that the child has committed an offence or offences the number, nature, or magnitude of which is such as to give serious concern for the wellbeing of the child; and (b)on that application the Family Court, having found 1 or more of the offences alleged in the application (the earlier offences) to be proved in accordance with [section 198\(1\)\(a\) and \(b\)](#), either—(i)declares the child to be in need of care or protection on that ground; or (ii)indicates clearly that, but for [section 73](#) (on the child’s need for care or protection being able to be met by other means), it would have made a declaration that the child is in need of care or protection on that ground; and (c)for 1 or more of the earlier offences the maximum penalty available is or includes imprisonment for life or for at least 10 years. (1B) A child is a previous offender under this subsection for the purposes of subsection (1)(c) if—(a)the child has been convicted by the High Court of murder or manslaughter; or (b)the child, as a result of an election of jury trial made by the child in [the Youth Court] in accordance with [section 66](#) of the Summary Proceedings Act 1957 or [section 50](#) of the Criminal Procedure Act 2011, has been convicted by [the District Court] or the High Court of 1 or more offences (other than murder or manslaughter) for which the maximum penalty available is or includes imprisonment for life or for at least 14 years; or (c)the child has been charged with, and [the Youth Court] has found proved before it the charge against the child for, 1 or more offences (other than murder or manslaughter) for which the maximum penalty available is or includes imprisonment for life or for at least 14 years.

<sup>517</sup> Thomas Crofts “Doli Incapax: Why Children Deserve its Protection” (2003) 10(3) *MurUEJL* 26.

<sup>518</sup> Heather Keating “Reckless Children” (2007) *Crim LR* 546 at 549-550.

common law has recognised the *doli incapax* presumption as a defence, but some States have set minimum ages.<sup>519</sup>

Since the 1990s at least, there has been a trend toward increased criminalisation of children and young people, by a variety of measures, including lowering the age of criminal responsibility. I have already referred, in ch 2, to the approach adopted to antisocial behaviour in England and Wales. Writing in the context of the United States' approach to juvenile justice, Tanenhaus argues that the early twentieth century response to juvenile homicide was far more flexible than the current approach. He says:<sup>520</sup>

Using the sound bite 'adult time for adult crime' as their mantra, critics of the [juvenile] court pushed for laws to make it easier to prosecute juveniles as adults. Their successful efforts produced a legal response to serious and violent juvenile crime which flushed pre-teens, first-time offenders, and even non-violent offenders into an adult criminal court system that had all but abandoned the concept of rehabilitation.

In 1974, a major United States study called "What Works? Questions and Answers About Prison Reform" concluded that rehabilitation programs had no effect on repeat offending. This study became known as "Nothing Works" and was a foundation for prison reform efforts which resulted in incarceration as a primary response to both juvenile and adult criminal behaviour.<sup>521</sup> This, combined with rhetoric around juvenile "super-predators", formed the basis for the "tough on crime" policies of the early and mid-1990s.<sup>522</sup>

In New Zealand this trend towards criminalisation is represented by proposals such as the Young Offenders (Serious Crimes) Bill 2006, which while not passed at that time, contained provisions that are remarkably similar to some of those that were eventually enacted as part of the Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010. The overall effect is that children are subject to prosecution at a younger age, for a wider range of offences. Such moves, particularly in respect of younger children and more serious crimes, is concerning considering current research on brain development which shows that the brain is not fully developed until the early 20s, much later than previously thought, meaning that children and young people are not necessarily capable of thinking like adults. Furthermore, as

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<sup>519</sup> See Andrew M Carter "Age Matters: The Case for a Constitutionalized Infancy Defense" (2006) 54 U Kan L Rev 687.

<sup>520</sup> David S Tanenhaus "'Owing to the Extreme Youth of the Accused': the changing legal response to juvenile homicide" (2002) 92 J Crim L & Criminology 641 at 641.

<sup>521</sup> Soler and others, above n 496, at 484-485.

<sup>522</sup> At 486-487.



Andrew Becroft, New Zealand's former Principal Youth Court Judge and now Children's Commissioner, points out:<sup>523</sup>

... harsher sanctions and shock/'scared straight' tactics, while understandably appealing to the public, have nowhere been proved to reduce youth re-offending.

It is disturbing to note that in the United States, because of life without the opportunity for parole (LWOP) sentences, there are people aged over thirty who are still in prison for offences committed when they were aged under the age of 14.<sup>524</sup>

Also relevant to the discussion is the right contained in s 25(i) of the New Zealand Bill of Rights Act 1990 which provides, as a minimum standard of criminal procedure "the right, in the case of a child, to be dealt with in a manner that takes account of the child's age".

#### CAPACITY AND CULPABILITY IN THE CONTEXT OF MURDER AND MANSLAUGHTER

All teenagers do stupid things. Sometimes those things have disastrous consequences, such as the death of an innocent victim. Children and young people who kill do not always act with the mental acuity expected of someone who has reached full maturity, and yet when they are charged with murder or manslaughter they are often tried as adults. In New Zealand, the jurisdiction of the Youth Court is not available to children or young people charged with murder or manslaughter. Such cases will be heard in the High Court.<sup>525</sup> Furthermore, the fact that children under the age of 12 can *only* be tried for murder or manslaughter raises some interesting questions. The moral culpability of a child who kills could be indistinguishable from that of a child who rapes. It appears that the rationale to these legal requirements reveals more about the way in which the legal system views murder rather than the way in which it views criminal capacity. This contradicts the basic principles of criminal responsibility, which is that criminality is based upon moral blameworthiness. Therefore, criminal offences generally require proof of mens rea – prescribed degrees of fault or blameworthiness.

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<sup>523</sup> Andrew Becroft "Alternative Approaches to Sentencing" (speech delivered to the CMJA Triennial Conference, Canada, 12 September 2006).

<sup>524</sup> Carter, above n 519, at 687-692.

<sup>525</sup> Oranga Tamariki Act 1989, s 272.

In the context of culpable homicide, a conviction for murder can be satisfied by proof of one of several mental states. These include, among other things, proof that the defendant intended to kill (or meant to cause death)<sup>526</sup>, or meant to cause bodily injury that the defendant knew was likely to cause death and was reckless as to that outcome.<sup>527</sup> Where a defendant commits a culpable homicide in the absence of mens rea for murder, then they are liable for manslaughter. For a child (aged between 10 and 14) charged with murder or manslaughter, the prosecution must also prove that the child knew that their “act or omission was wrong or that it was contrary to law”. The position becomes even more complex when the child is charged with murder or manslaughter as a secondary party under s 66(2) of the Crimes Act, whereby it must be proved that the defendant knew that the killing was a probable consequence of the group’s common unlawful purpose. And if the principal offender is charged with murder under s 168 of the Crimes Act, which deals with felony-murder offences, a secondary party can be liable for manslaughter even if they did not foresee death.

Determining whether a defendant possessed the requisite state of mind is difficult, and therefore statutes usually define mens rea broadly, using general categories.<sup>528</sup> Instructions are given to juries to help them understand what precisely must be proved to find the accused guilty.<sup>529</sup> Mens rea elements can be inferred from the circumstances including the any background history, post-mortem evidence and the circumstances of the killing itself.<sup>530</sup>

Young people do sometimes intentionally kill others. In New Zealand there have been two cases in which 14-year-old youths have shot and killed their abusive fathers and have been found guilty of manslaughter (having successfully claimed provocation),<sup>531</sup> but intentional killings are not limited to this type of circumstance. Thirteen-year-old Jordan Nelson shot and killed his caregiver because he mistakenly believed she had stopped him from visiting his mother.<sup>532</sup> Intentional killings usually fall within s 167(a) of the Crimes Act 1961.

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<sup>526</sup> Crimes Act 1961, s 167(a).

<sup>527</sup> Crimes Act 1961, s 167(b).

<sup>528</sup> Taylor-Thompson, above n 509, at 158.

<sup>529</sup> At 158-159.

<sup>530</sup> *R v C* CA90/99, 24 June 1999.

<sup>531</sup> *R v Erstich* (2002) 19 CRNZ 420 (CA); *R v McCarthy* HC Auckland T 981197, 25 November 1998. It is important to note that in New Zealand the defence of provocation has since been repealed as from 8 December 2009.

<sup>532</sup> *R v Nelson* [2012] NZHC 3570.

When that section is relied upon it must be proved that the defendant formed an actual intent to kill, in the sense that they did an act which they knew would result in death and acted to bring about that consequence. Foresight of death does not equate to intention to bring it about, but:<sup>533</sup>

... the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended.

Because recklessness is easier to establish than intention and is sufficient for a murder conviction, charges are often laid in the alternative under ss 167(a) and 167(b). Section 167(b) provides that a killing is murder where the defendant intended to cause bodily injury that they knew was likely to cause death and continued regardless of the risk.

In New Zealand, the test for recklessness is subjective, in that the prosecution must prove that the defendant had actual foresight or knowledge of the risk of harm.<sup>534</sup> In the context of murder under s 167(b) of the Crimes Act, there must be an actual appreciation of a real risk of death.<sup>535</sup> It is irrelevant whether a reasonable person would have foreseen the risk of death. In this regard, New Zealand's approach is the same as the subjective approach taken in the United Kingdom case of *R v Cunningham*<sup>536</sup>, rather than the later objective recklessness test adopted in *R v Caldwell*<sup>537</sup>. More recently, in *R v G and Another*<sup>538</sup>, the House of Lords also reverted to the *Cunningham* subjective approach. *R v G and Another* involved two boys, aged 11 and 12, who set fire to some newspapers in a yard, threw them under a plastic wheelie bin, and left the yard. The fire spread to the wheelie bin and a building, causing significant damage. The boys said that they had expected the papers to burn themselves out on the concrete floor of the yard and did not realise that the fire could spread further. The jury was instructed that they must consider whether it would "have been obvious to the ordinary, reasonable bystander that there was a risk that the fire would spread" to the building.<sup>539</sup> The jury were further instructed that:<sup>540</sup>

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<sup>533</sup> *R v Hancock & Shankland* [1986] 1 All ER 641, [1986] AC 455 (HL) at 651, 465, per Lord Scarman.

<sup>534</sup> See, for example, *R v Harney* [1987] 2 NZLR 576 (CA).

<sup>535</sup> At 579.

<sup>536</sup> *R v Cunningham* [1957] 2 QB 396 (HL).

<sup>537</sup> *R v Caldwell* [1982] AC 341 (HL).

<sup>538</sup> *R v G and Another* [2003] UKHL 50, [2004] 1 AC 1034.

<sup>539</sup> At 1040.

<sup>540</sup> At 1040.

The ordinary, reasonable bystander is an adult. He does not have expert knowledge. He has got in his mind that stock of everyday information which one acquires in the process of growing up.

On appeal, the House of Lords held that a defendant charged with recklessness could not be regarded as culpable if he or she genuinely did not appreciate or foresee the consequences of his or her actions.<sup>541</sup> The effect of the judgment, as Keating identifies, is that.<sup>542</sup>

...if children claim not to have foreseen the risks involved in their actions and they are believed, they should not be convicted of offences requiring recklessness.

As noted, this is the approach that has been applied to recklessness in New Zealand, but there are still difficulties with its application in respect of young defendants. Particularly relevant is the practical requirement of convincing a jury that the young person is credible, if he or she gives evidence that he or she did not perceive the risk. Despite the test being subjective, the jury will base their decision as to what the teenager thought or knew, based on what they, as adults, would have thought or known. Instructions to juries presuppose an adult's conduct and reasoning even when the defendant is an adolescent.<sup>543</sup>

In the United States, developmental neuroscience has been used to support calls to ban the death penalty for defendants under 18, and in determining competence to stand trial<sup>544</sup>, but the evidence is also relevant to determinations of culpability. In establishing mens rea for particular offences, evidence about the inability to foresee a particular consequence must be relevant to the question of whether the defendant *actually did foresee* that consequence (as is required, for example, in offences of recklessness where it must be established that the defendant had a conscious appreciation of the risk). As Steinberg says:<sup>545</sup>

[W]e cannot claim that adolescents "ought to know better" if, in fact, the evidence indicates they do not know better, or more accurately, cannot know better, because they lack the abilities needed to exercise mature judgment.

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<sup>541</sup> At 1055.

<sup>542</sup> Keating, above n 518, at 547.

<sup>543</sup> Taylor-Thompson, above n 509, at 159.

<sup>544</sup> See, for example, Elizabeth S Scott and Thomas Grisso "Developmental Incompetence, Due Process, and Juvenile Justice Policy" (2005) 83 NC L Rev 793.

<sup>545</sup> Laurence Steinberg "Adolescent Development and Juvenile Justice" (2009) 5 Annu Rev Clin Psychol 459 at 471.

An adolescent may understand that a particular course of conduct is wrong, or contrary to law, but may be unable to act in accordance with that understanding because of underdeveloped cognitive functioning.<sup>546</sup>

Gaps in interpretation may also result from the fact that juries consist of adults, and adults who are often from different social and racial groups to the defendant.<sup>547</sup> Indeed, the notion of trial by one's peers is notably absent from proceedings in which children and young people are tried for homicide.

Some of the foregoing difficulties involved in prosecuting children and adolescents for homicide are demonstrated by several New Zealand cases in which a young person has killed.

### ***Bailey Kurariki***

Kurariki was 12 years old when he participated in a plan to rob a pizza delivery worker. The victim, Michael Choy, died from injuries received when he was struck with a baseball bat. Two principal offenders, Alexander Peihopa and Whatarangi Rawiri, were convicted of murder under s 168 of the Crimes Act which deals with killings that occur in the furtherance of other serious offences, namely aggravated robbery in that case. Kurariki and others were convicted of manslaughter on the basis of secondary liability.<sup>548</sup> There was evidence of a witness that Kurariki had admitted acting as a decoy by pretending to look for money in his pockets, and that he had told Peihopa, "Go, Alex" before Peihopa struck the victim.<sup>549</sup>

Because Kurariki was under the age of 14, the prosecution was required to prove that he knew that his "act or omission was wrong or that it was contrary to law" under s 22 of the Crimes Act 1961. It was argued for Kurariki on appeal that the trial Judge did not properly identify the act upon which liability depended for the purposes of this understanding. The Court of Appeal held that under s 22 all acts giving rise to liability for the offence must be proved to have been known to be wrong or unlawful. In the context of Kurariki's case, this

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<sup>546</sup> Soler and others, above n 496, at 494.

<sup>547</sup> At 494.

<sup>548</sup> *R v Rapira* [2003] 3 NZLR 794, (2003) 20 CRNZ 396 (CA).

<sup>549</sup> At [76].

required a finding that Kurariki knew that his conduct was wrong or unlawful in respect of all of the following elements:<sup>550</sup>

... forming a common intention with others to rob a delivery driver and help each other to do it in circumstances where one of the group would intentionally strike the delivery driver ...

Essentially what was required to prove Kurariki liable for manslaughter was foresight that one of the group would intentionally strike the victim. It did not have to be proved that Kurariki foresaw the risk of death. In other words, because foresight of death is not a requirement for a principal charged under s 168 (as distinct from s 167), foresight of death is similarly not required for a secondary party. It is arguable that this is not even a reasonable corollary in the case of an *adult* charged as a party but convicting a 12-year-old of manslaughter without requiring that he at least foresaw death completely undermines the moral underpinnings of the criminal law by endowing a child with cognitive skills well beyond his years. While Kurariki might have known that robbing the victim was wrong, the real question should be whether he had the capacity to foresee that death could well result from *his* actions, not the actions of others. Young people may be able to identify their conduct as inappropriate or even dangerous, but other factors such as peer pressure or lack of foresight of consequences might lead them to engage in the conduct regardless.<sup>551</sup> In the seminal United States case of *Roper v Simmons*<sup>552</sup>, in which the Supreme Court found that the imposition of the death penalty for defendants under the age of 18 violates the Eighth<sup>553</sup> and Fourteenth<sup>554</sup> amendments, the Court drew parallels with its own findings in an earlier case that mental incapacity diminishes criminal capacity *even if* the defendant can distinguish right from wrong.<sup>555</sup>

Kurariki was sentenced to seven years' imprisonment. Because of his "extreme youth" this was a lesser sentence than that imposed on the other defendants convicted for manslaughter.<sup>556</sup> No MPI was imposed.

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<sup>550</sup> At [67].

<sup>551</sup> Soler and others, above n 496, at 493.

<sup>552</sup> *Roper v Simmons* 543 US 551 (2005) cited in Soler and others, above n 496, at 494-495.

<sup>553</sup> The Eighth Amendment protects citizens from cruel and unusual punishment.

<sup>554</sup> The Fourteenth Amendment guarantees the right to due process and equal protection to every citizen.

<sup>555</sup> *Roper v Simmons* 543 US 551 (2005); *Atkins v Virginia* 536 US. 304 (2002) cited in Soler and others, above n 496 at 494-495.

<sup>556</sup> *R v Rapira*, above n 548, at [114].

## ***Renee O'Brien***

O'Brien was 14 years old when she and two other teenagers, Puti Maxwell and Kararaina Te Rauna, tried to steal Kenneth Pigott's car. They intended to trick him to get him to leave his car, but he refused. Maxwell saw a hammer in the car and following a discussion between her and O'Brien, O'Brien decided to get the hammer and hit Pigott on the head. According to the evidence given at trial, in the course of that discussion, O'Brien said "what happens if I kill him?", to which Maxwell said "you will just knock him out".<sup>557</sup>

Following that conversation, O'Brien hit Mr Pigott on the head with a hammer. Thinking that he was dead, the three placed him in a nearby river. O'Brien was found guilty of murder and sentenced to life imprisonment. She appealed against conviction and sentence.

In terms of the appeal against conviction, one of the submissions made on O'Brien's behalf was that, because of her limited intellectual capacity, there was the reasonable possibility that she did not appreciate the likelihood that death might result from her actions. The Court of Appeal said that the statements that O'Brien made to Maxwell were "uncontradicted evidence that [O'Brien] actually envisaged the possibility of killing"<sup>558</sup> and the jury were entitled to use that evidence to infer that with that knowledge she was reckless as to the death. With respect, while the question asked may allow for an inference of knowledge, the answer to it ("you will just knock him out") could well have dismissed the risk entirely in the mind of the defendant. This is highly likely in the case of any fourteen-year-old, let alone one with limited intellectual capacity.

In terms of the appeal against sentence, it was argued by O'Brien's counsel that, given her age and intellectual impairment, a sentence of life imprisonment was manifestly unjust. The Court of Appeal referred to *R v Rapira* in relation to the sentencing of Peihopa, aged 15, and Rawiri, aged 17 – the principal offenders in the killing of Michael Choy. In that case it was argued on behalf of the appellants that life imprisonment was manifestly unjust because of their youth. The Court of Appeal in *Rapira* accepted the sentencing Judge's approach that the manifest injustice test imposes a high threshold for departing from life imprisonment and held that "[w]here the offending is grave, the scope to take account of

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<sup>557</sup> *R v O'Brien* (2003) 20 CRNZ 572 (CA) at [3].

<sup>558</sup> At [24].

youth may be greatly circumscribed”.<sup>559</sup> The Court of Appeal in *R v O’Brien* thought that those words were apt to describe the case before it.<sup>560</sup>

Youth is not necessarily immune to wickedness and, regrettably, that is demonstrated in this case. In our view, low intellectual capacity unrelated to the mental elements of criminal responsibility, is seldom likely to justify a departure from the statutory presumption. It is to be remembered that the fact of conviction for murder will have excluded mitigating features such as provocation, and disease of the mind amounting in law to insanity. There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment. This is not such a case, particularly when the circumstances of the offence, which must be considered along with the circumstances of the offender, demonstrate premeditated brutality.

The appeal against conviction and appeal against sentence were both dismissed.

### ***Ngatai Reweti***

Reweti had just turned fourteen years old when he intentionally dropped a concrete block from a motorway overbridge, killing the driver of a car travelling below. According to the sentencing judgment, Reweti picked up an 8-kilogram concrete block from a building site and asked his friend if he wanted to drop it off the bridge. His friend declined. Reweti then waited on the northern side of the bridge and waited for a car travelling from south to north to pass underneath.<sup>561</sup> As the victim’s car passed under the overbridge, Reweti dropped the concrete block. It hit the front windscreen of the car and crushed the driver’s chest. He was killed almost immediately.<sup>562</sup>

Reweti was acquitted of murder but convicted of manslaughter. While his act was, in the words of the sentencing Judge, one of “breath-taking stupidity”,<sup>563</sup> there was no evidence Reweti ever contemplated the natural consequence of his actions.<sup>564</sup> There was also evidence that he had a frontal lobe abnormality which affected his ability to concentrate, had limited verbal abilities<sup>565</sup> and met the diagnostic criteria for several mental disorders.<sup>566</sup>

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<sup>559</sup> *R v Rapira*, above n 548, at [122].

<sup>560</sup> *R v O’Brien*, above n 557, at [36].

<sup>561</sup> *R v Reweti* HC Auckland CRI-2005-92-14652, 6 September 2006 at [2].

<sup>562</sup> At [3].

<sup>563</sup> At [29].

<sup>564</sup> At [32].

<sup>565</sup> At [41].

<sup>566</sup> Nicola Boyes “It was murder, says father of man killed by concrete block” *The New Zealand Herald* (online ed, Auckland, 8 July 2006).



Although Reweti was acquitted of murder on the basis of lack of foresight of death, the sentencing Judge remarked:<sup>567</sup>

You must have understood that your actions were likely to cause mayhem on the road below. At the very least you should have foreseen that your actions could endanger the safety of road users.

Reweti was sentenced to four years' imprisonment, the Judge taking into account his remorse, and his youth at the time of the offending.<sup>568</sup> This case is relevant for present purposes because it is clear that the jury were not persuaded that he did intend, or even foresee, death.<sup>569</sup>

### ***Courtney Churchward***

At the age of 17 Churchward and her cousin, Lori-lea Te Wini (aged 14) beat Mr Rowe, a 78-year-old man, who subsequently died. Both defendants were looking for money to buy cannabis. They entered Rowe's house, first looking for money or valuables in his lounge. They then entered the bedroom and Churchward at first raised a wooden walking staff above Rowe's head but then appeared to have had second thoughts and left the bedroom. The two defendants then encouraged each other to go back and hit Rowe. The conversation between the pair was described by Te Wini as them getting "hyped up". They both returned to the bedroom and Churchward struck Rowe with the staff. When Rowe tried to get up and defend himself, Churchward continued to hit him with the staff, to try and stop the noise he was making.<sup>570</sup> Te Wini then joined in the attack with another stick. The defendants stopped the attack when they turned on the light and saw the injuries to Rowe. They then left the house after they ransacked the lounge trying to cover up the attack. They took with them Rowe's wallet, car keys and CD player.

Both defendants were convicted of murder following a jury trial and were each sentenced to life imprisonment with a minimum parole period of 17 years. Te Wini appealed against conviction and was granted a retrial. Somewhat oddly, four days before the retrial she pleaded guilty to an amended murder charge (based solely on s 167 of the Crimes Act 1961 and not s 168). Given that one of the grounds of appeal was inadequate representation, one does have to question what advice Te Wini was given in relation to her subsequent guilty

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<sup>567</sup> *R v Reweti*, above n 561, at [29]-[30].

<sup>568</sup> At [43].

<sup>569</sup> At [32].

<sup>570</sup> *R v Churchward and Te Wini*, HC Tauranga CRI-2008-270-000361, 18 December 2009 at [5].

plea. In any event, Te Wini was resentenced to life imprisonment with an MPI of 10 years. Te Wini appealed that sentence on the ground it was “manifestly unjust” and sought a finite sentence of eight to 10 years. That appeal was dismissed.

Churchward also appealed against her conviction on several grounds, one of which was that the trial Judge erred in not directing the jury on the relevance of youth to the question of Churchward’s intent. In support of this ground, defence counsel sought leave to lead evidence from Dr Chaplow, in which Dr Chaplow surveyed the leading literature on adolescent brain development, including information about the difference between hot and cold cognition,<sup>571</sup> that teenagers have a diminished capacity to control impulsive responses, are less future-oriented than adults, and are more likely to be influenced by their peers. In giving the judgment for the Court, Glazebrook J observed:<sup>572</sup>

As a general rule, we accept that it would be preferable for judges to draw the jury’s attention to an accused’s youth and the effect this may have had on intent. However, the jury were well aware of Ms Churchward’s youth and her trial counsel had specifically drawn attention to it in closing. Her trial counsel reminded the jury that Ms Churchward was a ‘young girl’ and that they needed to be sure that, within her ‘young mind’, she had developed the requisite intent. We therefore do not consider that the absence of a direction on youth has caused a miscarriage.

The Court of Appeal said that Dr Chaplow’s report was a “double-edged sword” from Churchward’s perspective.<sup>573</sup> This was because “on the one hand” the report points to difficulties adolescents may have in understanding likely consequences and making good decisions in “hot” situations,<sup>574</sup> but “on the other hand” that adolescents are less likely to give weight to consequences over immediate risks and thrills of the current situation.<sup>575</sup> With respect, there is not necessarily an inconsistency between these findings. An adolescent may be able to foresee some consequences and not others, and be able to dismiss some of the consequences they did foresee, in the heat of the moment. Foresight of consequences is not an all-or-nothing proposition. Interestingly, the Court of Appeal used the fact that Churchward *did* foresee some consequences as a basis for dismissing this aspect of the appeal.<sup>576</sup>

In any event, in Ms Churchward’s case, the defence position was that she did foresee the consequence of her actions: it was to knock Mr Rowe out and, on the basis of Ms

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<sup>571</sup> See ch 2 for a fuller explanation.

<sup>572</sup> *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [12].

<sup>573</sup> At [10].

<sup>574</sup> At [10].

<sup>575</sup> At [11].

<sup>576</sup> At [13] (emphasis added).

Churchward's own experiences (of which corroborating evidence was called), *this should not have caused any long term adverse consequences* for Mr Rowe.

Surely, if all Churchward foresaw was that she may knock Mr Rowe unconscious, she did not foresee that death may well result. It is also relevant that Churchward did concede that she was liable for manslaughter. What the outcome in this case suggests is that even though the jury were aware of Churchward's age, they did not appreciate that her developmental stage made it unlikely that she did have the mens rea for murder under s 167; hence the absence of a strong direction on youth *may* have caused a miscarriage of justice.

Dr Chaplow's report was given much more attention when the Court turned to determine Churchward's appeal against sentence which was on the basis that a sentence of life imprisonment was manifestly unjust and that the presumption of a 17-year MPI should have been displaced.

Dr Chaplow's report, along with another by a clinical psychologist, were relied upon to set out Churchward's background. Dr Chaplow's report was again relied upon as summarising the literature on adolescent brain development. The Court dealt rather summarily with the first ground of appeal – whether life imprisonment should have been imposed – rejecting the submission that life imprisonment was inappropriate, and holding that:<sup>577</sup>

This was a brutal murder committed in the course of a premeditated home invasion for the purpose of robbery.

On the second ground – that the presumption of a 17-year MPI should be displaced – the Court accepted that while there is no automatic displacement of the presumption due to age alone, age can be a mitigating factor, falling for consideration under the test for “manifestly unjust”. The Court noted that neurological factors can reduce an adolescent's culpability vis à vis adults, but added:<sup>578</sup>

This does not mean that young persons should not take responsibility for their actions – it is merely that their actions may be partly explicable (but not necessarily excusable) by their state of neurological development.

The Court referred to *R v Rapira* – the sentencing of Alexander Peihopa and Whatarangi Rawiri – and its qualification that where the offending is grave, the extent to which youth can be taken into account is “greatly circumscribed” due to concerns about protection of the public, and the need for denunciation and both specific and general deterrence.<sup>579</sup>

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<sup>577</sup> At [65].

<sup>578</sup> At [81].

<sup>579</sup> At [84].

Notwithstanding this principle, the Court of Appeal did find that Churchward's mental health issues, upbringing, immaturity, and her attachment to Te Wini at least partly explained her offending. The Court was at pains to point out, again, that her offending is not to be excused, but rather that "her culpability is lower than if she had been a mature adult".<sup>580</sup> The Court thought that a 17-year MPI would be almost as long as Churchward had lived and could have a "crushing effect".<sup>581</sup> The Court's "overall impression" was that it would be manifestly unjust for Churchward to serve an MPI of 17 years, and considered that 13 years would be more appropriate.<sup>582</sup>

### ***Theo Kriel***

Kriel was found guilty by a jury of the murder and indecent assault of Liberty (Libby) Templeman.<sup>583</sup> At the time of death, Templeman was 15 and Kriel was 14. They were known to each other but were not close friends. They had spent the afternoon of Templeman's death in the company of other mutual friends. Later in the day, the pair both went down to a stream to get a traffic cone that was in the water. Kriel said that he slipped on a rock which accidentally caused Templeman to fall over in the stream. He said that she blamed him for pushing her and became angry with him. When she went to walk back up to the road, Kriel said that he grabbed her to stop her walking away at which point she hit him. He hit her back and knocked her unconscious. Afraid that she would go to the police, he attempted to strangle her and dragged her into the stream. When Templeman's body was found, her upper clothing had been pulled up to expose her breasts, and her lower clothing had been pulled down to her knees. Kriel admitted displacing the clothing to make it appear that Templeman was the victim of rape. In an early assertion he said that she was breathing when he pulled her into the stream, but in his evidence in court he said that he thought she was dead.

Kriel pleaded guilty to manslaughter, but he was found guilty of murder by a jury. The jury rejected his claims in court that he thought she was dead before he put her in the stream.

Kriel's defence was significantly hamstrung by the fact that he had given conflicting accounts, and by the fact that he had sought to divert attention away from himself for a

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<sup>580</sup> At [100].

<sup>581</sup> At [101].

<sup>582</sup> At [107].

<sup>583</sup> *R v Kriel* HC Whangarei CRI 2008-027-2728, 23 March 2010 at [4]-[5].

period of time after the killing. However, the jury still needed to be satisfied beyond a reasonable doubt that he possessed the mens rea requirements set out in s 167 of the Crimes Act. Taking into consideration his age and circumstances there is arguably a reasonable doubt that he did. The problem is that because of his different versions of events, he was unlikely to have been believed on the crucial matters. Consider the following comments of the sentencing Judge:<sup>584</sup>

The inherent problem with your version of events, which is that the slip caused her anger and your fear of the police, is that it seems a slim premise on which to base an allegation that Liberty was so angry with you that a fight ensued, and that you felt obliged to punch her so that she did not go to the police. It seems unlikely that she would have reacted in such an angry way, even given the defence contention that Liberty could dramatise. It is even more unlikely that you could have thought you were threatened with police action in this way, if all that had happened was that you had accidentally pushed her. I have to say that what seems more likely is that you did something to gravely offend Liberty, possibly a sexual advance. When she reacted strongly to this, possibly punching you in the chest, (and we know there was a red mark on your chest), you then attacked her in retaliation, knocking her unconscious. However that is speculation and we will never know exactly what happened.

While the Judge acknowledges he is speculating on what happened, in the absence of unequivocal admissions from a defendant, a determination of whether they had the requisite mens rea is always speculative. Steinberg notes that an individual's culpability is something that is always judged by someone else. In other words, culpability is in the "eye of the beholder".<sup>585</sup>

Where young defendants are concerned, the assessment of culpability is *even more* speculative than it is with adults. Most adults would have realised that, in the circumstances Kriel found himself, they would not have been threatened with police action. However, it does not necessarily follow that a 14-year-old would, especially one who emigrated from South Africa when he was seven, and for whom English was not a first language.<sup>586</sup> We could also take into account, while we are speculating, that he may have been bullied at the school he attended, and where Templeman was formerly a pupil.<sup>587</sup> While the Judge was sceptical of Kriel's claims that he was afraid Templeman would go to the police<sup>588</sup>, it is plausible that Kriel was afraid, not necessarily of the police, but of the condemnation that

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<sup>584</sup> At [15].

<sup>585</sup> Steinberg "Adolescent Development", above n 545, at 471.

<sup>586</sup> Beck Vass "Liberty Templeman's killer revealed" *The New Zealand Herald* (online ed, Auckland, 20 February 2010).

<sup>587</sup> "This is the face of Libby's murderer" *The New Zealand Herald* (online ed, 25 February 2010).

<sup>588</sup> This claim seems to be at odds with the Judge's later finding that this was an aggravating factor in the offence.

might ensue from Templeman's friends, once they became aware that there had been an incident between the two.

The sentencing Judge was of the view that Kriel's actions showed considerable immaturity:<sup>589</sup>

The panicky reaction of trying to hide your wrongdoing, despite the inevitability of your actions being discovered, in itself had a childish quality. *There was no hope that Liberty's death, or the general circumstances of it, could ever be disguised.*

However, Kriel's immaturity was incongruent with his physical appearance.<sup>590</sup>

... although possessed of considerable height and strength, you were immature. You were, if anything, young for your age in terms of your social skills and ability to deal with situations. The very attempt to hide your wrongdoing by attacking Liberty had the mark of childish panic and then denial. Your calmness in the days that followed is a source of concern. But it has to be said it was almost a blankness.

While the sentencing Judge drew a great deal of attention to Kriel's immaturity, it is clear that this was not a factor that was taken into account in determining his culpability for murder. However, it is worthwhile noting that Kriel's conviction on the murder charge was a result of a majority verdict, whereas the jury were unanimous on the indecency charge.

### ***Jordan Nelson***

Two months after he turned 13, Nelson shot and killed Rose Kurth, the partner of a man, Mr Lock, who Jordan called "granddad". At some time prior to the killing, Nelson moved the gun and ammunition from where it was stored in the house, to a sleepout. When Lock left the house to move some stock, Nelson retrieved the gun from the sleepout and shot Kurth while she had her back to him. He then fled the property.

Nelson had been exposed to domestic violence early in his life and a restraining order had been in place for 12 years preventing him having contact with his father. For most of his life he was cared for by Lock although he did from time to time stay with his mother and had spent a number of months with her from Christmas 2010 until October 2011 when Child, Youth and Family placed him with Lock and Kurth. Key features of psychiatric,

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<sup>589</sup> *R v Kriel*, above n 583, at [57] (emphasis added).  
<sup>590</sup> At [59].

pre-sentence and Child, Youth and Family reports were summarised by Heath J in his sentencing notes:<sup>591</sup>

- (a) Dr Immelman opines that relevant characteristics are: the state of Jordan’s brain development at the time of the killing, problems that he suffered with attachment to other people in his life, a prior exposure to domestic violence ... and communication difficulties.
- (b) At the time of the offending, Jordan was subject to a care and protection order, meaning that his place of residence was for determination by Child, Youth and Family Services. Jordan wished to spend time with his mother. However, he believed that Ms Kurth had denied him that opportunity. It now appears that the decision may have been made through Child, Youth and Family Services. Whatever the true position, and the tragic consequences of that mistake, there is no doubt that Jordan believed that Ms Kurth was responsible for this decision and that he was angered by it.
- (c) Notwithstanding Jordan’s separation from his father and his mother since a young age, it is clear that Jordan had established a bond with his mother and that he was upset that he could not see her. That reaction needs to be viewed through the eyes of a 12 or 13 year old boy for whom an issue such as that assumes far greater importance than it would for an adult.
- (d) Jordan did not have the ability to evaluate risk, consider outcomes or make informed choices at the time of the killing. At his age, and with his state of brain development, he was simply not equipped to rationalise solutions.
- (e) Jordan’s early exposure to domestic violence is likely to have been a factor in his inability to communicate the degree of distress that he felt at not being able to see his mother. Dr Immelman indicates that the offending occurred ‘in the context of Jordan feeling extremely powerless and unheard with the relative immaturity of his frontal executive brain functioning’.

It is important to note that Nelson pleaded guilty to murder, which meant manslaughter was not an available outcome. On this point one may wonder whether he had the best legal representation. It is noteworthy that, in sentencing Nelson, the Judge felt it necessary to determine Nelson’s culpability. Ordinarily, determinations of culpability and the question of sentence involve two different exercises.<sup>592</sup> In any event, in making this determination, Heath J considered all of Nelson’s actions in shooting Kurth, including what he did prior to and following the shooting, to conclude that Nelson’s actions were “not the actions of a calculating killer trying to cover his tracks”<sup>593</sup> and were more consistent with “impulsive

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<sup>591</sup> *R v Nelson*, above n 532, at [24].

<sup>592</sup> See comments of the Court of Appeal in *P v R* [2016] NZCA 128, discussed below.

<sup>593</sup> *R v Nelson*, above n 532, at [43].

decision-making rather than a cold blooded intent to kill”.<sup>594</sup> Of particular salience, in the context of Nelson’s culpability, is the following statement of Heath J:<sup>595</sup>

I have approached sentencing on the basis that, *irrationally*, Jordan formed the view that Ms Kurth was responsible for many of his life problems and determined to do something about it, *without having any comprehension of the consequences of his actions* beyond Ms Kurth’s immediate demise.

That Heath J was compelled to make these statements underlines the importance of young defendants having competent representation. Those findings, when combined with the other evidence in the case, including the psychiatric evidence called on behalf of Nelson (consistent with the scientific literature dealing with adolescent brain development outlined here in ch 2), cast real doubt on whether Nelson had the mens rea for murder. If the case had proceeded to trial, there is a reasonable chance that a jury could have found that Nelson’s degree of moral blame was out of step with a murder conviction.

**“P” (the Arun Kumar case)<sup>596</sup>**

On 10 June 2014 P (aged 13) and R (aged 12), at the urging of an older person living with P, set out to steal shoes from a shoe shop. P took with him a bag containing a knife and a metal pole. They decided not to steal from the shoe shop but instead focused their attention on a dairy. P scoped out the dairy twice before entering for a final time while R stood in the doorway holding the metal pole. CCTV footage revealed much of what went on inside the dairy. P demanded money from the shopkeeper, Arun Kumar. Mrs Kumar, the shopkeeper’s wife, came into the shop with a phone which she held in the air so that both P and R could see it. P produced the knife from the bag which he waved in a threatening manner towards Mrs Kumar and knocked the phone out of her hand. When Mr Kumar moved from behind the shop counter to intervene, P drove him, by waving the knife at him, backwards into the corner of the shop. Mr Kumar bent down to pick up a pole from the floor. P attempted to stab Mr Kumar several times, landing two blows to Mr Kumar’s shoulder and abdomen. The sentencing Judge rejected any suggestion that P was acting in self-defence and considered that all of Mr Kumar’s actions in using the pole were defensive. Mr Kumar tried to push P out of the shop, holding P by the shoulder to keep the knife away.

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<sup>594</sup> At [44].

<sup>595</sup> At [45] (emphasis added).

<sup>596</sup> *P v R* [2016] NZCA 128.



While trying to break free from Mr Kumar's grasp, P stabbed Mr Kumar in the neck. This wound proved to be fatal.

Initially P and R were jointly charged with aggravated assault with intent to rob, but the Judge discharged them on that count (as a result of being invited to by the prosecutor), so that the Court could focus on the more serious charges: in respect of P, murder under ss 168(1)(a) of the Crimes Act 1961; in respect of R, manslaughter under s 66 and 160(2)(a) of the Crimes Act 1961 (party to manslaughter by an unlawful act).

At the time of trial, P was 14 and R was 13. R was found not guilty of manslaughter and was acquitted. P was found not guilty of murder but guilty of manslaughter. When this outcome is compared with Kurariki's case we can begin to see how inconsistent outcomes can lead to significant injustice. Remember that in Kurariki's case, two principal offenders were convicted of murder under s 168 of the Crimes Act (killings in furtherance of other serious offences). Kurariki was convicted of manslaughter on the basis of secondary liability. In the case presently under discussion, P (the principal offender) was also charged under s 168. If he had been convicted of murder under s 168 the jury could have convicted R of manslaughter if it was satisfied beyond reasonable doubt that R had foresight that P would intentionally strike Mr Kumar with the knife. That they did not find P guilty of murder under s 168 can be considered a stroke of good luck from R's perspective because, as the outcome for Kurariki so clearly demonstrates, other young people are not so fortunate. However, it is interesting to observe the views of Lang J on the sentencing decision in Kurariki's case, when sentencing R's associate, P, for manslaughter.<sup>597</sup> The Crown in *P v R* sought to rely on *R v Rapira*.<sup>598</sup> In *Rapira*, the sentencing Judge adopted a starting point of 10 years imprisonment (upheld on appeal) and the Crown in *P v R* submitted that a similar starting point should be adopted for P. However, Lang J considered that *Rapira* did not assist him as it was in "a different league", involving "extensive premeditation and planning by a large number of people"; it was a complex case with different people having different roles; and the two principal offenders were convicted of murder.<sup>599</sup> The real comparison here, however, as I have already hinted, is between the moral blameworthiness of Kurariki vis-à-vis the defendant R in *P v R*. The parasitic nature

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<sup>597</sup> The sentencing of P will be discussed in more depth below.

<sup>598</sup> *R v Rapira*, above n 548.

<sup>599</sup> *R v DP* [2015] NZHC 1796 at [26].

of liability under ss 66 and 168 of the Crimes Act is problematic in many cases, but particularly so where young defendants are concerned. It essentially requires that the defendant read the minds of their associates.

Returning now to outcomes for P. For manslaughter, P was sentenced to six years imprisonment with an MPI of three years and three months. In his sentencing notes Lang J set out in some detail P's unfortunate history. Because this history is of such relevance to P's moral blameworthiness, I repeat much of it verbatim:<sup>600</sup>

[11] ... in order to understand both the offending and the jury's verdict it is necessary to go much further back than 10 June. The story really begins before you were born. The evidence at trial confirm that your mother drank alcohol and consumed drugs heavily whilst she was pregnant with you. This has produced in you some features of children who have defects caused by foetal alcohol syndrome.

[12] Your early childhood was turbulent in the extreme. You were exposed to excessive consumption of alcohol and drugs within your family environment. You also moved from school to school on a regular basis. Then in 2009 when you were eight years of age another significant event occurred. At this time you were struck by a vehicle while you were crossing a pedestrian crossing. This caused you to be thrown in the air and to land on your head. You suffered a significant injury to the side of your face and a fracture to your skull. The incident also left you with permanent brain injury. The evidence given by Dr McGinn at trial was to the effect that an injury of this type required intensive therapeutic and rehabilitative intervention. She said that an adult would be off work for about two years as a result of such an injury. As a bare minimum you ought to have been kept in a secure environment with very little outside stimuli. Instead you were returned to school just two weeks after the incident. Your mother then continued an established trend of moving you from school to school. During the trial I heard evidence that you had attended a large number of schools during the years leading up to this incident. This meant that the schools you attended were not aware of the existence of your traumatic brain injury, and were not aware of the effect that it would have and the needs you would have in a rehabilitative and educative sense.

[13] By the time of this offending you had virtually given up going to school. You were spending a large amount of time with friends and associates. You had already become accustomed to using alcohol and drugs from an early age. You were addicted to synthetic cannabis. Your mother endeavoured to deal with this problem by providing you with real cannabis. There can be no doubt from the evidence given at trial that the house in which you were living at the time of offending was no more than a den associated with drug consumers and drug dealers.

[14] On the night before the offending you had stayed up late. You had consumed drugs and then you had gone to sleep in the living room. Your associate had gone to sleep in your bedroom because he was not supposed to be at the house. During the early hours of the morning your associate and another older person began talking about committing some form of burglary or robbery. I am satisfied that the older person egged on your associate and taunted him when he showed any signs of weakness. Your associate ultimately woke you up and presented you with the idea of the offending. I am satisfied that you were not initially a willing participant but eventually you elected to go on with it. You were certainly a willing participant as you walked down the street carrying the pole and at the time when you walked into the dairy carrying the knife.

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<sup>600</sup> At [11]-[15].

P appealed against his sentence on three grounds: (a) that the starting point of seven and a half years imprisonment was too high; (b) that a discount of 20 per cent for mitigating factors was too low; and (c) that the Judge erred in imposing an MPI.

In the Court of Appeal, the judgment was given by Wild J (on behalf of Miller and Winkelmann JJ). The Court firstly found that Lang J's starting point of seven and a half years was not out of step with other cases.

In terms of the second ground of appeal – that the discount for mitigating factors was too low – the defence argued that in combining the discounts for P's age and traumatic brain injury the Judge had not allowed sufficient credit for P's youth and prospects of rehabilitation and reintegration. Lang J had considered that:<sup>601</sup>

... limited weight should be placed on [the traumatic brain injury] for sentencing purposes. I say that because I am satisfied that the impact of your traumatic brain injury has already had a large impact in your case by virtue of the jury's verdict. Had it not been for the effects of your injury that were explained to the jury, I have no doubt that you would have been convicted of murder.

The Court of Appeal disagreed with Lang J's approach on this point:<sup>602</sup>

The trial on the one hand, and any resulting sentencing on the other hand, are two different and discrete exercises.

The Court of Appeal held that Lang J's task in sentencing was to impose a sentence commensurate with the crime of manslaughter and with P's culpability as the person who committed that crime. In considering mitigating factors that were personal to P, the Judge needed to take full account of his traumatic brain injury. The Court of Appeal agreed with both Crown and defence counsel that a proper discount for personal mitigating factors was 40 per cent.

In terms of the appeal against the MPI, Lang J considered that all four purposes set out in s 86(2) of the Sentencing Act 2002 for imposing an MPI were engaged: holding the offender accountable for the harm done; denouncing the offender's conduct; deterring the offender and others; and protecting the community from the offender. Lang J considered that this last factor was of significant relevance, stating that the head injury makes P vulnerable to acting impulsively in situations of stress or complexity.

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<sup>601</sup> At [31].

<sup>602</sup> *P v R*, above n 596, at [37].

The Court of Appeal considered that Lang J erred in imposing an MPI. Because Lang J focused on the protection of the community, the Court of Appeal did not have much to say about deterrence and denunciation but did draw attention to the comments of Dr McGinn, a neuropsychologist, who stated:<sup>603</sup>

Issues of denunciation and general deterrence in my opinion do not apply to the sentencing considerations of a child with brain damage. One cannot harshly punish a child in order to deter the general population from rule breaking. Clearly P does not represent the general population of serious offenders. His is a unique case that justifies a targeted sentence applicable to him, rather than one that will deter others or denunciate such acts in general. Even specific deterrence is of limited application to a child who has a brain injury and is therefore less able to respond normally to consequences.

Dr McGinn recommended a sentence that would allow P to be released from prison at the age of 16 so that he could be placed in a Child Youth and Family approved placement and attend suitable educational and therapeutic programmes. The Court of Appeal observed that this recommendation emphasised that P was a young, developing, person whose rehabilitative needs were changing. The Court of Appeal was of the view that the imposition of an MPI was inconsistent with the flexibility needed to facilitate P's rehabilitation. The Court felt protection of the community was best achieved by leaving it to the Parole Board and Child, Youth and Family to decide the date and conditions upon which to release P on parole.

The Court of Appeal allowed the appeal against sentence and substituted a sentence of four years and six months.

### *Analysis*

When the outcomes in the above cases are compared against each other, it is arguable that Reweti and P were treated the most fairly by the criminal justice system, by having their age and development considered at both the culpability and sentencing stages. However, these cases would seem to be the exception rather than the rule. In any event, Reweti and P were still convicted of culpable homicide, albeit manslaughter, for killings they committed when aged 14 and 13 respectively.

What seems to be emerging from the more recent cases is that there is a greater responsiveness by courts to evidence on adolescent brain development research, at least at the sentencing stage. The problem, however, is that this evidence is still not always seen

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<sup>603</sup> At [50].

as relevant to culpability. Kurariki, O'Brien, Churchward, Kriel and Nelson were all held culpable to the fullest extent of the law. Even though Kurariki was found guilty of manslaughter, not murder, his offending was still viewed as severe to an extent that is out of step with his actual moral blameworthiness, considering his age.

We must question the outcomes of these cases in light of theories surrounding the development of young people outlined in ch 2. Taking Kurariki's age into account, was it fair to convict him of manslaughter without proof he foresaw that his actions carried a risk of death? Taking Kriel's age into account, was it fair to assume he had the capacity to foresee the risk of death, and even if he did foresee the risk, because of his cognitive functioning was he able to act in accordance with that foresight? Was it Reweti's frontal lobe abnormality that resulted in the jury's finding that he did not foresee death? If so, is it such a huge leap to suggest that because frontal lobes are late to develop in all adolescents, they may be simply *unable* to foresee the consequences of their actions. Were the courts determining the culpability of O'Brien, Churchward and Nelson correct to conclude that those defendants had sufficient capacity to intend or foresee death? Ought we also to question the decision-making of Crown prosecutors when they decide to proceed with murder when a young defendant is prepared to plead guilty to manslaughter; or the advocacy of defence counsel who does not dissuade a young defendant from pleading guilty to murder? All these influences can converge to contribute to inconsistent outcomes for young defendants who act in very similar ways. The question is, what can be done to avoid these inconsistencies in future cases?

## TAKING DEVELOPMENTAL FACTORS INTO ACCOUNT IN THE CRIMINAL JUSTICE SYSTEM

If we accept the finding of cognitive neuroscience, that adolescents generally do not possess the same capacity for mens rea as adults, how should this finding be utilised by the criminal justice system? Steinberg and Scott suggest that there is a policy choice available between treating immaturity on an individual basis as a mitigating factor, or as the basis of treating young defendants as a separate category.<sup>604</sup> I would argue that to varying degrees, both approaches are able to coexist within a criminal justice system. Youth should be a

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<sup>604</sup> Laurence Steinberg and Elizabeth S Scott "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty" (2003) 58 Am Psychol 1009 at 1016.

mitigating factor at the culpability stage. Developmental delays could be relied upon to support a defence similar to diminished capacity. Furthermore, young defendants who kill can be dealt with by youth processes rather than adult ones. Potentially these processes could include trial by youth panels rather than by a jury of adults. In essence, there are a number of options available to the criminal justice system once it is accepted that young killers are a different category of offender to adult killers. Whatever approach is adopted, a sound understanding of the developmental issues with regard to young defendants is essential for lawyers to make compelling defence arguments on behalf of their clients and to engage their clients effectively in the legal process.<sup>605</sup>

### ***Absence of mens rea***

McDiarmid suggests that, in terms of existing mechanisms for defending young people, a plea of absence of mens rea is the most promising.<sup>606</sup> Even without raising a specific defence of the diminished capacity type, as part of standard advocacy, defence counsel representing young people charged with homicide should make arguments based on current research on brain development,<sup>607</sup> and make use of experts in doing so. Most defences are argued on the basis that a defendant did not have the mens rea for the offence relied upon – the defences of O’Brien, Kriel and Churchward are relevant examples. However, there are definitional issues that arise:<sup>608</sup>

On one definition, [the mental element of an offence] could incorporate all aspects of the criminal charge which relate to the defendant’s mental state which would encompass both his/her attitude to the criminal act and his/her criminal capacity. Alternatively, it could be defined narrowly to represent only the specific mental attitude comprised in the crime’s definition which has a direct relationship with the defined *actus reus*.

Where a “thin” definition is given to the mens rea element of an offence, it would be relatively easy to convince a jury that a young person *intended* their actions.<sup>609</sup> However, if the mental element includes broader issues of understanding and development, such as the ability to exercise rational control over one’s actions, there is greater scope for an argument that the young defendant did not possess mens rea.<sup>610</sup>

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<sup>605</sup> Patricia Puritz and Katayoon Majd “Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice” (2007) 45 Fam Court Rev 466 at 473.

<sup>606</sup> McDiarmid, above n 508, at 336.

<sup>607</sup> Puritz and Majd, above n 605, at 474.

<sup>608</sup> McDiarmid, above n 508, at 336.

<sup>609</sup> At 336.

<sup>610</sup> At 336.

If absence of mens rea arguments are to be made on behalf of a young person, it is vital that defence lawyers make use of expert witnesses to provide the court with information on the implications of brain development research on culpability in the individual case in order to argue that mens rea was not present.<sup>611</sup> This evidence has a counter-intuitive function which is essential in demonstrating to a jury that a defendant's actions may not be consistent with the requisite mens rea. As Puritz and Majd point out, a young person's conduct may appear vengeful when it is actually driven by some other motivator, such as a desire to please others or an intolerance of things that seem unfair.<sup>612</sup> In *R v Makoare*<sup>613</sup> the Court of Appeal noted that Courts are reluctant to allow expert evidence on whether or not a defendant was acting with intent, as this would be a matter on which the jury must ultimately decide.<sup>614</sup> However, this case was decided before the enactment of s 25(2) of the Evidence Act 2006 which states that expert evidence is not inadmissible simply for the fact that it breaches the "ultimate issue" rule. The Law Commission, when it drafted the Code upon which the Evidence Act 2006 was based, said that:<sup>615</sup>

Expert evidence is likely to be substantially helpful if it will help the fact-finder to understand the evidence of certain witnesses and avoid drawing the wrong inferences from their evidence.

Furthermore, the Court of Appeal in *R v Makoare* did not preclude the admissibility of expert evidence where a Court must decide if someone is "mentally abnormal".<sup>616</sup> In that case, the Court suggested:<sup>617</sup>

An expert is then able to supply the Court with scientific or medical opinion which is likely to be beyond the experience and knowledge of jurors. Such testimony may also be helpful when the case involves human behaviour which does not conform [with] what a lay person might expect.

Arguably this principle could be extended to acknowledge that adolescents, because of their *normal* development level, may show lack of judgement and impaired decision-making that affects their culpability.<sup>618</sup> It could also, perhaps, be argued that violence is a

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<sup>611</sup> Puritz and Majd, above n 605, at 474-475.

<sup>612</sup> At 475.

<sup>613</sup> *R v Makoare* [2001] 1 NZLR 318, (2000) 18 CRNZ 511 (CA).

<sup>614</sup> At 323, 516.

<sup>615</sup> Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Volume 2, 1999) at C102.

<sup>616</sup> *R v Makoare*, above n 613, at 323, 517.

<sup>617</sup> At 323-324, 517

<sup>618</sup> Praveen Kambam and Christopher Thompson, 'The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants' (2009) 27 Behav Sci Law 173 at 175.

normal part of life for many young defendants, which could mean that they simply do not foresee the risk of death. Further, evidence about the effects of alcohol and drugs that may compound impaired developmental decision-making should be available to the courts.

Yet one attempt to raise these issues in New Zealand was thwarted by the High Court. Petani Fa’avae was 16 when he fatally stabbed a 14-year-old in the chest. He also stabbed another person in the arm. Fa’avae was charged with one count of murder, under ss 167(a) and (b) of the Crimes Act 1961<sup>619</sup>, one of wounding with intent to cause grievous bodily harm and three of assault with a weapon.<sup>620</sup> Prior to his trial, defence counsel applied for an order declaring admissible at trial the evidence of a child and adolescent psychiatrist.<sup>621</sup> The evidence of the psychiatrist fell into two parts. The first part related to Fa’avae’s personal characteristics and was to the effect that he showed no areas of cognitive defect but his vocabulary was mildly limited, which was to be expected given his parents used English as a second language. He did not meet diagnostic criteria for any major mental disorder, mental retardation or personality disorder.<sup>622</sup> The second part of the psychiatrist’s evidence was headed “Opinion Regarding Adolescent Development” and was general in nature, containing no reference to Fa’avae.<sup>623</sup> Essentially, the evidence canvassed similar issues to those presented in ch 2 – that developmental studies indicate that adolescents are more likely than adults to be impulsive and engage in risky behaviour, and that the brain continues developing through adolescence, and in particular that the frontal lobes, “involved in decision-making and impulse control”<sup>624</sup> are the last to develop.<sup>625</sup>

Defence counsel submitted that the psychiatrist’s proposed evidence would be of assistance to the jury because it will warn the jury against assuming that the “conscious appreciation of risk” required by s 167(b), which might be expected of an adult, will not necessarily be found in a sixteen-year-old.<sup>626</sup>

The Judge determined that the evidence was not admissible since the jury would not be likely to obtain substantial help from it. The decision in *R v Makoare*<sup>627</sup> was relied upon

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<sup>619</sup> *R v F* HC Auckland CRI-2006-204-748, 2 April 2008 at [12].

<sup>620</sup> At [2], [4].

<sup>621</sup> At [1].

<sup>622</sup> At [8].

<sup>623</sup> At [9].

<sup>624</sup> At [10].

<sup>625</sup> At [9], [10].

<sup>626</sup> At [14].

<sup>627</sup> *R v Makoare*, above n 613.



as sounding a note of caution about expert evidence on the topic of whether a defendant was acting with murderous intent. The Judge noted that the psychiatrist's evidence was that Fa'avae was a completely normal adolescent, and no attempt was made to link the general evidence about adolescents as a group to Fa'avae.<sup>628</sup> The Judge concluded:<sup>629</sup>

The evidence would tend to support the creation of a de facto common law defence, based on the proposition that adolescents were less able than older offenders to form the necessary murderous intent. There is no warrant for the creation of such a precedent.

Two issues arise from the decision in this case. First is the question of whether, if an attempt to link the general evidence about adolescents as a group to the defendant had been made, the evidence would have been admissible. This would seem to be a rather straightforward matter, requiring defence counsel to refer to aspects of Fa'avae's conduct before and after the killing to support the argument that because of Fa'avae's developmental stage at the time of the killing, he did not consciously appreciate the risk of death.

The second issue is that while the Judge correctly warns against the creation of a de facto defence, there is nothing to preclude the legislature from creating a legal one, along the lines discussed below. Either way, evidence of brain development needs to be taken into account by the legal system when dealing with young defendants who kill. This can either be achieved by focusing on the capacity for intent, as per a specific diminished capacity defence, or by using the evidence to show that the defendant did not actually have the intent (via expert witnesses). The only other way of justly dealing with these issues is to raise the age of criminal responsibility.

### ***An affirmative defence – developmental immaturity***

In respect of almost all other facets of life, the law acknowledges the limitations of children's and adolescents' capacity. There are age requirements imposed on the rights to vote, to drive, to have sex, to be home alone, to buy cigarettes and alcohol, and to watch particular movies. It is difficult to understand why the law should prevent children from engaging in these types of activities and yet insist they are mature enough to intend or even appreciate the consequences of a criminal act. What is the justification for this distinction?

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<sup>628</sup> *R v F*, above n 619, at [17].

<sup>629</sup> At [24].

At present, New Zealand law does not allow for a specific defence that takes into consideration the diminished capacity of young people, or indeed any defendant. The defence of diminished responsibility has its origins in Scottish courts in the mid-18<sup>th</sup> century as a way of dealing with mental impairment that did not meet the strict insanity test.<sup>630</sup> In 2010 the defence was put into statutory form in Scotland.<sup>631</sup> Chalmers observes that this contains “only the most minor changes to the common law defence”. In 1957, a version of the defence was imported into English law by virtue of s 2 of the Homicide Act 1957<sup>632</sup> which provides (in part) as follows:

- 1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
- 2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder ...

In the case of *R v Byrne*<sup>633</sup>, Lord Parker CJ said that an abnormality of mind is:

[A] state of mind so different from that of ordinary human beings that the reasonable [person] would term it abnormal. It appears...to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.

The abnormality does not have to be permanent and does not have to constitute a disease of the mind. The defence may cover intellectual disability, anti-social personality disorder or premenstrual tension.<sup>634</sup> The abnormality must also have *substantially* impaired the defendant's capacity. In *R v Byrne*, it was held that substantial impairment was a matter of degree and it signified more than *some* impairment.<sup>635</sup>

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<sup>630</sup> Robert S Shiels “The Uncertain Medical Origins of Diminished Responsibility” (2014) 78(6) JCL 467 at 467.

<sup>631</sup> Criminal Justice and Licensing (Scotland) Act 2010, s 168, inserting s 51B into the Criminal Procedure (Scotland) Act 1995. See James Chalmers “Partial Defences to Murder in Scotland: An Unlikely Tranquility” in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, England, 2011) at 167.

<sup>632</sup> James Chalmers “Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate (No.2)*” (2002) 6(1) Edinburgh L Rev 108 at 114.

<sup>633</sup> *R v Byrne* [1960] 2 QB 396 (Crim App).

<sup>634</sup> Guy Cumes “Reform of Diminished Responsibility in New South Wales” (1999) 6 Psychiatry Psychol & L 175 at 176.

<sup>635</sup> *R v Byrne*, above n 633, at 404.

In England and Wales the defence was amended by the Coroners and Justice Act 2009, following a lengthy reform process.<sup>636</sup> The new provision reads.<sup>637</sup>

## 2 Persons suffering from diminished responsibility

- [(1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
- (a) arose from a recognised medical condition,
  - (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
  - (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
- (1A) Those things are—
- (a) to understand the nature of D's conduct;
  - (b) to form a rational judgment;
  - (c) to exercise self-control.
- (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.]
- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
- (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
- (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any party to it.

According to Cornford, the new definition of diminished responsibility is “at least ostensibly, little more than a modernisation of the old one”.<sup>638</sup> “Abnormality of mental functioning” replaces “abnormality of the mind” and it must arise from “a recognised medical condition”. This abnormality explains the defendant’s conduct if it is a “significant contributory factor” in causing it. Based upon developmental neuroscience, it is arguably the case that young people who kill are suffering from an “abnormality”<sup>639</sup> of mental functioning which substantially impaired their ability to understand the nature of their conduct; form a rational judgment; or exercise self-control. What needs to also be proved is that the abnormality was a significant contributory factor in causing the defendant to carry out their conduct. One stumbling block here could be the requirement that the abnormality in mental functioning arises from a recognised medical condition. Whether developmental immaturity qualifies as a recognised medical condition remains to be seen.

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<sup>636</sup> Andrew Cornford “Mitigating Murder” (2016) 10 Crim Law and Philos 31 at 32.

<sup>637</sup> Homicide Act 1957 (UK), s 2 as amended by Coroners and Justice Act 2009 (UK), s 52.

<sup>638</sup> Cornford, above n 636, at 32.

<sup>639</sup> This is not to say that young people are abnormal, rather their normal development is different to the norm of adult capacity.

In England and Wales, the Law Commission in its report *Partial Defences to Murder*, observed that diminished responsibility does not include developmental immaturity unless it is of such a degree to amount to an abnormality of mind.<sup>640</sup> The Commission heard from two forensic psychologists, one of whom was of the view that the defence was defective because it omits reference to developmental immaturity. The Commission subsequently recommended that diminished responsibility be available on the grounds of developmental immaturity for an offender aged under 18 at the time of the killing.<sup>641</sup> This recommendation was not carried through into the reform of diminished responsibility in the Coroners and Justice Act 2009.<sup>642</sup>

The Scottish diminished responsibility provision is as follows:<sup>643</sup>

Diminished responsibility

- (1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.
- (2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.
- (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
  - (a) constitute abnormality of mind for the purposes of subsection (1), or
  - (b) prevent such abnormality from being established for those purposes.
- (4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.
- (5) In this section, “conduct” includes acts and omissions.]

It is apparent from a comparison of the provisions that, contrary to the English and Welsh defence, the Scottish defence does not require a “recognised medical condition”. This is consistent with the decision in *Galbraith v HM Advocate (No 2)*<sup>644</sup>. In that case, the elements of the common law defence of diminished responsibility were held to be as follows:<sup>645</sup>

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<sup>640</sup> Law Commission (England and Wales) *Partial Defences to Murder* (Law Com No 290, 2004) at [3.134].

<sup>641</sup> Law Commission (England and Wales) *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) at [5.125].

<sup>642</sup> Law Commission (England and Wales) *Criminal Liability: Insanity and Automatism* (Discussion Paper, 2013) at [9.6], [9.7].

<sup>643</sup> Criminal Justice and Licensing (Scotland) Act 2010, s 168, inserting s 51B into the Criminal Procedure (Scotland) Act 1995. See James Chalmers “Partial Defences”, above n 631, at 167.

<sup>644</sup> *Galbraith v HM Advocate (No 2)* 2001 SLT 953 (HCJ).

<sup>645</sup> At [54] (footnotes omitted). See also ch 4.

1. Where, on the facts found proved by the jury, the law holds that the accused's responsibility was diminished at the time when he killed his victim, the proper course is for the jury to convict the accused of culpable homicide.
2. But, precisely because diminished responsibility is a legal concept, it is for the trial judge to determine whether there is evidence on which the jury would be entitled to convict the accused of culpable homicide rather than of murder, on the ground of diminished responsibility. In determining that issue, the judge must consider the kinds of issue that we have discussed. In essence, the judge must decide whether there is evidence that, at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts.
3. The abnormality of mind may take various forms. It may mean that the individual perceives physical acts and matters differently from a normal person. Or else it may affect his ability to form a rational judgment as to whether a particular act is right or wrong or to decide whether to perform it. In a given case any or all of these effects may be operating.
4. The abnormality must be one that is recognised by the appropriate science. But it may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma. In every case, in colloquial terms, there must, unfortunately, have been something far wrong with the accused, which affected the way he acted.
5. While the plea of diminished responsibility will be available only where the accused's abnormality of mind had substantial effects in relation to his act, there is no requirement that his state of mind should have bordered on insanity.
6. It is for the court to determine, having regard always to relevant policy considerations, whether any particular abnormality can found a plea of diminished responsibility. Thus, no mental abnormality, short of actual insanity, which is brought on by the accused himself taking drink or controlled drugs or sniffing glue, will found a plea of diminished responsibility (*Brennan*). Similarly, our law does not recognise psychopathic personality disorder as a basis for diminished responsibility (*Carraher*).
7. If, applying the appropriate tests, the judge concludes that the evidence is not capable of supporting a plea of diminished responsibility, he should direct the jury that, if convicting, they should convict of murder.
8. If, on the other hand, the judge concludes that there is evidence to support the plea, then he must leave it for the jury to consider. In that event the judge's directions to the jury should not simply recite the Savage formula but should be tailored, so far as possible, to the facts of the particular case. The amount of detail required will also depend on the facts of the particular case and on the precise issue in controversy between the Crown and the defence. In essence, the jury should be told that they must be satisfied that, by reason of the abnormality of mind in question, the ability of the accused, as compared with a normal person, to determine or control his actings was substantially impaired.

Taylor-Thompson suggests that in cases where the prosecution must prove intention or knowledge as essential elements of an offence, what she refers to as a defence of “developmental negligence” may be appropriate.<sup>646</sup> She provides the following example of a jury instruction which could be used to signal developmental issues:<sup>647</sup>

In deciding whether the defendant acted with the requisite intent in this case, you may take [their] age into consideration in assessing whether [they] had reached a level of

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<sup>646</sup> Taylor-Thompson, above n 509, at 162.  
<sup>647</sup> At 164-165.

development that enabled [them] to form the specific intent to kill. You may consider whether developmental immaturity prevented [them] from exercising the sort of judgment in which [they] fully appreciated the risks involved or the potential outcome of [their] acts. If you find that the defendant lacked the capacity to form the specific intent in this case, you must find [them] not guilty and may proceed to consider whether the state has met its burden of proof with respect to [any lesser offences].

Taylor-Thompson's proposal could function as a form of diminished responsibility in that, if accepted by a jury, it might result in a conviction for a lesser offence.<sup>648</sup> It would remind the jury that society accepts that adolescents do not make the same decisions as adults and that while an adolescent may have the physical capacity to commit an act, he or she may not have reached a level of maturity that is needed to weigh up the consequences of a choice in the way that an adult is expected to.<sup>649</sup> The essence of this type of instruction to the jury is to suggest to them that the defendant's responsibility for the killing is diminished because of their mental state (or developmental state) at the time of the killing.

As Taylor-Thompson acknowledges, the success of this approach depends upon expert evidence regarding the defendant's cognitive development in general and specific capacities in the particular circumstances of the killing.<sup>650</sup> She acknowledges too that the approach has limitations. She suggests that if jurors are entitled to infer that an actor intends the natural and probable consequences of their acts, convincing them that an adolescent lacked the capacity to intend their act will be difficult.<sup>651</sup> There are also admissibility issues in relation to evidence of developmental delays – courts may be reluctant to find that such evidence is necessary to help the fact-finder reach a decision.<sup>652</sup> Furthermore, perceptions that the defence is a lenient option for young killers is likely to lead to objections.<sup>653</sup>

McDiarmid also suggests that there is good reason for the provision of a "bespoke defence" for young people within the criminal process<sup>654</sup> but, consistent with Taylor-Thompson's concerns about perceptions, McDiarmid acknowledges that public opinion about children who commit serious crimes have tempered recommendations for reform in England and

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<sup>648</sup> At 162.

<sup>649</sup> At 163.

<sup>650</sup> At 163.

<sup>651</sup> At 165.

<sup>652</sup> At 165.

<sup>653</sup> At 168.

<sup>654</sup> McDiarmid, above n 508, at 337.

Wales.<sup>655</sup> However, the point that must be consistently asserted in the face of these concerns is that any arguments made on behalf of young defendants, or defences asserted by them, serve to *mitigate* responsibility, not to absolve it. In arguing in support of an affirmative defence, McDiarmid observes that:<sup>656</sup>

... a defence is not a blanket exemption from criminal liability. No child defendant would have to plead it and, indeed, making the plea is no guarantee of success, which depends on the evidence.

McDiarmid suggests that a test which would acquit a young defendant on the grounds of developmental immaturity ought to incorporate several elements: the defendant's knowledge of the difference between right and wrong (both in a moral and legal sense); the defendant's ability to exercise rational control over their actions; and the defendant's understanding of causation.<sup>657</sup> Drawing upon the Scottish defence of mental disorder, McDiarmid suggests how a defence for young defendants could be worded:<sup>658</sup>

A child [or young person] is not criminally responsible for conduct which would otherwise constitute an offence and should be acquitted if, due to developmental immaturity,

- (a) s/he was unable sufficiently to know the full implications of, to understand, and/or to appreciate the nature of, that conduct, its criminality, its wrongfulness and/or its consequences (legal and/or physical); and/or
- (b) s/he was severely restricted in his/her ability to judge whether to carry out the conduct, to exercise rational control over the conduct and/or to refrain from carrying it out.

Rather than relying upon absence of mens rea arguments, an affirmative defence based upon a young defendant's neurological development is preferable, and I suggest that an approach incorporating elements of both McDiarmid's and Taylor-Thompson's proposals is a promising way forward.

Despite Taylor-Thompson's labelling of her proposal as a defence, it leans more toward an "absence of mens rea" argument by use of the words, "[i]n deciding whether the defendant acted with the requisite intent ..." in the proposed jury instruction. Further, the instruction does not provide that age was a mandatory consideration ("you *may* take ... age into consideration" (emphasis added)) but it does mandate acquittal if the jury finds the defendant lacked the capacity to form the specific intent. McDiarmid's suggested wording is, in one sense, more absolute: "[a] child [or young person] *is not* criminally responsible

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<sup>655</sup> At 337.

<sup>656</sup> At 338.

<sup>657</sup> At 340.

<sup>658</sup> At 340.

for conduct which would otherwise constitute an offence and should be acquitted ...” (emphasis added); but could be stronger by replacing the word “should” in the latter part of that segment with the word “must”. With those points in mind, I suggest the following affirmative defence of “developmental immaturity”:

- (1) A defendant is not criminally responsible for conduct which would otherwise constitute an offence and must be acquitted if, due to developmental immaturity:
  - (a) they did not fully understand the nature of their conduct, or that it was morally or legally wrong, or its legal or physical consequences; and/or
  - (b) they were substantially impaired in exercising rational control over their conduct and/or refraining from carrying it out.
- (2) Where a defendant is found not guilty of an offence under subs (1)(a) or (b) of this section, the court may proceed to consider whether the prosecution has met its burden of proof with respect to any lesser offences.

This proposal relies, as do Taylor-Thompson’s and McDiarmid’s, on the causal role “developmental immaturity” plays in the responsibility of young defendants. However, I suggest that the focus of the defence should be on the *fact* of understanding (etcetera) not on the *capacity* for it.<sup>659</sup> Just as capacity cannot be assumed, neither can incapacity. For the defence to succeed it must be proved (to the relevant standard<sup>660</sup>) that due to developmental immaturity, the defendant met either of the tests set out in (a) or (b).

Another key difference proposed here is that I have not specified an upper age limit and have avoided the use of definitional terms such as “child” or “young person”. To that end, the scope of the defence could be extended to adults who have suffered developmental delays. The expansive scope is arguably necessary in the absence of any other diminished capacity defence, and I will address this concern in ch 6 “Recommendations and Conclusion”.

As to the standard of proof, this clearly depends upon the burden ascribed to the defence of developmental immaturity. In other words, which party must prove the elements of the defence (absence of understanding or substantial impairment etcetera)? The English defence of diminished responsibility places the burden of proof on the defendant, under s 2(2) of the Homicide Act 1957 (UK). In New Zealand, the defence of insanity also places the burden on the defendant to rebut the presumption of sanity by proving that the defendant was insane. The rationale for shifting the burden from the prosecution to the

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<sup>659</sup> The same approach applies to intoxication (at least in New Zealand and England and Wales) as it bears upon the question of intent: see *R v Kamipeli* [1975] 2 NZLR 610 (CA) and *R v Sheehan* [1975] 2 All ER 960, [1975] 1 WLR 739 (CA).

<sup>660</sup> See below at 124-125.



defence in such cases is that the defendant is better placed to provide evidence to discharge the burden. In criminal cases, where the defendant bears a legal burden (as distinct from an evidential burden), the standard of proof is on the balance of probabilities. The defence of developmental immaturity could adopt this approach, in which the prosecution must still prove all other elements of the offence beyond reasonable doubt (namely, in the context of culpable homicide, that the defendant caused the death of the victim). Alternatively, given the particular vulnerabilities of young defendants, it may be that a reverse burden is too onerous. Instead, an evidential burden – the obligation to show sufficient evidence to raise the issue of developmental immaturity – could be imposed. This would only require defendants to point to a “credible narrative” of developmental immaturity, and place the legal burden of disproving the defence back on the prosecution (as in self-defence).

The difference between the defence of developmental immaturity and the defence of infancy (as provided for by s 21 of the Crimes Act 1961) is that the latter provides for a conclusive presumption – no evidence may be brought to suggest that a child under the age of 10 was, in fact, capable of committing an offence. A defence of developmental immaturity provides an option to defendants – it does not have to be raised if the defendant chooses not to (presumably having received competent legal advice). Finally, subs 2 allows for a measure of accountability in some cases, potentially reducing murder to manslaughter. However, it is by no means certain that manslaughter is the only available verdict if subs (1) of the defence is established – a full acquittal on a murder charge ought still to be available even if the defendant has committed the actus reus of culpable homicide.

The defence needs to be accompanied by evidence of how developmental immaturity affects decision-making. In other words, the sort of evidence that would accompany an absence of mens rea argument, is also a necessary component of an affirmative defence.

In terms of how this proposed defence could potentially have changed the outcomes in the cases examined above, the analysis is necessarily brief and speculative because, of course, the outcome does depend upon the court’s weighing of the evidence in each case. In Kurariki’s case, the defence would, at least, have focused the court’s attention on Kurariki’s understanding of his own conduct rather than the conduct of his associates. It would provide the court with the option of finding he did not have foresight of the lethal consequences of agreeing to participate in the robbery. To that end, a full acquittal could have been granted, even though the principals were charged under s 168 of the Crimes Act

1961. The absence of this foresight of death (understanding of the physical consequences) is also crucial to the determination of the cases against Churchward, O'Brien, Nelson and Kriel, and arguably these four defendants could at least have been found guilty of manslaughter under the proposed defence. This would have been a better reflection of their moral blameworthiness, and given a sentencing Judge more discretion, while at the same time allowing for a more appropriate measure of accountability. In all of those cases there was additional background information about the defendants which suggested impaired abilities to foresee the consequences of their actions, in addition to their young age.

It must be noted that there is, however, still the risk of jury nullification if juries are unsympathetic to the notion that immaturity bears on criminal responsibility. I suggest that strong jury directions might mitigate this risk.

### SUMMARY

The argument put forward in this chapter is that developmental immaturity is relevant to the culpability of young people charged with murder and manslaughter. It is also relevant at other stages of the proceeding, because a just and fair hearing requires the competent participation of the defendant in their defence.<sup>661</sup> These competencies include the ability to understand the nature of the charges the defendant faces, to assist the lawyer, and to enter a plea.<sup>662</sup>

It must be noted that the use of developmental neuroscience within the criminal justice system is not universally supported. Some say that arguments that a young defendant lacked capacity are unconvincing in light of the facts of cases where there is evidence of premeditation.<sup>663</sup> Morse suggests that while adolescents are clearly different from adults, difference does not necessarily entail diminished responsibility.<sup>664</sup> Morse argues that almost all adolescent killers have the capacity to form, and actually do form, the mental states required for the offences they commit.<sup>665</sup>

They kill on purpose, or they are aware that they are creating a great and unjustifiable risk of death or serious bodily injury, or they kill inadvertently in circumstances in which they

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<sup>661</sup> Steinberg "Adolescent Development", above n 545, at 464.

<sup>662</sup> At 464.

<sup>663</sup> See, for example, Terry A Maroney "The False Promise of Adolescent Brain Science in Juvenile Justice" (2009) 85 Notre Dame L Rev 89 at 135.

<sup>664</sup> Stephen J Morse "Not So Hard (And Not So Special), After All: Comments on Zimring's 'The Hardest of the Hard Cases'" (1999) 6 Va J Soc Pol'y & L 471 at 472.

<sup>665</sup> At 473.

should know and are capable of knowing that they are creating a great and unjustifiable risk of death.<sup>666</sup>

Aronson points out that the vast majority of adolescents do not commit violent crimes and are able to control their impulses.<sup>667</sup> It is also true that some adult defendants are “impulsive, sensation-seeking risk takers who discount future consequences”.<sup>668</sup> Furthermore, there is no consensus within the scientific community that brain imaging studies should guide legal decision-making and public policy.<sup>669</sup>

There are several responses to these criticisms. First, which is precisely the point that brain development studies suggest, is that conduct that a reasonable adult might perceive as premeditation might reveal an entirely different motive from the point of view of an adolescent. Second, few people would argue that the question here is not whether the young defendant should be held accountable, but the degree to which they are held accountable. As Zimring notes,

The intentional taking of life without justification requires a punitive response in most circumstances when the offender has even minimal appreciation of the nature of his acts and their consequences . . . But, the proper punishment for fifteen-year-olds who kill must take into account the offender’s immaturity and other particular circumstances.<sup>670</sup>

Steinberg and Scott accept that a juvenile defendant, because of developmental immaturity, should be seen as *less* culpable than an adult, but nonetheless still has some responsibility for the crime.<sup>671</sup> In relation to risk-taking adult defendants, Steinberg argues that their motivations are not developmental but “characterological” and unlikely to change simply with the passage of time.<sup>672</sup>

Third, while some young defendants may intend to kill, such cases are rare, and the majority of crimes committed by young people are likely to be reckless crimes, committed under situations of “hot cognition”.

It is important to acknowledge that neuroimaging techniques do not reveal an “objective truth” and do involve an element of subjectivity,<sup>673</sup> in that the interpretation of a given

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<sup>666</sup> At 473-474.

<sup>667</sup> Jay D Aronson “Neuroscience and Juvenile Justice” (2009) 42 Akron L Rev 917 at 929.

<sup>668</sup> Steinberg “Adolescent Development”, above n 545, at 473.

<sup>669</sup> Aronson, above n 667, at 928.

<sup>670</sup> Zimring, above n 510, at 438.

<sup>671</sup> Steinberg and Scott, above n 604, at 1010.

<sup>672</sup> Steinberg “Adolescent Development”, above n 545, at 473.

<sup>673</sup> Sara B Johnson, Robert W Blum and Jay N Giedd “Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy” (2009) 45 J Adolesc Health 216 at 219.

brain image is not necessarily straightforward.<sup>674</sup> This is an area of ongoing investigation.<sup>675</sup> In the meantime, it is important to be clear that neuroscientific data about the structure and function of the brain is not a proxy for an individual's actual cognitive functioning. However, such information can help in interpreting an individual's behaviour and providing clues as to whether it is likely that they possessed the required mens rea. Further:<sup>676</sup>

In addition to showing that juveniles are not as culpable for their actions as adults, the new research suggests that juveniles may be more responsive than adults to rehabilitation. Because their brains are still learning and creating new connections, research suggests rehabilitation will be particularly effective for juveniles. However, the current trend of transferring juveniles to the adult system results in harsher punishment and less rehabilitation.

Utilising developmental neuroscience in the way suggested in this chapter is not simply a means by which young killers can be exculpated from responsibility. It provides realistic options for holding young people accountable for their fatal actions while recognising that their actions may not accurately reflect their moral blameworthiness. In essence, the contribution that developmental neuroscience makes is in providing support for affirming and extending the principle of *doli incapax* rather than limiting it.

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<sup>674</sup> At 219.

<sup>675</sup> Jay N Giedd "The Teen Brain: Insights from Neuroimaging" (2008) 42 *J Adolesc Health* 335 at 340.

<sup>676</sup> Tracy Rightmer "Arrested Development: Juveniles' Immature Brains Make them Less Culpable than Adults" (2005) 9 *Quinnipiac Health L J* 1 at 25.

# Chapter 4: Victims of violence or coercion who kill their abusers

## INTRODUCTION

Despite the focus of this chapter on victims of violence or coercion who kill, it must be noted that, comparatively speaking, such killings are rare. On the other hand, between 1 January 2009 and 31 December 2015, 936 women were killed by men (mostly known to the victims) in England and Wales. Of those 936 women, 64 per cent were killed by men identified as current or former partners.<sup>677</sup> An Australian review found that women were three times more likely than men to be murdered in their own home by a current or former partner.<sup>678</sup>

Perhaps because of the low rate of such homicides, victims of violence who kill their abusers<sup>679</sup> pose a universal problem for legal systems.<sup>680</sup> However, unlike English law which provides a defence of loss of control alongside diminished responsibility, New Zealand's legal regime does not have sufficient flexibility to deal with the culpability of these defendants. Arguably other jurisdictions have similar problems, although there is data to suggest that the New Zealand criminal justice system's response to these defendants is more punitive than, for example, Australia's or Canada's.<sup>681</sup> This chapter suggests an approach that moves away from a focus on the violence perpetrated against defendants toward a holistic approach that focuses on coercive control as it affects criminal responsibility. While the emphasis of this chapter is on the New Zealand position, where relevant it will reference Australian, Canadian, South African, Scottish and English and

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<sup>677</sup> Deidre Brennan "The Femicide Census" (2016) [online] Available at: <1q7dqy2unor827bqjls0c4m-wpengine.netdna-ssl.com/wp-content/uploads/2017/12/The-Femicide-Census-Report-published-2017.pdf>.

<sup>678</sup> Patricia Cullen and others "Counting Dead Women in Australia: An In-Depth Case Review of Femicide" (2018) *J Fam Viol* <doi.org/10.1007/s10896-018-9963-6>.

<sup>679</sup> Use of the term "battered women" has fallen out of favour in recent years, in part due to recognition that it is not just women who are battered, and that battering is not an accurate description of the harm suffered by victims of violence. The descriptors "victims of violence who kill" or "coerced victims who kill" is more apt in the context of this thesis.

<sup>680</sup> Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?" (2012) 45(3) *Aust NZ J Criminol* 383.

<sup>681</sup> At 394.

Welsh authorities as the thesis ultimately proposes a framework that could be adapted for use in other jurisdictions as well as New Zealand.

The New Zealand Law Commission (NZLC) has recently considered what can be done to assist victims of violence who kill their abusers, releasing an issues paper in November 2015<sup>682</sup> and tabling its final report on 12 May 2016.<sup>683</sup> The NZLC has also recently addressed strangulation in light of increasing understanding of the role it plays in the context of family violence.<sup>684</sup> At the same time, New Zealand's Ministry of Justice is undertaking a review of family violence laws, recognising that.<sup>685</sup>

The distinction between a victim and perpetrator is not always clear. Victims of ongoing abuse use a range of strategies to cope that can include violence in retaliation to the abuse.

The NZLC notes that researchers working with victims of family violence have begun to centre their analyses on the concept of "coercive control". A central figure in this research is Evan Stark, who has argued that coercive control includes non-physical harm and behaviours on the part of the abuser to intimidate and isolate victims.<sup>686</sup> Labelling these victims of violence or coercion as "murderers" or "killers" when they act to end their abuse can be inconsistent with their degree of moral blameworthiness. Yet in many jurisdictions, New Zealand included, there is no present scope for a lower degree of fault to be recognised by the criminal justice system at the conviction stage. This chapter considers some of the options for reform in this context, and concludes that the creation of a new offence that reflects the lesser degree of moral blameworthiness involved when a victim of coercive control kills her abuser, or defences in partial or full mitigation of responsibility, are viable options.

The first part of this chapter sets the scene for considering law reform in this context by emphasising the psychological research supporting the concept of coercive control as central to domestic violence discourse. This is followed by an exposition of the legal landscape within which claims of mitigation by coerced victims who kill currently fall to be considered. In this section I draw particular attention to *R v Wickham* and *R v Wihongi*,

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<sup>682</sup> Law Commission *Victims of family violence who commit homicide* (NZLC IP39, 2015).

<sup>683</sup> Law Commission *Understanding family violence: reforming the criminal law relating to homicide* (NZLC R139, 2016).

<sup>684</sup> Law Commission *Strangulation: The case for a new offence* (NZLC R138, 2016).

<sup>685</sup> Ministry of Justice *Strengthening New Zealand's legislative response to family violence – A public discussion document* (2015) at 11.

<sup>686</sup> Evan Stark *Coercive control: how men entrap women in personal life* (Oxford University Press, New York, 2007). See ch 2.

as foreshadowed in ch 1, a comparison of which amply demonstrates the potential for unfair labelling and punishment that can arise from the existing legal regime. Finally, I move to consider how the problems presented by coerced victims who kill might be addressed within the legal system itself. In this section of the article I explore some of the approaches taken in other jurisdictions as well as briefly outlining the NZLC's options.

## SETTING THE SCENE

As canvassed in ch 2, the killing of a violent abuser has evolutionary underpinnings. Incapacitating someone who poses a physical threat is a time-honoured strategy.<sup>687</sup> It goes without saying that killing an abuser in self-defence would have had evolutionary advantages over non-lethal strategies – killing eliminates future threats from the abuser.<sup>688</sup>

In the environment of evolutionary adaptedness (EEA)<sup>689</sup>, contexts in which victims were likely to kill in self-defence were ones in which there was a lack of kin or allies close enough to come to assistance; the failure of other, non-lethal strategies to incapacitate the abuser; and a lack of any other options.<sup>690</sup> As this thesis demonstrates, these are precisely the conditions in which most victims who kill their abusers exist. Natural selection would also have favoured adaptations that led killers to catch their victims alone and by surprise, to reduce the chance that they themselves would be injured or killed.<sup>691</sup> This again is particularly apt in the case of victims of violence or coercion who kill, given the usual size and strength disparity between them and their abusers. Furthermore, of particular relevance to a self-defence strategy, is the notion of a cognitive system that “irrationally” overestimates the likelihood of violence, leading individuals to avoid it.<sup>692</sup> As Duntley and Shackelford argue, “[it] would be better, on average, to infer that a rival might want to kill you when they really do not, than to infer that the rival does not want to kill you when he actually does”.<sup>693</sup> On that basis, a cognitive bias towards overestimating homicidal intent

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<sup>687</sup> Joshua D Duntley and Todd Shackelford “Adaptations to avoid victimization” (2012) 17 *Aggress Violent Behav* 59 at 66.

<sup>688</sup> At 69.

<sup>689</sup> John Tooby and Leda Cosmides “Psychological Foundations of Culture” in Jerome H Barkow, John Tooby and Leda Cosmides (eds) *The Adapted Mind: Evolutionary Psychology and the Generation of Culture* (Oxford University Press, UK, 1992) at 69. See ch 2 for a fuller discussion.

<sup>690</sup> Duntley and Shackelford, above n 687, at 67.

<sup>691</sup> At 67.

<sup>692</sup> At 68.

<sup>693</sup> At 68.

is a psychological mechanism to avoid being killed. In New Zealand, a claim of self-defence requires an honest belief in a situation of imminent peril. This is a subjective test. As I will show in this chapter, courts often do not believe a woman when she claims she held such a belief. Evidence of this perceived cognitive “irrationality” may go some way to shore up women’s claims that they did honestly believe that they were at risk of serious bodily harm, notwithstanding that such a belief may seem unreasonable to observers.

Some of the elements of coercive control, as described in ch 2, can be seen in the lived realities of women charged with killing their abusers, in New Zealand and Australia. In *R v Wihongi*,<sup>694</sup> in addition to a history of violence against Wihongi, the deceased (who Wihongi killed by stabbing) was alleged to have taken Wihongi’s Accident Compensation payout for his own use. In *R v Wang*,<sup>695</sup> Xiao Jing Wang killed her violent husband after he threatened to kill her and her family and was trying to extort money from them. The attending police officer gave evidence at trial that Wang said, in reference to her deceased husband, that he was a “very bad man, make money trouble for me, I’m just feeling free”.<sup>696</sup> While there was some discussion about whether the police officer had mistaken the word “money” for “many”, arguably the distinction is irrelevant when considered in the context of the violent, coercive relationship. In *Wharerau v R*,<sup>697</sup> Wharerau stabbed her abusive partner at a time when he had followed her into a confined kitchen and was “really angry” with her. The stabbing followed immediately from an argument about the use of Wharerau’s phone. Wharerau then tried to use the phone to contact her cousin but her partner broke it, and threw it on the ground a number of times.<sup>698</sup> Similarly, in the Australian case *R v Kells (Ruling)*,<sup>699</sup> Jade Kells stabbed and killed her partner after he had stolen her money and mobile phones.<sup>700</sup> While the relationship between the two was characterised by violence by both parties, it is significant that, as noted above, coercive controlling violence is committed predominantly by men. Stark also argues that coercive control is gendered. In other words, it is exercised by men over women:<sup>701</sup>

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<sup>694</sup> *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775, (2011) 25 CRNZ 483.

<sup>695</sup> *R v Wang* [1990] 2 NZLR 529 (CA).

<sup>696</sup> At 532.

<sup>697</sup> *Wharerau v R* [2015] NZCA 299.

<sup>698</sup> Wharerau was convicted of manslaughter following a trial and sentenced to three years and two months’ imprisonment.

<sup>699</sup> *R v Kells (Ruling)* [2011] VSC 679.

<sup>700</sup> Kells was found guilty of manslaughter and sentenced to eight years’ imprisonment.

<sup>701</sup> Stark *Coercive control*, above n 686, at 377-378.



Women and men assault their partners in similar ways and with similar motives ... But I have never had a case that involved a female perpetrator of coercive control, and no such cases are documented in the literature. The asymmetry in coercive control reflects the asymmetric nature of sexual inequality, not the fact that women are less aggressive, controlling or domineering than men ... coercive control is also *about* gender.

Interestingly, the NZLC noted that in all of the 29 strangulation assaults studied by the New Zealand Family Violence Death Review Committee, the perpetrator was male.<sup>702</sup> This suggests, consistently with overseas findings, that strangulation, in particular, is a gendered assault.<sup>703</sup>

The NZLC observed that abusers do not strangle to kill but to show that they *can* kill. This makes strangulation a unique tool of control and coercion, often accompanied by threats to kill, which can traumatise victims even after the assault has ended.<sup>704</sup>

According to Stark, “coercive control” answers the question of why victims of violence become entrapped in relationships where ongoing abuse is “virtually inevitable”.<sup>705</sup>

Cognitive psychologists in the late 1970s and 1980s tried to capture what these women were experiencing by comparing it to “coercive persuasion”, brainwashing, and other tactics used with hostages, prisoners of war, kidnap victims and by pimps with prostitutes.<sup>706</sup>

## LEGAL LANDSCAPE

On the face of it, a victim of coercive control who kills her abuser does not deserve the same censure as, say, someone who shoots a bank teller in the head during the course of a robbery. This thesis is premised on the social fact that there are different degrees of moral culpability. For example, in mercy killings, the reduced degree of moral blameworthiness derives from altruistic motives. When young people kill, developmental immaturity may affect their capacity to reason and foresee the consequences of their conduct. When victims of coercive control kill their abusers, an element of self-preservation, even if not recognised by existing self-defence provisions, mitigates fault. Even someone who deliberately shoots a bank teller (as in the above example) is at a lesser degree of fault if they themselves had a gun pointed at their head. In other words, to be labelled as culpable, one must be able to freely choose to break the law. If the defendant’s choices are constrained or his or her will

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<sup>702</sup> Law Commission *Strangulation*, above n 684, at [2.14].

<sup>703</sup> At [2.18].

<sup>704</sup> At [2.16].

<sup>705</sup> Stark *Coercive control*, above n 686, at 12.

<sup>706</sup> At 12.

is overborne by the will of another, the moral fault of the defendant is, or at least may be, absent. The question this thesis attempts to address is how can, or should, the legal system accurately reflect these differing degrees of fault?

As discussed in ch 1, in a murder trial, the role of a jury is to make a decision on the facts, having been directed on the law by the judge. It must find an accused guilty if satisfied, beyond a reasonable doubt, that she committed the actus reus, accompanied by any one of the mens rea elements for murder (for example, intention to kill or intention to cause bodily injury that she knows is likely to cause death and is reckless as to that result).<sup>707</sup> If the prosecution proves that intent to kill or recklessness as aforesaid was present, and there is no available defence, a jury must convict of murder; any sympathy it may feel for the accused should not be taken into account in determining culpability. However, as identified in ch 1, there is evidence to suggest that this may not be how juries work in practice. This is particularly well demonstrated by a comparison of the following two New Zealand cases.

### *New Zealand*

#### *Dale Wickham*

On 10 October 2009 in West Auckland, New Zealand, Dale Wickham killed her husband, John, with one shotgun blast. Wickham, who suffers from multiple sclerosis, said she had been abused by John for years, and that on the night of his death he had thrown a bottle at her, attempted to throttle her, and told her he would “gut [her] like a fish”.<sup>708</sup> He had threatened to kill her with a brick and put her in the pool to make it look like an accident.<sup>709</sup> While the jury rejected Wickham’s claim of self-defence, it found her not guilty of murder but guilty of manslaughter on the apparent basis that the killing was accidental. This is despite the fact that Wickham called the police *before* going into her bedroom to get the shotgun and returning to the lounge to shoot John. In sentencing Wickham to 12 months home detention, Justice Ellis accepted that Wickham’s multiple sclerosis made her feel that

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<sup>707</sup> Crimes Act 1961, s 167.

<sup>708</sup> *R v Wickham* HC Auckland CRI-2009-090-010723, 20 December 2010 at [16].

<sup>709</sup> Edward Gay “Husband’s last words: ‘I’ll gut you like a fish’” *The New Zealand Herald* (online ed, Auckland, 13 October 2010).

fewer options were available to her in dealing with the situation she faced at the time of the killing.<sup>710</sup>

### *Jacqueline Wihongi*

A few months earlier, on 5 June 2009 in Napier, New Zealand, Jacqueline Wihongi fatally stabbed her former partner, Vivian Hirini. Wihongi had numerous “cognitive deficits”,<sup>711</sup> including those which flowed from a painkiller overdose at age 13. She was sexually assaulted at 14, gang-raped at 19, and was the victim of a home invasion by gang members, an incident in which she was assaulted with a full beer bottle in front of her children, leaving her physically scarred. Crucially, there was a history of abuse from Hirini. On the night of the killing both parties had been drinking and an argument developed between Wihongi and Hirini about money that Hirini was alleged to have taken from Wihongi’s ACC compensation. Wihongi said that Hirini demanded sex, which she refused. Wihongi was convicted of murder (she did not claim self-defence); therefore the jury must have found that she either intended to kill Hirini or that she intended to cause him an injury that she knew was likely to cause death.<sup>712</sup> At Wihongi’s sentencing the presumptive sentence of life imprisonment for murder was displaced due to her “mental impairments” outlined above, and she was sentenced to eight years’ imprisonment. This was uplifted on appeal to 12 years with a minimum period of imprisonment (MPI) of four years.

What are the moral and legal principles that underpin the disparate outcomes in these cases? At first glance it might appear that Wihongi’s failure to claim self-defence might have been an influential factor. However, while Wickham *did* claim self-defence, this was not accepted by the jury and so was not a factor in its verdict of manslaughter. In any event, the failure to raise the defence should not have precluded the Wihongi jury from considering its availability. Self-defence, under s 48 of the Crimes Act 1961, should be put to a jury where there is a credible or plausible narrative of it, even if it is not raised by the defendant.<sup>713</sup>

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<sup>710</sup> *R v Wickham*, above n 708. See also Edward Gay “Turbulent relationship ends in manslaughter” *The New Zealand Herald* (online ed, Auckland, 15 October 2010) and “Home detention for killing husband” *The New Zealand Herald* (online ed, Auckland, 20 December 2010).

<sup>711</sup> *R v Wihongi*, above n 694, at [94].

<sup>712</sup> Crimes Act 1961, s 167.

<sup>713</sup> *R v Tavete* [1988] 1 NZLR 428 (CA); *R v Wang*, above n 695.

It is apparent that the sentencing Judge, and even the Court of Appeal, treated Wihongi's vulnerabilities and her circumstances as relevant to sentencing. The Court of Appeal saw Wihongi as:<sup>714</sup>

... a battered defendant who has reacted in an extreme way to her abuser in circumstances where both the history of abuse and the offender's cognitive deficits have played a significant role in that extreme reaction arising.

Clearly, however, those features did not hold much sway with the jury in finding her guilty of murder.

I must stress that the problem with these cases is not that Wickham deserved to be convicted of murder, or that she deserved a harsher punishment. The problem lies in the jury's application of the law in reaching the conclusion that she did not have the relevant intention for murder. There was no evidence that the gun discharged accidentally so on the face of it, it would appear there was no reasonable foundation for their verdict that Wickham did not intend or at least foresee death, when shooting her husband. What is concerning, from a justice point of view, is the question of whether another defendant (such as Wihongi), in similar circumstances but with a different jury, would have been acquitted of murder. As noted in ch 1, there are differences in the material facts between these two cases. But is the moral blameworthiness of the two accused sufficiently distinct to warrant different verdicts and wildly disparate sentences? Ultimately the real problem with these cases is that they signal that the actual consequences for a defendant depend upon the caprice of the jury, or the enlightenment or otherwise of the judge, rather than the strict application of legal principles.<sup>715</sup> What happened in *Wickham* can be seen as a stark example of jury nullification. Recently in New Zealand it has also been suggested that lawyers are appealing to juries to consider provoking conduct in coming to its verdict.<sup>716</sup> Therefore, it would seem that provocation claims are still being heard in murder cases, even though provocation as a defence has been repealed as of 7 December 2009 by the Crimes (Provocation Repeal) Amendment Act 2009.

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<sup>714</sup> *R v Wihongi*, above n 694, at [94].

<sup>715</sup> See, for example, *R v Falls* SC Queensland, 3 June 2010 and the analysis in Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 38 *Melb Univ Law Rev* 666.

<sup>716</sup> See Rob Kidd "Provocation defence still being used" *The New Zealand Herald* (online ed, Auckland, 27 April 2016).

In any event, these issues aside, the legal system has always struggled to deal with women who kill in the context of ongoing violence or coercive control. In New Zealand, despite there being several instances of this type of killing, no systematic approach has developed. Early cases relied upon battered woman syndrome and its effects on the accused's state of mind as relevant to self-defence or provocation.<sup>717</sup> In *R v Oakes*,<sup>718</sup> referred to in ch 1, the defendant killed her long-time partner, Doug Gardner, by giving him an overdose of sleeping pills. She then buried him in her back garden. In her defence it was argued that she suffered from battered woman syndrome, brought about by years of physical and verbal violence perpetrated against her by Gardner. The Court acknowledged the reality of "the syndrome" and its effects.<sup>719</sup> The expert called for the defence regarded the significant aspect of the syndrome as its effect on woman's sense of judgment, vulnerability and ability to reason.<sup>720</sup> The Court noted that evidence that the defendant suffered from battered woman's syndrome makes it more plausible that she could have been mistaken about how dangerous her situation was and since reasonableness of force is based on the circumstances as the accused believed them to be, a pre-emptive strike might therefore be justified.<sup>721</sup> However, the Court also observed:<sup>722</sup>

It hardly needs to be said that a battered woman has no more right to kill or injure than any other person, man or woman. And so that fact that a woman suffers from the syndrome is not in itself a defence; the syndrome is not in itself a justification for the commission of a crime.

Oakes was convicted of murder and sentenced to life imprisonment. She was granted early parole after eight years with the Parole Board recognising the need for flexibility in cases involving battered women.<sup>723</sup> In *R v Wang*,<sup>724</sup> Wang killed her husband, Jing Wah Li, while he was asleep in a drunken stupor. Wang had tied Li up with some bathrobe ties, tried to strangle him, stabbed him several times in the stomach, and finally put a pillow over his face. There was evidence of a history of violence from Li, and on the evening in question he had threatened to kill Wang and her sister and was attempting to extort money from her family in Hong Kong. Wang was convicted of manslaughter on the basis of

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<sup>717</sup> See, for example, *R v Wang*, above n 695; *R v Oakes* [1995] 2 NZLR 673 (CA) and *R v Gordon* (1993) 10 CRNZ 430 (CA).

<sup>718</sup> *R v Oakes*, above n 717.

<sup>719</sup> At 675.

<sup>720</sup> At 676.

<sup>721</sup> At 676.

<sup>722</sup> At 675.

<sup>723</sup> "Oakes wins chance of early parole" *The New Zealand Herald* (online ed, Auckland, 12 June 2001).

<sup>724</sup> *R v Wang*, above n 695.

provocation, but she appealed against conviction on the basis that the trial Judge erred in not putting self-defence to the jury. Victims of violence or coercion who kill their abusers will often struggle to raise a credible narrative that the force used was necessary or reasonable. Indeed, Wang's claim of self-defence was rejected on the grounds that.<sup>725</sup>

There was no immediate danger to render causing [her husband's] death a reasonable course of action.

The principle in *Wang* – that an imminent threat of serious harm is required – is still good law in New Zealand, meaning that the defence will not usually be available in the context of coercive control as killings in that context are often pre-emptive. While a pre-emptive strike is not necessarily fatal to self-defence, the court will take into account any options it believes the accused had to seek help in other ways.

Ultimately, reliance on battered woman syndrome meant the focus was on *physical* harm to the accused which diverted attention away from potentially more significant consequences of the abuse and the nature of the coercive relationship as a whole. The problem is compounded now by the fact that provocation is no longer a defence in New Zealand, and none of the other defences to culpable homicide are likely to be seen as relevant, even if they can prima facie be relied upon. So, when a victim of violence kills her abuser, a conviction for murder is a real possibility unless a sympathetic jury finds them guilty of manslaughter, as in the *Wickham* case, or they are charged with or plead guilty to a lesser offence. In any event, there is no consistent approach that can be taken in these cases that can accurately reflect the diminished degree of moral blame involved.

### ***Canada***

In *R v Lavallee*,<sup>726</sup> where the defendant shot her abusive partner in the back of the head as he was leaving the room, the Supreme Court stated that waiting until a threat was actualised would “in the words of an American court, be tantamount to sentencing her to ‘murder by installment’”.<sup>727</sup> The Court in *Lavallee* construed the “imminence” requirement much more broadly than the New Zealand Court of Appeal in *Wang*, to effect that a threat that may not be immediate, may still be imminent.

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<sup>725</sup> At 537.

<sup>726</sup> *R v Lavallee* [1990] 1 SCR 852.

<sup>727</sup> At 883 per Wilson J, citing *State v Gallegos* 719 P2d 1268 (NM 1986) at 1271.

In terms of coercive control evidence, the 2008 trial of Teresa Craig in Ottawa, Ontario was the first of its kind in Canada in which such evidence was called in support of self-defence.<sup>728</sup> The killing of Craig’s husband in that case was remarkably similar to that in *R v Wang*<sup>729</sup> – the deceased was asleep in a drunken stupor; Craig put a pillow over the deceased’s face then retrieved a large butcher’s knife from the kitchen and stabbed the deceased four times in the chest.<sup>730</sup> Craig was from Malaysia and at the time of the killing was “socially, geographically and economically isolated from everyone except the deceased and [their son]”.<sup>731</sup> However, there was a complicating factor in terms of a self-defence claim: while there was ample evidence that the deceased psychologically and verbally abused Craig, there was no serious physical violence perpetrated by the deceased toward her. But the deceased did have a bad temper and he could be violent, especially when drinking, and Craig was afraid of him.

Craig was charged with first degree murder. She claimed she acted in self-defence. Evan Stark gave evidence for the defence on coercive control and explained that “physical violence may or may not play a significant role in the abuser’s control over his abused partner”.<sup>732</sup> Stark gave his opinion that Craig was under the deceased’s coercive control, which included emotional and psychological abuse, economic and social isolation, “low-level” physical abuse (shoving her out of the way, for example), intimidation, and threats to take her son away.

The trial judge refused to put self-defence to the jury on the basis that there was “no air of reality”<sup>733</sup> to Craig’s self-defence claim, but a defence of absence of mens rea was put to the jury and it returned a verdict of not guilty of murder but guilty of manslaughter. Craig appealed against conviction and sentence.

The Court of Appeal for Ontario set out the three elements for self-defence under the then s 34(2) of the Canadian Criminal Code:<sup>734</sup>

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<sup>728</sup> *R v Craig* 2011 ONCA 142 (CanLII), 269 CCC (3d) 61; Elizabeth Sheehy “Expert evidence on coercive control in support of self-defence: The trial of Teresa Craig” (2017) 18(1) *Criminol Crim Justice* 100 at 101.

<sup>729</sup> *R v Wang*, above n 695.

<sup>730</sup> *R v Craig*, above n 728, at [4].

<sup>731</sup> At [9].

<sup>732</sup> At [26].

<sup>733</sup> Essentially the same requirement as the “credible narrative” or “plausible narrative” test under New Zealand’s self-defence provision.

<sup>734</sup> *R v Craig*, above n 728, at [33] citing *R v Pétel* [1994] 1 SCR 3 at 12-13.

- an unlawful assault, or at least a reasonable belief by the accused that he or she was being assaulted;
- a reasonable apprehension of risk of death or grievous bodily harm; and
- a reasonable belief that it is not possible to preserve one's self from harm except by killing the perpetrator of the assault.

The Court of Appeal observed that self-defence “is a justification for what would otherwise be culpable homicide, based on the necessity of self preservation”,<sup>735</sup> but echoing the New Zealand Court of Appeal in *R v Oakes*<sup>736</sup>, noted that not every person who kills an abuser is justified in doing so:<sup>737</sup>

A person who kills another to escape from a miserable life of subservience to that person does not act in self-defence absent reasonably perceived threats of significant physical harm and reasonably held beliefs that the killing is necessary to preserve one's self from significant physical harm or death.

Like New Zealand's self-defence provision, self-defence in the then s 34(2) had both a subjective and objective element. Whether the defendant actually apprehended the risk of death or grievous bodily harm was a subjective inquiry into the mind of the defendant at the relevant time. That apprehension must be reasonable in the circumstances as the defendant perceived them to be.<sup>738</sup> It was the absence of the subjective belief in the instant case which led to the failure of Craig's self-defence claim:<sup>739</sup>

There is nothing in the appellant's testimony or in her statements to the neighbours, the 911 operator and the police to suggest that she apprehended death or grievous bodily harm at the hands of the deceased, or that she believed she had to kill him to save herself.

Counsel for the appellant submitted that the trial Judge had been wrong to limit the inquiry into Craig's state of mind to her own evidence, and should have examined the evidence as a whole, especially that of Evan Stark. The Court of Appeal, however, held that the trial Judge did consider other evidence, including the expert evidence “particularly as it related to the *objective* components of the defence”.<sup>740</sup> This suggests, therefore, that in the view of the Court of Appeal, Stark's evidence was not, in fact, particularly relevant to the subjective test.

The Court of Appeal ultimately agreed with the trial Judge's finding that there was no air of reality to Craig's assertion that when she killed her husband she apprehended that he

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<sup>735</sup> At [35].

<sup>736</sup> *R v Oakes*, above n 717, at 675.

<sup>737</sup> *R v Craig*, above n 728, at [35].

<sup>738</sup> At [36].

<sup>739</sup> At [38].

<sup>740</sup> At [43] (emphasis added).



would kill her or cause her grievous bodily harm or that she reasonably believed she had to stab him in self-preservation.

Sheehy identified from the transcripts from Craig’s trial the prosecution’s attempts to shut down self-defence by excluding coercive control evidence, but suggests that even though self-defence was kept from the jury in this case, Stark’s evidence “did serve an educative function regarding men’s use of coercive control to entrap women”.<sup>741</sup> Sheehy also suggests that the changes to Canada’s self-defence law may make it easier for victims of violence who kill to use coercive control evidence in the future.<sup>742</sup> Reforms were introduced in Canada in 2011 to the effect that a jury must engage in a contextual analysis of the reasonableness of self-defence claims, and the ruling in *R v Lavallee*, to the effect that imminence is a factor rather than a requirement, has been codified.<sup>743</sup> The new section provides:<sup>744</sup>

- 34 (1) A person is not guilty of an offence if
- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
  - (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
  - (c) the act committed is reasonable in the circumstances.
- ...
- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
- (a) the nature of the force or threat;
  - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
  - (c) the person’s role in the incident;
  - (d) whether any party to the incident used or threatened to use a weapon;
  - (e) the size, age, gender and physical capabilities of the parties to the incident;
  - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
  - (f.1) any history of interaction or communication between the parties to the incident;
  - (g) the nature and proportionality of the person’s response to the use or threat of force; and
  - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
- ...
- Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that

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<sup>741</sup> Sheehy “The trial of Teresa Craig”, above n 728, at 101.

<sup>742</sup> At 113.

<sup>743</sup> Criminal Code, RSC 1985, c C-46, s 34; see also Vanessa MacDonnell “The New Self-Defence Law: Progressive Development or Status Quo” (2013) 92 Can Bar Rev 301 at 317.

<sup>744</sup> Criminal Code, RSC 1985, c C-46, s 34.

constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

This new iteration no longer requires that a defendant reasonably believed they faced death or serious bodily harm or reasonably believed they had no other alternative, for self-defence to be put to the jury. Rather the non-exhaustive list of factors in s 34(2) are relevant to the question of reasonableness, and may make it possible to acquit a defendant who kills pre-emptively in the way that many victims of violence do.<sup>745</sup> However, MacDonnell argues that the new statutory approach has its advantages in that it is likely to produce more contextualised judgments, but it would have been helpful for some contextual elements, such as race, to be explicitly mentioned.<sup>746</sup> MacDonnell also makes the point that bias and discrimination on the part of jurors still exist.<sup>747</sup> Therefore, jury nullification is still a live risk.

### ***South Africa***

In South Africa, where domestic violence and coercive control are pervasive “private defence” incorporates a range of defences in which a private individual (not a police officer or public official) uses force to defend his or her legal interests. Private defence of a person allows the use of force to defend against an unlawful attack, provided certain conditions are met. These are: an unlawful attack or threat thereof; which threatens some legally protected interest (for example, human life, physical or sexual integrity); the attack must be in progress or imminent; the use of force must be necessary; and the use of force must be reasonable.<sup>748</sup> Despite the imminence requirement, in *S v Engelbrecht*<sup>749</sup> Satchwell J sought to invoke the *Lavallee* approach to circumvent it. In *Engelbrecht*, the defendant killed her abusive partner while he slept.<sup>750</sup> In a more recent case, *Steyn v S*<sup>751</sup>, where the defendant shot her abusive partner, who was armed with a knife, the trial Court found her guilty of murder because she acted unreasonably in leaving a locked bedroom and therefore placed herself in a position of danger in which she was forced to use the pistol. The

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<sup>745</sup> Sheehy “The trial of Teresa Craig”, above n 728, at 113.

<sup>746</sup> Vanessa MacDonnell, above n 743, at 321.

<sup>747</sup> At 323.

<sup>748</sup> See Gerhard Kemp et al *Criminal Law in South Africa* (Oxford University Press, Southern Africa, 2012) at 77-79.

<sup>749</sup> *S v Engelbrecht* 2005 2 SACR 41 (W).

<sup>750</sup> While Justice Satchwell would have acquitted the defendant on the ground of private defence, the two assessors found that she had failed to act reasonably. See Elizabeth A Sheehy *Defending battered women on trial: lessons from the transcripts* (UBC Press, Canada, 2014) at 377.

<sup>751</sup> *Steyn v S* (105/2009) [2009] ZASCA 152.

Supreme Court of Appeal did not rely on any overseas authorities, but overturned her conviction, noting that it was “necessary in such circumstances to ‘adopt a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence’”.<sup>752</sup>

### ***England and Wales***

In England and Wales until 2010, the two defences potentially available to victims of violence who kill their abusers were diminished responsibility and provocation, both partial defences which reduced the defendant’s culpability from murder to manslaughter.<sup>753</sup> The elements of diminished responsibility have already been canvassed in ch 3.<sup>754</sup> Perhaps in England and Wales the most well-known diminished responsibility case in the context of domestic violence is *R v Ahluwalia*<sup>755</sup>. The defendant, Kiranjit Ahluwalia, was in an arranged marriage. She killed her husband by setting fire to the room in which he slept. The context for the killing is summarised in the judgment:<sup>756</sup>

The appellant had suffered violence and abuse from the deceased from the outset of the marriage. He was a big man; she is slight. Her complaints of violence were supported by entries in her doctor's notes. Thus, in October 1981, there is a record of her being hit three or four times on the head with a telephone and thrown to the ground. In September 1983, a note states she was 'pushed' by her husband whilst pregnant and sustained a bruised hand. The next month she had a broken finger due to another argument. She made attempts at suicide in 1983 and again in 1986. The Croydon County Court granted her an injunction to restrain the deceased from hitting her in 1983. In 1986 the deceased abused the appellant and tried to run her down at a family wedding. She obtained her second injunction from the court after the deceased had held her throat and threatened her with a knife. He threatened to kill her and threw a mug of hot tea over her. Despite the court order, the deceased continued his violence, which intensified after January 1989.

At trial Ahluwalia claimed that she did not intend to kill or cause really serious harm to her husband, simply to cause him pain. She also claimed provocation, relying upon the history of abuse perpetrated against her by the deceased, which had culminated on the night of the killing in the deceased threatening to burn Ahluwalia with a hot iron and to beat her the following morning if she did not pay him money he had demanded from her. These threats were compounded by the fact that the deceased rebuffed all of Ahluwalia’s attempts to discuss their relationship and told her that their marriage was over. At trial, the jury was directed that the defence of provocation was only available if it was satisfied that there had

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<sup>752</sup> *Steyn v S*, above n 751, at [24] citing Holmes JA in *S v Ntuli* 1975 (1) SA 429 (A) at 437.

<sup>753</sup> Cornford “Mitigating Murder” (2016) 10 Crim Law and Philos 31 at 32.

<sup>754</sup> See ch 3.

<sup>755</sup> *R v Ahluwalia* [1992] 4 All ER 889 (Crim App).

<sup>756</sup> At 892.

been “a sudden and temporary loss of self-control on her part as result of acts which would have caused a reasonable person having her characteristics as a married Asian woman to lose her self-control”.<sup>757</sup> She was convicted of murder and sentenced to life imprisonment.

On appeal to the Court of Appeal, Criminal Division, it was held that the trial Judge’s directions to the jury on provocation were not in error. However, the Court admitted “fresh”<sup>758</sup> evidence that Ahluwalia was suffering from a “major depressive disorder” at the time of the killing. The Court also considered the evidence of Ahluwalia’s strange behaviour on the night of the fire, which included that she stood inside the locked and burning house with her son, saying that she was waiting for her husband. She eventually handed her son out of a window to witnesses then emerged herself. She was said to have “stood staring at the blazing window with a glazed expression”.<sup>759</sup> The Court took the view that had the fresh evidence been relied upon at trial, there “may well have been an arguable defence”<sup>760</sup> of diminished responsibility. Ahluwalia’s conviction was quashed, and a new trial ordered. Ahluwalia was subsequently convicted of manslaughter on the basis of diminished responsibility and was sentenced to time served.

That Ahluwalia was subjected to coercive control from the deceased is painfully obvious from a letter she had written to him after he left her for about three days a few weeks prior to the killing. As noted by Lord Taylor of Gosforth CJ, in that letter “she made a number of self-denying promises of the most abject kind”.<sup>761</sup> The letter read:<sup>762</sup>

‘Deepak, if you come back I promise you—I won’t touch black coffee again, I won’t go town every week, I won’t eat green chilli, I ready to leave Chandikah and all my friends, I won’t go near Der Goodie Mohan’s house again, Even I am not going to attend Bully’s wedding, I eat too much or all the time so I can get fat, I won’t laugh if you don’t like, I won’t dye my hair even, I don’t go to my neighbour’s house, I won’t ask you for any help.’

Subsequently the law on both diminished responsibility and provocation has changed by virtue of the Coroners and Justice Act 2009 (UK). Diminished responsibility has been redefined, as set out in ch 3, although the changes appear to be largely cosmetic, perhaps apart from the requirement that the abnormality of mental functioning arose from a recognised medical condition. The new defence replacing provocation – partial defence to

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<sup>757</sup> At 889.

<sup>758</sup> The evidence was available before the trial and the Court of Appeal said that it was unclear how this potentially important material was overlooked or not further pursued at the trial.

<sup>759</sup> *R v Ahluwalia*, above n 755, at 893.

<sup>760</sup> At 900.

<sup>761</sup> At 892.

<sup>762</sup> At 892.

murder: loss of control – is a more significant revision.<sup>763</sup> Section 54 of the Coroners and Justice Act 2009 (UK) provides:

- (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
  - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
  - (b) the loss of self-control had a qualifying trigger, and
  - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
- (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55 of the Coroners and Justice Act 2009 provides for the meaning of “qualifying trigger”:

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
  - (a) constituted circumstances of an extremely grave character, and
  - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger—
  - (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
  - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
  - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

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<sup>763</sup> Cornford, above n 753, at 32.

- (7) In this section references to “D” and “V” are to be construed in accordance with section 54.

Herring argues that the new loss of control defence is not simply an amended version of provocation: “the new defence has a significantly different philosophical underpinning”.<sup>764</sup> Although the new defence, like provocation, requires that the defendant’s act results from a loss of self-control, s 54 now also requires that the loss of self-control had one or both of two specific “qualifying triggers” (s 54(1)(b)): “fear of serious violence from V against D or another identified person” (s 55(3)) and/or “a thing or things done or said (or both) which ... constituted circumstances of an extremely grave character, and ... caused D to have a justifiable sense of being seriously wronged” (s 55(4)).<sup>765</sup> According to Herring, “[t]he new defence moves from a defence based on ‘angry loss of self-control’ to one based on righteous indignation or moral outrage”.<sup>766</sup>

Section 54 relies upon an objective test: whether “a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D” (s 54(1)(c)). Arguably, however, the inclusion of consideration of the defendant’s circumstances imports an element of subjectivity into the test. Under s 55(6)(c), in determining whether an act is a qualifying trigger, sexual infidelity must be disregarded. At first glance this might suggest that responding to sexual infidelity is incompatible with a defence of loss of control, but the Court of Appeal, Criminal Division has held that:<sup>767</sup>

... where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it.

It is of significant note that, by virtue of s 54(2), the loss of control need not be sudden. This is particularly salient in the context of victims of coercive control who usually kill, not in the heat of the moment, but at a time when their abuser is otherwise incapacitated (for example, asleep or drunk, or both).

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<sup>764</sup> Jonathan Herring “The Serious Wrong of Domestic Abuse and the Loss of Control Defence” in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, England, 2011) at 66.

<sup>765</sup> Cornford, above n 753, at 32.

<sup>766</sup> Herring, above n 764, at 66, citing Susan Edwards “Anger and Fear as Justifiable Preludes for Loss of Self-Control” (2010) 74 JCL 223.

<sup>767</sup> *R v Clinton; R v Parker; R v Evans* [2012] EWCA Crim 2 (Crim App) at [39].

Herring suggests that in the context of victims of domestic violence who kill, self-defence, diminished responsibility, or loss of control relying on the violence qualifying trigger in s 55(3) may be the more suitable defences. He also argues that such defendants should be able to claim loss of control on the basis of a “serious wrong”, relying upon s 55(4).<sup>768</sup> Herring analysed the question of what is the wrong in cases of domestic violence. In doing so, he identifies some specific wrongs associated with domestic violence, one of which is domestic abuse as coercive control.

On 1 March this year, Georgina (Sally) Challen was granted leave to appeal her murder conviction in the death of her husband. Her husband had, over a number of years, engaged in extramarital affairs. In 2009 Challen left him and bought her own property. However, by 2010 she sought a reconciliation with her husband and he agreed, but only on the basis she sign a post-nuptial agreement. In the week before his death she saw on his Facebook page an entry from a woman whom he had arranged to meet on Sunday 15 August. On Saturday 14 August Challen and her husband spent the morning clearing out their house and garage but then he sent her out of the house to get him some lunch. While she was away, he rang his female friend and cancelled their meeting on the Sunday. When Challen returned she noticed that the phone had been moved. She called the last dialled number and a woman picked up. She then asked her husband whether she could see him the following day, to which he said, “don't question me”. According to Challen that was how he often spoke to her. She then prepared a meal and while he ate, she repeatedly hit him on the head with a hammer which she had taken to the house in her handbag.<sup>769</sup>

Challen’s grounds of appeal relied on new psychiatric evidence and evidence on coercive control. Unfortunately, the reported decisions do not clearly articulate the coercive nature of the relationship between Challen and her husband. However, Challen’s sons have spoken in support of her appeal. One son was quoted as saying that his father was “morally corrupt” and always trying to undermine his mother. He discouraged her friendships and tried to control her every move. He said his father was “systematically trying to break her down, trying to mould her into what he wanted her to be and for her to never answer back”.<sup>770</sup> At trial, Challen’s defence counsel had relied on diminished responsibility, which

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<sup>768</sup> Herring, above n 764, at 65.

<sup>769</sup> *R v Challen* [2011] EWCA Crim 2919 (Crim App) at [3]-[8].

<sup>770</sup> Fiona Hamilton “My mum killed my dad. It was his fault” *The Times* (online ed, London, 17 February 2018).

was not accepted by the jury. In seeking leave to appeal, Challen’s counsel argued that “[i]f the state of scholarship and learning had been at trial, as it now is . . . then provocation was at the very least likely to have been advanced”.<sup>771</sup> At the time of Challen’s trial, there was little recognition of the long-term psychological consequences of abuse. A more recent development has been the criminalisation, in some circumstances, of coercive controlling behaviour, by virtue of s 76 of the Serious Crime Act 2015 (UK) which creates the offence of “[c]ontrolling or coercive behaviour in an intimate or family relationship”. The offence is constituted by repeatedly or continuously engaging in coercive or controlling behaviour towards someone to whom the offender is “personally connected”, having a serious effect on the victim where the offender “knows or ought to know that the behaviour will have a serious effect on” the victim. Personal connection includes intimate personal relationships, where the parties live together and are members of the same family or have previously been in an intimate personal relationship. The section does not include people who have responsibility for the victim for the purposes of pt 1 of the Children and Young Persons Act 1933 (UK) and the victim is under 16.

Under subs (4) behaviour has a “serious effect” if it causes the victim to fear, on at least two occasions, that violence will be used against B; or it causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities. “Family member” is broadly defined.

It is a defence to show that in engaging in the behaviour in question, the defendant believed that they were acting in the victim’s best interests and the behaviour was, in all the circumstances, reasonable. The defendant is to be taken to have shown these facts if there is sufficient evidence to raise an issue with respect to them, and the contrary is not proved beyond reasonable doubt. This defence does not apply to behaviour that causes the victim to fear that violence will be used against her.

Sheehy observes that the experience of the United Kingdom with this new offence will be instructive for other jurisdictions.<sup>772</sup> However, Walklate and others question whether

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<sup>771</sup> At [2].

<sup>772</sup> Sheehy “The trial of Teresa Craig”, above n 728, at 13.



criminalising coercive control is the right response to intimate partner violence. They argue, amongst other things, that:<sup>773</sup>

the extent to which the concept of coercive control can effectively capture the diversity of women's lives, the different forms and dynamics of violence(s) and the different levels of harms incurred, is open to debate.

Those authors question whether the concept of coercive control, which is meaningful in clinical practice, can adequately be translated into the realm of the criminal law.<sup>774</sup> One of the many difficulties here is that in the complexities of intimate relationships there is no consensus on what is “normal”, and difficulties abound about how and where we draw the line between what is benign behaviour in those relationships, such as wanting to know what the other party is doing, and behaviour which can properly be called surveillance or stalking.<sup>775</sup>

### ***Scotland***

Scots law contains two partial defences to murder: provocation and diminished responsibility. The origins of the diminished responsibility defence have been discussed in ch 3.

In *Galbraith v HM Advocate (No 2)*<sup>776</sup>, a case concerning the common law defence rather than the statutory provision, the defendant shot her husband while he lay in bed. She gave evidence that he had abused her over several years, including subjecting her to violent sexual assaults of various kinds. She said that he had threatened to kill her if she did not acquiesce, and that she was afraid that he would kill her. She said she killed the deceased because “she could not think of any other way in which to bring her tribulations to an end”.<sup>777</sup> The defendant pleaded diminished responsibility and defence counsel led evidence from two psychologists that the defendant had been suffering from post-traumatic stress disorder. Neither of these witnesses were medically qualified. The defendant was initially convicted of murder but appealed. One of the grounds of the appeal was that the trial Judge had instructed the jury that a plea of diminished responsibility requires evidence

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<sup>773</sup> Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch “Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories” (2018) 18(1) *Criminol Crim Justice* 115 at 117.

<sup>774</sup> At 117.

<sup>775</sup> At 119.

<sup>776</sup> *Galbraith v HM Advocate (No 2)* 2001 SLT 953 (HCJ).

<sup>777</sup> At [4].

of a *mental disease*. The appeal was allowed, with the High Court of Justiciary observing that.<sup>778</sup>

... many organic disorders in some way affect the operation of the brain and so lead to some mental abnormality which could be of relevance in the present context. For instance, head injuries and brain tumours may affect the patient's consciousness and lead to personality changes of various kinds. Strokes may result in patients becoming more aggressive. Disorders of the thyroid are known to have mental manifestations, while hypoglaecemia is well known to affect people's behaviour, sometimes making them disinhibited and aggressive. Many drugs administered for therapeutic purposes are known to have side effects of various kinds: some will induce drowsiness or confusion, while others will lead to euphoria and still others to depression. The mental abnormalities caused in these different ways could well impair an accused's ability to determine or control his acts and omissions, just as much as the conditions springing from the causes specified in the earlier case law. But a lay person, at least, might hesitate to say that someone suffering from one of these conditions was suffering from a 'mental disease' or 'mental illness'. This confirms that these terms may indeed be too narrow to describe the range of possible conditions in respect of which the doctrine of diminished responsibility may apply.

The Court concluded that, given that external causes could give rise to a mental abnormality for the purposes of diminished responsibility, there was no reason why non-medically trained witnesses such as the psychologists in the present case, could not give evidence of such conditions. A new trial was ordered, at which the defendant pleaded guilty to culpable homicide (the Scottish equivalent of New Zealand's manslaughter).

In a case dealing with failure to protect a child from violence perpetrated by her partner – *Bone v HM Advocate*<sup>779</sup> – there was evidence about the size and strength disparities between Bone and her partner, and Bone suffered from personality disorders and possessed a low level of intellectual functioning. She was afraid of her partner and was isolated both socially and geographically. This evidence was said to be relevant to both diminished responsibility and the reasonableness of the alleged failure to protect.

In terms of provocation in Scots law, it is said that there are now two different forms of provocation – provocation by violence and provocation by infidelity.<sup>780</sup> Provocation by violence is likely to be the most apt in the context of victims of violence who kill, in which case there must be provocation by violence, followed by a loss of self-control, and “[t]here must be a reasonable or proportionate relationship between the conduct amounting to the

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<sup>778</sup> At [52].

<sup>779</sup> *Bone v HM Advocate* 2005 SCCR 829 (HCJ).

<sup>780</sup> James Chalmers “Partial Defences to Murder in Scotland: An Unlikely Tranquility” in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, England, 2011) at 178.

provocation and the accused's act".<sup>781</sup> The defendant must also have reacted in the heat of the moment – in other words, the provocation must be recent.<sup>782</sup> As with other jurisdictions, this is likely to prove a stumbling block for victims of violence who kill.

Although diminished responsibility and provocation are the only two formal partial defences to murder in Scotland, it has been suggested that there are six “unofficial categories” in which only culpable homicide (essentially manslaughter) is charged even though there is evidence upon which a murder charge could be pursued. These categories are infanticide, euthanasia, suicide pacts, necessity or coercion, killings “in excess of duty” and homicide by omission.<sup>783</sup> As these involve the exercise of prosecutorial discretion, they are not firm categories.<sup>784</sup> Of particular relevance for present purposes is the fourth category – necessity or coercion – but as Chalmers points out, Scottish courts have not affirmed a defence of necessity or coercion and in *Collins v HM Advocate* the trial Judge directed the jury that coercion was not available.<sup>785</sup>

As in England and Wales, a new offence dealing with abusive behaviour has just been enacted in Scotland, under the Domestic Abuse (Scotland) Act 2018:

- 1 Abusive behaviour towards partner or ex-partner
- (1) A person commits an offence if—
    - (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
    - (b) both of the further conditions are met.
  - (2) The further conditions are—
    - (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
    - (b) that either—
      - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
      - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
  - (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

Section 2 of the Act defines abusive behaviour:

- 2 What constitutes abusive behaviour
- (1) Subsections (2) to (4) elaborate on [section 1\(1\)](#) as to A’s behaviour.
  - (2) Behaviour which is abusive of B includes (in particular)—

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<sup>781</sup> *Robertson v HM Advocate* 1994 JC 245 (HCJ) at 249.

<sup>782</sup> At 249.

<sup>783</sup> Chalmers “Partial Defences”, above n 780, at 169, citing Gerald Gordon *The Criminal Law of Scotland* (2<sup>nd</sup> ed, W Green & Son Ltd/Scottish Universities Law Institute, Edinburgh, 1978) at [25.02].

<sup>784</sup> At 169.

<sup>785</sup> At 170; *Collins v HM Advocate* 1991 SCCR 898 (HCJ) at 902.

- (a) behaviour directed at B that is violent, threatening or intimidating,
- (b) behaviour directed at B, at a child of B or at another person that either—
  - (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
  - (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
- (3) The relevant effects are of—
  - (a) making B dependent on, or subordinate to, A,
  - (b) isolating B from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring B’s day-to-day activities,
  - (d) depriving B of, or restricting B’s, freedom of action,
  - (e) frightening, humiliating, degrading or punishing B.
- (4) In subsection (2)—
  - (a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
  - (b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

While the provisions do not refer explicitly to coercive control, the effects of abusive behaviour reflect a number of features of coercive and controlling behaviour such as isolating the victim, controlling their day-to-day movements, and frightening the victim.

The Act makes a number of associated changes to criminal procedure, evidence and sentencing in domestic abuse cases.<sup>786</sup> These include prohibiting a defendant from personally conducting the defence and the admissibility of certain expert evidence relating to the victim.<sup>787</sup>

The Scottish offence, while not relying on the concept of coercive control, gives a more expansive definition of abusive behaviour than the English and Welsh offence does in defining coercive and controlling behaviour. As noted below,<sup>788</sup> abusive and coercive behaviour is context-specific and potentially difficult to delimit on this basis. For this reason, it might have been preferable for the Scottish provision to make the list of relevant effects non-exhaustive.

### *Australia*

In some Australian jurisdictions attempts have been made to reform the law around self-defence to better provide for the realities of domestic violence victims who kill. These initiatives include removing the imminence requirement for self-defence; the creation of new offences; and reform of, or creation of, partial defences; and facilitating the reception of “family violence” evidence. Despite these reforms, there is no unified approach but

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<sup>786</sup> Domestic Abuse (Scotland) Act 2018 (explanatory note) at [3].

<sup>787</sup> At [7].

<sup>788</sup> See below at 160.

rather a “disparate array of defences and partial defences, with different technical requirements”.<sup>789</sup>

### *Defensive homicide*

In 2005 the Victorian government introduced a new offence of defensive homicide.<sup>790</sup> It was suggested that the new offence would give a jury and sentencing judge more options than the existing “all or nothing” mechanisms for self-defence.<sup>791</sup> Section 9AD of the Crimes Act 1958 (Vic), entitled “Defensive homicide” provided that:

[a] person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.

Section 9AC provided that:

[a] person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury.

Section 9AD created a new layer of legal and moral culpability sitting between murder and manslaughter.<sup>792</sup> The new offence attracted a lot of criticism, given that the overwhelming majority of offenders convicted of it were male. Of particular concern was the conviction of Luke Middendorp for defensive homicide, for killing his estranged partner. Evidence was given that Middendorp had been violent to the victim, Jade Bownds, on a number of occasions including incidents in which he had smashed her mobile phone; hit her and forced her to withdraw money from her account; told her that he would kill her if she tried to leave; and tried to strangle her<sup>793</sup> – all of the hallmarks of coercive control. Middendorp was almost twice the size of Bownds, and there was a domestic violence order against him to protect Bownds.<sup>794</sup>

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<sup>789</sup> Sheehy and others “Battered women”, above n 680, at 384.

<sup>790</sup> Crimes (Homicide) Act 2005 (Vic), s 9AD.

<sup>791</sup> Office of the Attorney-General “Hulls Announces Major Reform to Homicide Laws” (media release, 4 October 2005) cited in Kate Fitz-Gibbon and Sharon Pickering “Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond” (2012) 52 *Brit J Criminol* 159 at 168.

<sup>792</sup> Madeleine Ulbrick, Asher Flynn and Danielle Tyson “The abolition of defensive homicide: a step towards populist punitivism at the expense of mentally impaired offenders” (2016) 40 *Melb Univ Law Rev* 324 at 326.

<sup>793</sup> *R v Middendorp* [2010] VSC 147 at 3.

<sup>794</sup> Heather Douglas “A consideration of the merits of specialized homicide offences and defences for battered women” (2012) 45(3) *Aust NZ J Criminol* 367 at 370.

Fitz-Gibbon and Pickering identified three key concerns with defensive homicide, namely that it:<sup>795</sup>

... over-complicated the law of self-defence; that the offence is not operating as intended for battered women who kill; and that the offence has mirrored the problems previously associated with the defence of provocation.

The offence was ultimately repealed by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), with effect from 1 November 2014. That Act also inserted a new range of provisions for self-defence, duress, sudden or extraordinary emergency and intoxication. Self-defence is contained in s 322K, and reads:

- (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if—
  - (a) the person believes that the conduct is necessary in self-defence; and
  - (b) the conduct is a reasonable response in the circumstances as the person perceives them.
- (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

Of particular relevance in the context of victims of violence who kill, s 322M of the Act, headed “Family violence and self-defence” provides:

- (1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—
  - (a) the person is responding to a harm that is not immediate; or
  - (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.
- (2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—
  - (a) a person has carried out conduct while believing it to be necessary in self-defence; or
  - (b) the conduct is a reasonable response in the circumstances as a person perceives them.

These provisions reflect those earlier in force concurrent with the offence of defensive homicide. It is of note that these provisions remove the immediacy requirement in cases of family violence. In a troubling parallel to *Middendorp*, Phillip Bracken was acquitted of murder on the basis of self-defence, after he shot his partner five times. Interestingly, the account Bracken initially gave to police was that he shot Helen Curtis accidentally. At trial,

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<sup>795</sup> Fitz-Gibbon and Pickering, above n 791, at 167.

however, he alleged family violence under s 9AH of the Crimes Act (Vic), which is substantially similar to s 322M.<sup>796</sup>

However, others argue that abolition of defensive homicide was a premature and unjustified response driven by popular punitivism. Ulbrick and others point out that *Middendorp* was “the first and remained the only case involving a male perpetrator convicted of defensive homicide for killing his former female partner”.<sup>797</sup> In Ulbrick and others’ analysis of defensive homicide cases in which detailed information was accessible, 27 involved a male perpetrator and male victim, five involved female perpetrator and male victim, and only one (*Middendorp*) involved a male perpetrator and female victim. Their analysis focuses on 15 cases involving male perpetrators who presented evidence of a history of mental illness and impairment, and the authors argue that these cases do cohere with the intended scope of s 9AD “which sought to take into account that people kill in a range of different circumstances and that their culpability may be affected by a range of factors”.<sup>798</sup> Ulbrick and others set out to “challenge the dominant, populist voices that strongly informed the abolition of defensive homicide”.<sup>799</sup> They argue that defensive homicide was actually working effectively “capturing the very unique and complex circumstances inherent to homicide”.<sup>800</sup> In their view, it was “expressly contemplated”<sup>801</sup> that defensive homicide would not solely apply to victims of violence who kill their abusers, and that it would also be used by individuals with a mental illness or impairment that did not fall within the “narrow ambit”<sup>802</sup> of Victoria’s statutory defence of mental impairment. Ulbrick and others argue:<sup>803</sup>

Without a halfway house between murder and manslaughter, it is likely that the moral culpability of offenders suffering from mental illness and impairment cannot be adequately recognised in the type of conviction or sentence imposed.

The same argument can be made in respect of victims of violence who kill their abusers.

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<sup>796</sup> *DPP v Bracken* [2014] VSC 94.

<sup>797</sup> Ulbrick and others, above n 792, at 342.

<sup>798</sup> At 328-329.

<sup>799</sup> At 329.

<sup>800</sup> At 330.

<sup>801</sup> At 342.

<sup>802</sup> At 337.

<sup>803</sup> At 367.

### *Defence of self-preservation*

Queensland has provided a specific defence to murder for victims of intimate partner violence. The Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld) amended the Criminal Code (Qld) by inserting a new s 304B, which introduced a new partial defence to murder of “killing for preservation in an abusive domestic relationship”. Section 304B provides:

- (1) A person who unlawfully kills another (the *deceased*) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
  - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
  - (b) the person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
  - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case ...

This defence has also been criticised on the basis that it has the potential to undermine self-defence claims in the context of domestic violence.<sup>804</sup> Further, it is only a partial defence reducing murder to manslaughter and does not apply to defence of others.<sup>805</sup>

It appears the use of these offences or defences may reflect the predominant use of provocation as a defence, that is, it was used primarily to excuse men’s killing of men or women, either in response to perceived or actual infidelity or perceived or actual homosexual advances.

### OPTIONS FOR REFORM

Stark’s likening of coercive control to brainwashing, and other tactics used with hostages, prisoners of war, and kidnap victims highlights the issue that the criminal law has so far been unable to grasp: the criminal law ought not to hold wholly accountable all those who act under duress or compulsion or coercion. To be morally blameworthy, individuals must freely choose their actions. In reality, crime is often the result of factors beyond the control of the individual which reduce the individual’s moral responsibility.

As discussed in ch 2, Lacey gives an account of several conceptions of responsibility, two of which are founded in the idea of capacity. The first is the idea that a person is responsible

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<sup>804</sup> Sheehy “Securing Fair Outcomes” above n 715, at 668.

<sup>805</sup> Douglas, above n 794, at 378.



for conduct which he or she chooses. The second asks the question whether the defendant had a fair opportunity to avoid the thing they did.<sup>806</sup> Dressler makes similar arguments:

A person may properly be blamed for her conduct if she had the capacity and fair opportunity to choose freely whether to violate the moral/legal norms of society.<sup>807</sup>

In the context of victims who kill their abusers, capacity principles can be used to attribute responsibility. There is, first, an argument that such a person does not freely choose to kill their abuser: their capacity for choice being eroded by coercive control. There are parallels here to the complainant of sexual assault who submits to threats of, or actual, force. Such a complainant does not truly “consent” but rather yields out of an “inexorable instinct for human preservation”<sup>808</sup>. The second argument using the capacity principles is that a victim of violence who kills their abuser may not have had a fair opportunity to avoid the killing. In other words, as Dressler argues, they act under duress.<sup>809</sup>

Killing an abuser is not always a response to coercive control, but it is a possibility, just as it is a possibility that a prisoner of war might do the same thing. Would the criminal justice system hold the prisoner accountable in the same way as someone who is not acting under coercion or compulsion?

The question is how to incorporate these principles into a legal regime that would recognise that coercive control affects moral blame. Because depriving a woman of a defence in this context is, as Sheehy and others argue, “to throw the weight of the law behind her subjugation”.<sup>810</sup>

### ***New Zealand Law Commission options***

There are a number of other options for reform identified by the NZLC. These included reforming the law of self-defence by, for example, taking the Victorian approach by not excluding self-defence if the threat is not imminent or the force used is disproportionate,<sup>811</sup> or by expressly referring to inevitability of the danger rather than imminence;<sup>812</sup> or by the

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<sup>806</sup> Nicola Lacey “Space, time and function: intersecting principles of responsibility across the terrain of criminal justice” (2007) 1 Crim Law and Philos 233 at 237.

<sup>807</sup> Joshua Dressler “Battered Women and Sleeping Abusers: Some Reflections” (2006) 3 Ohio St J Crim L 457 at 469.

<sup>808</sup> Vicki Waye “Rape and the unconscionable bargain” (1992) 16 Crim LJ 94 at 95.

<sup>809</sup> Dressler, above n 807, at 469

<sup>810</sup> Sheehy and others “Securing Fair Outcomes”, above n 715, at 695.

<sup>811</sup> Law Commission *Victims of family violence*, above n 682 at [7.4] et seq.

<sup>812</sup> At [7.9] et seq.

creation of a new defence which applies where a defendant is responding to family violence. This defence would be underpinned by the principle of necessity.<sup>813</sup> Other reforms canvassed by the NZLC in relation to self-defence include evidential reform in relation to the reception of evidence about family violence and jury directions.

The NZLC considered partial defences (including excessive self-defence, loss of control, diminished responsibility and killing for preservation), and a separate homicide offence which would be more specific than manslaughter. The elements of the offence, as proposed by the NZLC, are:<sup>814</sup>

- (a) the defendant was a victim of family violence perpetrated by the deceased;
- (b) as a result of the family violence, the defendant considered they had no option other than to seriously injure or kill the deceased – that is, the defendant was acting to defend themselves or another in circumstances as they perceived them to be; but
- (c) the force used by the defendant was not reasonable in the circumstances as the defendant believed them to be.

The NZLC says that this offence would not affect the operation of self-defence, which would be available to a defendant charged with the separate homicide offence.

Ultimately the NZLC decided in favour of amending the Crimes Act 1961 to provide that where a person kills as a response to family violence, s 48 may apply even if the threat to the accused is not “imminent”.<sup>815</sup>

In a specific rejection of the NZLC’s proposals, Wake and Reed suggest that a new partial defence of self-preservation should be introduced in New Zealand. Drawing upon recommendations made by the Law Commission for England and Wales, Wake and Reed put forward a defence that “operates as an imperfect justification; the defendant is justified in responding to an unjust attack, but the overall response is wrong”.<sup>816</sup> This partial defence is nestled with self-defence and reduces murder to manslaughter where the killing is a response to fear of serious abuse from the victim toward the defendant or any other person. Neither the lack of an imminent threat nor the use of excessive force would necessarily negate the defence.<sup>817</sup> However, the defence does not automatically apply if self-defence

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<sup>813</sup> At [7.14] et seq.

<sup>814</sup> At [8.36].

<sup>815</sup> At [7.39], [7.47].

<sup>816</sup> Nicola Wake and Alan Reed “Reconceptualising the contours of self-defence in the context of vulnerable offenders: a response to the New Zealand Law Commission” (2016) 3(2) JICL 1 at 43.

<sup>817</sup> At 43.

fails. To have it so would mean “the defence would be overly broad in ambit and subject to similar criticisms that were levelled at defensive homicide in Victoria”.<sup>818</sup>

It is clear that in terms of solutions to the present problem, there is more than one road to Rome, many of which could derive from existing criminal law categories such as duress, compulsion, necessity, or automatism. However, because men do not (generally) live in relationships characterised by fear for their own lives, I suggest that the path to be taken in this context is the one illuminated by the gendered nature of coercive control. Because coercive control is exercised by men over women, centering an offence on coercive control could arguably mean that it cannot be exploited by men who kill women. The provision need not be framed in a gender-specific way, rather the hope is that it will not be commandeered by men killing women because, as Stark suggests, coercive control is unlikely to exist in those relationships. It is interesting to note that the offence of controlling or coercive behaviour in s 76 of the Serious Crime Act 2015 (UK) is defined in gender neutral terms, which departs from Stark’s framework in which the focus is exclusively on the victimisation of women.<sup>819</sup>

To that end, the elements of the provision should require that the accused was in a relationship characterised by the exercise of coercive control from another person and she used force because she honestly believed she had no other way of escaping that relationship.

#### OFFENCE OR DEFENCE?

Having suggested that the solution to the problem of coerced women who kill lies in coercive control, the next question is whether it is better to create a new offence or a defence (either partial or full). There are advantages and limitations inherent in either option. Creating a new offence has the advantage of reflecting a lower degree of moral blame but still providing for a measure of accountability. The offence does not necessarily need to be a category of culpable homicide (although it also could be, as proposed by the NZLC). An offence of “using force to escape coercive control” captures the essential elements. This could be a conduct crime (focusing on the use of force) rather than a result crime (wherein there must be a death). The structure of the offence could mirror the first two steps of the

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<sup>818</sup> At 43.

<sup>819</sup> Walklate and others, above n 773, at 116.

offence proposed by the NZLC, above, but tailored to the characteristics of coercive control.

The elements of the offence would require that:

- (a) the defendant was in a relationship characterised by the exercise of coercive control from another person; and
- (b) as a result of the coercive control, the defendant considered they had no option other than to seriously injure or kill that other person – that is, the defendant used force because she honestly believed she had no other way of escaping that relationship or protecting herself or another person; and
- (c) the defendant used force against that other person.

The question of how, or whether, to define coercive control needs to be considered. It is interesting that the offence of controlling or coercive behaviour in England and Wales does not actually delimit what such behaviour is, aside from its effects on the victim. Walklate and others question whether:<sup>820</sup>

coercive control, rooted in an appreciation of context, can in and of itself be rendered measurable in the way in which any risk assessment process assumes or can be readily prosecuted in the criminal courts.

Because of this contextual nature, and because coercive control is constituted by a pattern of behaviour rather than relying on specific incidents, it may be that it cannot be readily quantified for the purposes of a statutory definition. Rather it would be up to experts to give examples of the types of behaviours that constitute coercive control.

I would omit the reference to unreasonableness of force in the third step of the NZLC's proposed offence. I do not believe there is room for an objective assessment of the force used, since what is relevant, in the present context, is the accused's subjective belief that it is necessary. In any event, there is a potential – possibly strained – argument that in the current climate of femicide committed by intimate partners it *may* be objectively reasonable to use deadly force to escape a coercive and controlling relationship.

The creation of a new offence which recognises the effects of coercive control on the conduct of the accused, will mean that the conduct is not necessarily excused. The conduct is blameworthy, and punishable, both of which elements consist of degrees. This would serve to respond to the criminal justice system's requirement that an accused be responsible for the harm caused. It would take into account that while in some cases the killing might

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At 122.

be necessary, it may not be proportionate to the harm. In arguing for a partial defence of self-preservation, Wake and Reed observe:<sup>821</sup>

A partial defence avoids the stigmatic murder label, it may influence charging practices by encouraging guilty pleas thereby avoiding unnecessary trials or by encouraging a trial where self-defence might apply on grounds that the partial defence represents a safety-net; and, it sends a signal to sentencing judges and society regarding culpability levels. Importantly, there is evidence that the lack of a partial defence in New Zealand does not accord with societal expectations of how victims of family violence ought to have their victimisation and culpability reflected in criminal offending ... The implementation of a new partial defence would reduce current jury nullification practices, and provide a more accurate reflection of the rationale for the verdict returned.

While it would not be just to convict someone for using force when there really was no alternative option available to them, such cases would be covered by the existing self-defence provision, depending upon the conduct of the defence case and the sympathies of legal personnel. In *R v Falls*<sup>822</sup> the accused was acquitted of murder on the grounds of self-defence even though it was decided in Queensland which has one of the strictest self-defence regimes in Australia,<sup>823</sup> and the accused drugged her abusive husband and shot him while he was asleep. As Sheehy and others argue, the success in that case was partly due to a judge who “was sympathetic to an expansive reading of the legal requirements for self-defence”,<sup>824</sup> and the conduct of the defence which included:

[A]n expansion of the time frame within which the danger the accused was facing was to be understood (with the result that historical and cumulative experiences of violence and the risk of future harm were both relevant); an understanding that the danger in battering cases includes an element of entrapment; an attention to detail in the range of evidence presented in court in order to describe and corroborate this danger; the provision of support for the accused’s credibility in her assessment of her situation; up-to-date expert explanations of the phenomenon of intimate partner violence and the broader social framework within which it occurs; and the use of rhetorical devices to support particular normative readings of the material before the Court.<sup>825</sup>

It has been argued, however, that certain gender, class and ethnic stereotypes may have been relevant in *Falls*.<sup>826</sup> We need to be alive to the risk of courts drawing on stereotypes about women’s behaviour and basing decisions upon their characterisation of coerced women as “good victims” or “bad victims”. These factors may have played causal parts

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<sup>821</sup> Wake and Reed, above n 816, at 42-43.

<sup>822</sup> *R v Falls*, above n 715; see also Sheehy and others “Securing Fair Outcomes” above n 715; Douglas, above n 794.

<sup>823</sup> Sheehy and others “Securing Fair Outcomes”, above n 715, at 669-670.

<sup>824</sup> At 672.

<sup>825</sup> At 672.

<sup>826</sup> At 672.

in the outcomes in some of the cases referred to here: for example, *Falls* as compared with *Kells*; *Wickham* as compared with *Wihongi*.

Any reform needs to consider possible negative consequences of introducing the language of coercive control into the legal system:<sup>827</sup>

[The] presumption of involuntariness, when coupled with the practical challenges of measuring the impact of coercion, poses an enormous risk to victim autonomy. If a court substitutes its judgment for that of the victim's because it believes her to be coerced, and presumes that when she is coerced she cannot make an autonomous decision, it usurps control over a decision the victim would like to make for herself, thereby replicating the very dynamic it seeks to prevent.

The creation of an offence rather than a defence for coerced women has the potential to recognise women's agency and resists the tendency to characterise them as wholly passive victims. It recognises their social reality without resorting to a conception of coerced women as frail or mentally incapable.

Finally, and importantly, there is an argument that the creation of a new offence will provide both for better options for charging decisions and a coherent and consistent framework for culpability decisions not presently available. Juries will be justified in taking into account the accused's circumstances in convicting her of a lesser offence. For example, on the facts of *R v Wickham*, a jury would not need to make a finding that is inconsistent with the evidence (lack of intention or foresight) given that the circumstances disclose coercive control. A conviction for a lesser offence gives juries options in cases where they feel a murder or even manslaughter conviction carries a stigma which is out of proportion to the degree of culpability, yet the accused still bears some responsibility that a full acquittal will not recognise. This would reduce the scope for jury nullification and the potential for overall unfairness that it gives rise to.

It is important to note that the Law Commission's recommendations have been criticised for "failing to consider extra-familial vulnerable offenders who kill in self-defence"<sup>828</sup> such as subjects of human trafficking or modern-day slavery, those trapped by gang membership and others subject to abuse by non-intimates or otherwise unrelated parties. While other

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<sup>827</sup> Tamara L Kuennan "Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?" (2013) 22(1) Berkeley Journal of Gender, Law & Justice 2 at 6 (footnotes omitted).

<sup>828</sup> Wake and Reed, above n 816, at 2.

vulnerable offenders were not within the Law Commission's remit, so long as coercive control is established in the particular case, there is no reason why an offence along the lines proposed here could not be amended so as to include other vulnerable offenders. As Wake and Reed rightly point out:<sup>829</sup>

In assessing criminal responsibility, where two individuals respond in a similar way to a particular set of circumstances, the question should concern culpability rather than the class or category that individual belongs to.

Other options for reform, relying upon the analysis above, include amending the existing self-defence provision and the creation of partial or complete diminished responsibility. These will be incorporated into the recommendations set out in ch 6.

## SUMMARY

When victims of violence or coercive control kill their abusers, there is no “malice aforethought” in the true sense of that phrase, despite the appearance of willed action. The act is not malicious or angry – it is a normative response to coercive conditions. On that basis, it is not just or fair to label these victims as “murderers” or “killers”, even though the criminal justice system might rightly hold them responsible to some degree.

The criminal justice system would not classify as morally blameworthy, someone who killed a hostage-taker in order to regain their freedom. Yet women under coercive control are essentially hostages: they have no autonomy over their own lives. The continual failure of the criminal justice system to acknowledge this truth reinforces the notion that women's lives matter less than men's.

There is scope in the reform proposed here for like cases to be treated more alike than the current approach indicates. If we return to the *R v Wickham* and *R v Wihongi* comparison for a moment, it is at least arguable that the evidence in each case discloses a relationship characterised by the exercise of coercive control from another person and that each accused used force because she honestly believed she had no other way of escaping that relationship. I suggest that Gay Oakes, who drugged and accidentally killed her husband and was convicted of murder, is not on a dissimilar moral plane to the defendant in *Falls*, who

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<sup>829</sup> At 27.

drugged then shot her husband and was acquitted. What reform ought to do is to reduce the chance that these defendants end up with such disparate outcomes.

It is not intended that this proposal presents a specific solution that will address, in all jurisdictions, the problem of victims of violence who kill their abusers. What it does do, however, is provide a new framework – based on coercive control – for considering culpability in that context.



# Chapter 5: Child victims of homicide

## INTRODUCTION

The media coverage of the 2015 death of 3-year-old Moko Rangitoheriri and the prosecution of his killers has once again highlighted the serious problem of child homicide in New Zealand. In 2007, similar outrage was evoked by the killing of Nia Glassie; in 1999 it was James Whakaruru, and even before James Whakaruru became a household name, the case of Delcelia Witika in 1991 made headlines and was described by Justice Gault as, “a case of wicked child abuse”<sup>830</sup> in which Delcelia was “subjected to violence and brutality of almost incomprehensible cruelty and was neglected appallingly”.<sup>831</sup>

There are few societies in which child abuse is not a serious issue, with homicide at the extreme end of a range of abusive behaviours.<sup>832</sup> However, not all child homicides are the result of child abuse, as commonly understood. In 2015 and 2016, Fairfax Media, in its series “Faces of Innocents” collected data on just over two hundred cases of child homicide between 1992 and 2015.<sup>833</sup> The database includes information (where available) on the name and age of the child, cause of death, perpetrator, relationship of perpetrator to victim, and the nature of any charges laid or convictions entered. At the outset, it is important to note that those who kill very young children are almost always caregivers or people in a significant relationship to the child.<sup>834</sup> Even where the victim is not especially young, the nature of the relationship between the child and the perpetrator is often an important factor

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<sup>830</sup> *R v Witika* [1993] 2 NZLR 424, (1992) 9 CRNZ 272 (CA) at 427, 274.

<sup>831</sup> At 429, 276.

<sup>832</sup> One of the reasons for exploring theories of causation in respect of undesirable behaviour is so that we can regulate that behaviour. It is helpful to look for causes before we look to solutions. But despite the fact that there are a multitude of socio-cultural theories explaining child abuse, very few societies have managed to curb its incidence. One question is whether evolutionary theories of child abuse will assist in that endeavor, bearing in mind the declaration of Paulo Sérgio Pinheiro, independent expert for the United Nations Secretary-General's study on violence against children: “No violence against children is justifiable; all violence against children is preventable”: Paulo Sérgio Pinheiro *Report of the independent expert for the United Nations study on violence against children A/61/299* (2006). In the long term, prevention strategies are more effective (Yanghee Lee “The intersection between the UN Convention on the Rights of Child and child abuse and neglect prevention” (paper presented at the XIXth ISPCAN International Congress, Istanbul, 8-12 September 2012)), and clearly more desirable. However, that discussion is not within the remit of this thesis.

<sup>833</sup> Fairfax Media “Faces of Innocents” (2015-2016) <[www.stuff.co.nz/national/faces-of-innocents](http://www.stuff.co.nz/national/faces-of-innocents)>.

<sup>834</sup> Charles A Phipps “Responding to Child Homicide: A Statutory Proposal” (1999) 89(2) *J Crim Law Criminol* 535 at 542.

(including whether the perpetrator is a biological parent or a step-parent or de facto parent or is an unrelated person living in the same house as the victim). Alder and Polk also note that the *form* that the killing takes is related to the age of the victim.<sup>835</sup>

From the Fairfax Media database, some general patterns emerge. In cases where the mother was sole perpetrator, the cause of death was split roughly equally between head or internal injuries, drownings and asphyxiation. When the father was the sole perpetrator, head or internal injuries were the cause of death in 45 per cent of cases, with stabbings or throat cuttings occurring in roughly 20 per cent, and the remainder consisting of intentional car accidents, drowning and asphyxiation. When de facto fathers and step fathers were the sole perpetrator, over 80 per cent of deaths were caused by head or internal injuries, the remainder consisting of asphyxiation, stabbings or throat cuttings, and burns. Clearly the majority of all deaths were the result of some form of violence in the strict sense of that word (negligent drownings or failure to provide medical treatment perhaps being the exceptions). If we look more closely at the circumstances of these deaths, particular patterns emerge about the particular motivations involved. A number of researchers have also attempted to identify a range of “motives” associated with child homicide. For example, Friedman and others<sup>836</sup> identified the following contemporary motives:

1. Fatal child maltreatment, whereby the child dies as a result of abuse, neglect or Munchausen Syndrome by Proxy (MSBP).
2. Partner/spouse revenge, which treats the homicide as an expression of the perpetrator’s anger at his or her partner/ex-partner.
3. Where the child is unwanted.
4. Altruistic, where the child is killed in the belief that he or she would be “better off dead”. This is common in murder-suicide cases.
5. Where the perpetrator is acutely psychotic.

Other researchers have identified several other categories and it is important to note that cases do not always conform neatly to just one – there is significant overlap.<sup>837</sup> In this chapter I will analyse information from the Fairfax Media database and other New Zealand cases where a child has been the victim of homicide in an attempt to identify the different

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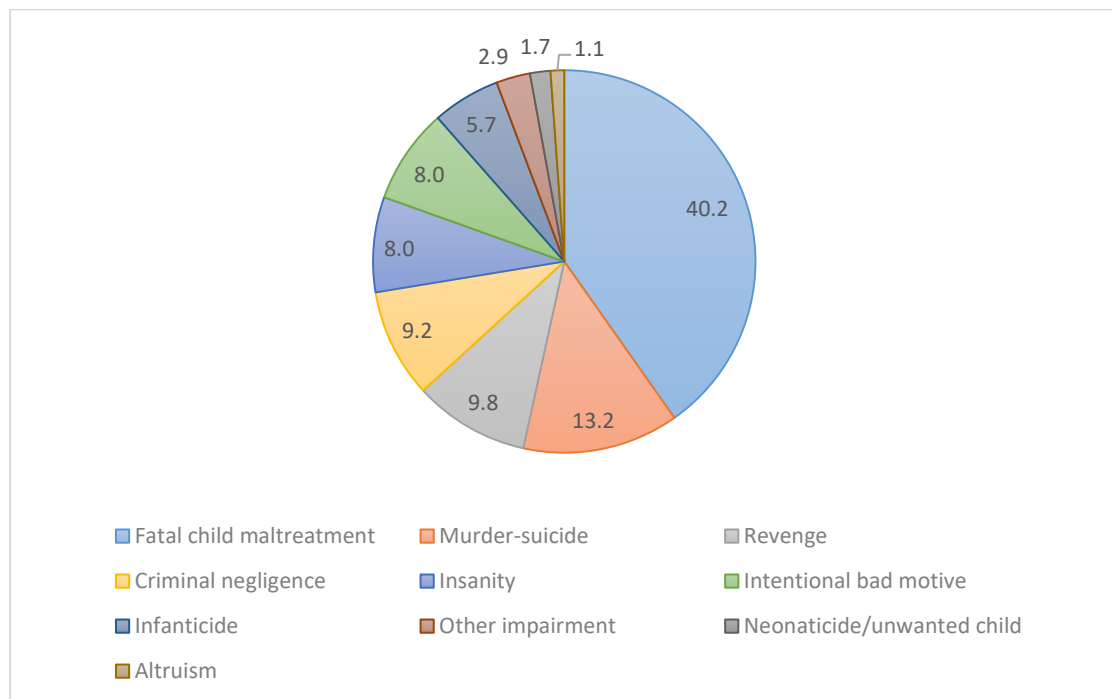
<sup>835</sup> Christine Alder and Ken Polk *Child Victims of Homicide* (Cambridge University Press, United Kingdom, 2001) at 16.

<sup>836</sup> Susan Hatters Friedman, James Cavney and Phillip J Resnick “Child Murder by Parents and Evolutionary Psychology” (2012) 35 *Psychiatr Clin N Am* 781; Phillip J Resnick “Felicide in the United States” (2016) 58 *Indian J Psychiatry Supp* 2 203.

<sup>837</sup> Ania Wilczynski *Child Homicide* (Oxford University Press, London, 1997) at 42.

motives that might be relevant in the New Zealand context. From this analysis I will construct a legal framework for considering the differing moral culpability standards which might apply. To that end, I have identified, from New Zealand child homicide cases between 1992 and 2018, the following motives:

Figure 1: Motives for child homicide



This range of motives reflects the actual cases observed in New Zealand. It expands upon the motives identified by Friedman and others (and other researchers) in several ways:

1. It includes the category of “intentional bad motive” which covers cases where the primary motive for the homicide is to achieve some other nefarious purpose such as to cover up or evade detection for the commission of another crime (sexual or other assault, for example). In general, these cases fall to be considered under the same general principles as revenge cases in terms of moral culpability. Examples are Steven Williams who killed his partner’s daughter to cover up a prior serious assault; Peter Howse who killed his partner’s two daughters to cover up his sexual offending in relation to them. It could be argued that revenge cases are actually a subset of the “intentional bad motive” category, although this thesis will focus on the revenge cases because they constitute a relatively large proportion of the “intentional bad motive” cases and the remainder are quite diverse.
2. The scheme creates a separate category of “other impairment” which includes cases that are not classified as either insanity or infanticide, such as where the perpetrator is suffering from a factitious disorder (for example, what used to be

called MSBP). Under Friedman and others' classification some of these cases may have been categorised as fatal child maltreatment.

3. Cases of neonaticide which have not been categorised as infanticide are assumed to involve "unwanted" children.
4. I have identified a not insignificant number of cases in which a child dies as a result of an act or omission by a parent or caregiver where their failure to observe a standard of care is a major departure from the standard expected of a person in their situation – these include criminal negligence including vehicular manslaughter, failure to protect, failure to supervise and other acts and omissions. Aside from failure to protect cases which have a clear link to fatal child maltreatment, criminal negligence will not be specifically discussed in this thesis, although some recommendations in this category of case will be suggested in ch 6.

As noted above, many child homicide cases involve more than one motive. The classifications depicted in Figure 1 have been classified according to what could be referred to as the "primary" motive, considering all the available facts relating to the case. Because of this overlap, the incidence of particular motives may be masked. For example, some of the murder-suicides may have been driven by spousal revenge; or some of the murder-suicides may have otherwise been classified as insanity. It should be noted that one of the spousal revenge cases involved five victims and three other cases involved two or three victims each. Therefore, the incidence of revenge homicides in Figure 1 may appear over-inflated. Finally, the infanticide classification refers to the legal determination in the case. Some cases may not have met the threshold required, while in other cases charges may have not been pursued. At least one of the cases was initially prosecuted as infanticide but the defendant was found not guilty by reason of insanity.

The following discussion proceeds as follows. First, I will address fatal child maltreatment where a child dies as a result of abuse or failure to protect.<sup>838</sup> That section is followed by a consideration of the cases in which a perpetrator commits child homicide as an act of revenge, and those in which altruistic motives are present. These categories are considered together in this chapter because each involves intention to kill which is not always present in cases of fatal child maltreatment. The third and final category involves cases where the killer is psychotic or insane, and cases of "other impairment" which fall short of the legal insanity standard. The category of "unwanted child" is also dealt with in this part of the chapter because, although they involve an element of intention, there is evidence to suggest

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<sup>838</sup> This section will not deal with Munchausen Syndrome by Proxy which is covered under "other impairment".

that a number of these cases are not truly voluntary. Murder-suicides as a primary motive are not dealt with in this thesis for the simple reason that the perpetrator of the child homicide is not amenable to justice. However, some of the cases discussed here do involve perpetrator suicide as a secondary motive.

## FATAL CHILD MALTREATMENT & FAILURE TO PROTECT

Included in the following analysis are cases in which the child homicide victim dies as a result of a beating or by neglect, or a combination of both; or the defendant becomes criminally liable for failing to protect their children from the violence of another. These cases are considered together here because although it is argued there are different degrees of moral blame attributable to each category, neither involves an intention to kill.

### *Homicide by abuse*

Child homicide in the context of child abuse has been identified as a distinct type of child homicide, and the one that occurs most frequently.<sup>839</sup> This finding is supported by the analysis presented above in Figure 1, showing that by far the largest category of child homicide in New Zealand involves fatal child maltreatment (40.2 per cent). In general, these are cases where the child dies following a beating rather than where the defendant sets out to intentionally kill the child. The last 30 or so years have seen a large number of New Zealand children die in these circumstances. The following cases are just a small sample.<sup>840</sup>

#### *1991: Delcelia Witika, aged 2 years*

Delcelia suffered massive blows to her stomach, rupturing her intestine and causing peritonitis. She had her teeth knocked out, burns to her limbs and buttocks, bruises and sores covering her body.<sup>841</sup> The pathologist was of the opinion that Delcelia had also been subjected to prolonged and chronic sexual abuse.<sup>842</sup> She died alone while her mother, Tania Witika, and mother's boyfriend, Eddie Smith, were at a party. Delcelia had suffered systematic abuse over a period of time. Both Witika and Smith were found guilty of

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<sup>839</sup> Kate Cavanagh, R Emerson Dobash and Russell P Dobash "The murder of children by fathers in the context of child abuse" (2007) 31 *Child Abuse Negl* 731 at 732.

<sup>840</sup> See generally Brenda Midson "Child Homicide: Charges, Convictions & Sentencing" in Breen (ed) *Children's Needs, Rights and Welfare: Developing Strategies for the 'Whole Child' in the 21st Century* (Thomson Dunmore Press, Wellington, 2004).

<sup>841</sup> David McLoughlin "The Canonisation of Tania Witika" *North & South* (December 1998) 32.

<sup>842</sup> *R v Witika*, above n 830, at 430, 277-278.

manslaughter and each sentenced to 16 years imprisonment. Witika was also charged with failing to provide the necessities of life, for not intervening in Smith's attacks on Delcelia.

*1994: Jordan Ashby, aged 3 years*

Jordan Ashby was assaulted over a four-day period, including being punched and struck with a metal-studded belt. His heart, lungs and diaphragm were bruised. His right adrenal gland was in several pieces. A third of a litre of blood was found in his abdomen. He had a black eye, broken arm, and bruising on his head, face, chest, back and buttocks. His mother's boyfriend, Phil Rakete, pleaded guilty to manslaughter and was sentenced to eight years in prison.<sup>843</sup>

*1999: James Whakaruru, aged 4 years*

James was beaten to death by his mother's boyfriend, Benny Haerewa. Haerewa used a hammer, steel vacuum cleaner pipe, electric jug cord, his fists and his feet.<sup>844</sup> He had previously spent four months in jail for assaulting James when the child was two. James' mother, Te Rangi Whakaruru contributed to assaults on James with a vacuum cleaner pipe. Haerewa pleaded guilty to manslaughter and was sentenced to 12 years' imprisonment. Whakaruru pleaded guilty to charges of cruelty to a child and assault with a weapon<sup>845</sup> and received a non-custodial sentence.

*1999: Mereana Edmonds, aged 6 years*

Mereana had suffered three major brain traumas since birth, the first at approximately 6 months old and the last approximately three and a half hours before death. She had suffered a range of other non-fatal injuries before her death, including broken bones.<sup>846</sup> Mereana's mother, Belinda Edmonds, and her partner, Dorothy Tipene, were charged with manslaughter. Tipene later had the charge reduced to cruelty to a child. Edmonds was convicted of manslaughter and sentenced to 8 years' imprisonment (originally five years but the sentence was increased on appeal). Tipene was found guilty on the cruelty charge

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<sup>843</sup> David McLoughlin "Killing our Kids" *North & South* (April 1994) 43.

<sup>844</sup> Simon Collins "Never again: how we all failed James Whakaruru" *The New Zealand Herald* (online ed, Auckland, 1 July 2000).

<sup>845</sup> Simon Collins "Violence Scars Five Generations" *The New Zealand Herald* (online ed, Auckland, 14 February 2002).

<sup>846</sup> *R v Tipene* [2001] 2 NZLR 577, (2000) 18 CRNZ 311 (CA).

and sentenced to 27 months (originally 18 months). Edmonds had regained custody of Mereana only shortly before the child's death.

*1999: Pirimai Simmonds, aged 17 months*

Pirimai suffered severe head and internal injuries after being thrown across the room by his father for crying during a televised rugby game. Prior to being thrown, he was struck on the back and shaken.<sup>847</sup> Matthew Iorangi was found guilty of manslaughter and sentenced to four and a half years' imprisonment.

*2000: Hinewaoriki Karaitiana-Matiaha (Lillybing), aged 23 months*

Lillybing was shaken by her aunt, Rachaelle Namana, causing a major brain injury. Namana, and her sister, Rongomai Paewai, applied a boiling hot cloth to a lump on Lillybing's head causing her face to be badly burned. Lillybing had a blood clot, and more than ninety bruises and abrasions on her body. In addition, she had sustained life-threatening genital injuries (not alleged to have been inflicted by Namana or Paewai) for which both accused failed to get medical help.<sup>848</sup> Namana pleaded guilty to manslaughter, ill-treatment of a child, and failing to provide the necessaries of life, and was sentenced to 6 years' imprisonment. Paewai pleaded guilty to wilful ill-treatment of a child and failing to provide the necessaries of life, and was sentenced to 2 years' imprisonment.

*2000: Liotta Leuta, aged 5 years*

Liotta's mother, Sipea Leuta, broke a fanbelt into a metre-long strap and used that and an old car aerial to beat Liotta. Over one hundred bruises were found on his body. The ultimate cause of Liotta's death was aspiration of gastric contents secondary to multiple acute soft tissue injuries. Leuta was found guilty of manslaughter and sentenced to 6 years' imprisonment. The sentence was increased to seven years, on appeal by the Solicitor-General.<sup>849</sup>

*2000: Tangaroa Matiu, aged 3 years*

Genesis Mahanga was the boyfriend of Tangaroa's mother. He beat Tangaroa with a toilet brush and a piece of wood, on his feet, hands, back, knees, shoulders, scrotum and head.

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<sup>847</sup> "Father jailed over death of 'defenceless' toddler" *The New Zealand Herald* (online ed, Auckland, 30 June 2000).

<sup>848</sup> "Lillybing's Aunts Sentenced to Jail" *The New Zealand Herald* (online ed, Auckland, 15 June 2001).

<sup>849</sup> *R v Leuta; R v Rauf* [2002] 1 NZLR 215 (CA).

The fatal attack took place over 30 minutes. Tangaroa had been systematically beaten by Mahanga over a period of months. Tangaroa died of blood loss from his injuries.<sup>850</sup> His mother, Hoani Rose Matiu, contributed to the assault by Mahanga, and failed to get medical assistance for her son. Mahanga pleaded guilty to manslaughter but was found guilty of murder by the jury. He was sentenced to life imprisonment. Matiu was found guilty of two counts of manslaughter and two counts of cruelty to a child. Her sentences of 7 years for manslaughter and 18 months for cruelty were concurrent.<sup>851</sup>

*2006: Ngatikoura Ngati, aged 3 years*

Ngatikoura was beaten to death by his mother and her boyfriend, using a baseball bat and oar handle, as well as their hands. The beatings took place over two days and were triggered by Ngatikoura's incontinence (some incidents of which were attributed to earlier beatings by the pair). Both were found not guilty of murder but guilty of manslaughter and sentenced to eight and a half years' imprisonment.

*2007: Nia Glassie, aged 3 years*

Nia was taken to hospital suffering severe injuries from which she later died. Neighbours reported that they had heard Nia screaming and crying, and that she had been seen spinning from a clothesline until she fell off.<sup>852</sup> Nia's mother, Lisa Kuka, was convicted of two counts of manslaughter for failing to provide the necessities of life (medical treatment) and failing to protect Nia from violence. Kuka's partner, Wiremu Curtis, and his brother, Michael, were convicted of Nia's murder. Other adults in the house were convicted of various counts relating to the abuse of Nia and her siblings. The Curtis brothers were both sentenced to life imprisonment with minimum non-parole periods of 17.5 years. Kuka was sentenced to nine years imprisonment.<sup>853</sup>

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<sup>850</sup> “‘Naughty’ Tangaroa Died of 100 Vicious Blows” *The New Zealand Herald* (online ed, Auckland, 28 August 2000).

<sup>851</sup> “7 year sentence for mother who failed to protect Tangaroa Matiu” *The New Zealand Herald* (online ed, Auckland, 29 September 2000).

<sup>852</sup> Catherine Masters “Nia Glassie case: behind the neighbours’ silence” *The New Zealand Herald* (online ed, Auckland, 19 November 2008).

<sup>853</sup> Alanah May Eriksen “Nia Glassie murderers jailed for minimum 17.5 years” *The New Zealand Herald* (online ed, Auckland, 4 February 2009).



*2015: Moko Rangitoheriri, aged 3 years*

Moko was left in the custody of Tania Shailer and David Haerewa<sup>854</sup> while his mother was looking after another child who was in Starship hospital. On 10 August 2015, Moko was rushed to hospital. At the time, he had extensive facial injuries and swelling. Both of his eyes were swollen shut. His stomach was distended. He had bruising, abrasions, and bite marks on his body. He was very cold, so much so that the equipment medical staff normally used to measure body temperature would not actually work. Moko died later that night. A pathologist found the direct cause of Moko's death to be multiple blunt force injuries, including lacerations and haemorrhages deep inside his stomach. There was older bruising and damage to his bowel, which had caused it to rupture, which in turn led to peritonitis and septic shock. Moko's brain was swollen, with significant clots and haemorrhages on his brain, which indicated multiple injuries had been inflicted over a period of days. The pathologist also suggested that a further possible cause of the brain swelling and therefore death was smothering, as there were mouth and face injuries consistent with that conclusion.<sup>855</sup> Shailer and Haerewa pleaded guilty to manslaughter and ill treatment of a child. They were both sentenced to 17 years' imprisonment for manslaughter, with a minimum period of imprisonment of nine years. They were both given seven years and six months' imprisonment on the ill treatment charges, to be served concurrently with the manslaughter sentence. The sentencing Judge, Katz J, noted that, to the best of her knowledge, 17 years' imprisonment is the highest sentence ever imposed in New Zealand for the manslaughter of a child, if not the highest finite sentence imposed in any manslaughter case in New Zealand.

The killing of Moko and its aftermath reignited public debate about child abusers and the ability of our criminal justice system to deliver justice when their victims die. There was a great deal of outrage over the fact that Shailer and Haerewa were able to plead guilty to manslaughter rather than face trial for murder, for what was seen by many as intentional infliction of serious injuries, combined with severe callousness in failing to get those injuries treated.

Contrary to popular perception, the absence of murder convictions in that case was not a result of dereliction of duty on the part of the prosecutors. A person who causes the death

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<sup>854</sup> It is interesting to note that Michael Haerewa is an uncle of Ben Haerewa, James Whakaruru's killer.  
<sup>855</sup> *R v Shailer* [2016] NZHC 1414.

of a child by abuse or neglect is *liable* to a murder or manslaughter charge, but a manslaughter conviction is often the more likely outcome because a murder conviction requires at the very least that foresight of death be proved. Foresight of death is a subjective test – it is irrelevant that a reasonable person would have foreseen the likelihood. Proving that Shailer and Haerewa had this foresight would have been a significant hurdle for the prosecution.

However, the connotation of a manslaughter conviction is that the perpetrator is in some way less culpable because he or she did not possess a “murderous” state of mind. This is the source of much public dismay, given that the perception is inconsistent with the conduct of the defendant in cases where the death of the child is the culmination of a period of severe physical abuse or neglect.

### *Prosecuting fatal child maltreatment*

As discussed earlier in this thesis, culpable, or blameworthy, homicide is murder when the prosecution proves that the defendant acted with one of the specific intents to kill, or mental states, in terms of the Crimes Act 1961. In short, the prosecution either has to prove an actual *intent to kill*,<sup>856</sup> or an *intent to cause bodily injury* that is *known* to the offender to be likely to cause death, and *recklessness* as to whether death ensues or not.<sup>857</sup> In cases of child abuse homicide, the latter category will usually be invoked, as there are few of these cases where *death* is the intended outcome. In order for a murder charge to result from the death of a child in these circumstances, there must be evidence that the actions and mental state of the perpetrator fall within s 167(b) of the Crimes Act, in that he or she *meant* to cause to the victim any bodily injury that the defendant *knew* was likely to cause death, and they were *reckless* as to whether death resulted or not. In New Zealand, these are subjective tests meaning that there must be *actual* foresight or appreciation of a real and substantial risk of death, and a continuation of the conduct regardless of the risk.<sup>858</sup>

A person who causes the death of a child may be liable for *manslaughter* in a number of different ways. They may plead guilty to manslaughter, and the prosecution may proceed on this basis. In these cases, manslaughter may result from killing by an unlawful act

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<sup>856</sup> Crimes Act 1961, s 167(a).

<sup>857</sup> Crimes Act 1961, s 167(b).

<sup>858</sup> *R v Harney* [1987] 2 NZLR 576 (CA) at 579; *R v Fryer* [1981] 1 NZLR 748 (CA); *R v Piri* [1987] 1 NZLR 66 (CA) at 79.

(where the mens rea for murder is not present), or an omission without lawful excuse to perform a legal duty. In the case of manslaughter by an unlawful act, the perpetrator must have acted with the particular mental state required for the unlawful act relied upon, for example, an assault. The defendant must intend to commit the assault for liability to ensue. In terms of omissions, the requisite mental element involves the concept of criminal negligence.<sup>859</sup> Liability for manslaughter may also arise by virtue of an unlawful act combined with an omission to perform a legal duty,<sup>860</sup> for example, where an assault on a child is accompanied by a failure to obtain medical treatment, and the combination of these factors causes the death.<sup>861</sup>

Where manslaughter arises from an unlawful act, unlawful omission, or a combination of both, the manslaughter is characterised as “involuntary” or “accidental” in the sense that the defendant did not intend death to result or foresee death as something that could well happen. However, the factual matrix surrounding some of the deaths from abuse and neglect of New Zealand children makes it more difficult to comprehend why, given the conduct of the defendant in cases where the death of the child is the culmination of a period of severe physical abuse or neglect, more serious charges cannot be successfully laid against the defendants. The difficulty usually arises because a parent or caregiver does not typically kill a child in a one-off isolated, premeditated attack, or even when they do, they do not intend to kill, nor are they found to have foreseen the risk of death required by s 167(b) of the Crimes Act 1961.

To summarise, the facts that a court must determine in a prosecution for murder include whether the defendant intended to kill the child; whether the defendant intended to cause bodily injury to the child; and whether the defendant knew the child might well die as a result of the defendant’s conduct. There is rarely direct evidence of the defendant’s state of mind, so it must be inferred from the surrounding circumstances. For example, the seriousness of the injuries inflicted can be evidence that the defendant knew he or she was inflicting grievous bodily injury. Obviously, any admissions made by the defendant can be probative of a particular mental state. A failure to seek medical help, subsequent to the

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<sup>859</sup> In the context of manslaughter, criminal negligence occurs where a person fails to discharge or perform a legal duty, and the failure to do so constitutes a major departure from the standard of care expected of a reasonable person to whom that legal duty applies: see Crimes Act 1961, s 150A.

<sup>860</sup> Crimes Act 1961, s 160(2)(c).

<sup>861</sup> See for example *R v Witika*, above n 830.

injuring, can indicate a consciousness of guilt (although it may also indicate a lack of awareness of the severity and immediacy of the child's condition). Evidence of prior injuries committed by the defendant may be used to show the defendant acted with the required mental state for the crime charged.<sup>862</sup> In *R v Mackness*<sup>863</sup> the victim, Kelly Gush, was kicked twice in the head by her mother's boyfriend, a man with martial arts training. It was found that the appellant's background in martial arts and statements showing his knowledge that the area of the victim's head to which his kick was directed was sensitive to force, was evidence from which it could be inferred that he knew that those kicks were likely to cause death.

Despite the difficulties that have been observed in prosecuting fatal child maltreatment as murder, where the death of the child is the culmination of a period of physical abuse and neglect it could be argued that death is not only a risk, it is inevitable. In some cases, perpetrators embark on a sustained course of abuse, such that it could be argued that, at some point, they were aware of the likely consequences of their actions and continued regardless.

Further, because of increased media coverage including the "Faces of Innocents" project, and campaigns such as "Never shake a baby", the public are much more aware of the potentially fatal consequences of child abuse. On that basis, it is at least arguable that a person who physically abuses a child would know, at some point during the abuse of the child, what they are doing, and be, therefore, in a position to end that abuse before fatal consequences ensue. Similarly, in some instances the amount of force used to kill suggests that the perpetrator knew what they were doing. This is because trauma to a child's internal organs or head, resulting in death, requires significant force.<sup>864</sup> As noted by the Court of Appeal:<sup>865</sup>

The fragility of young children, particularly infants, is frequently referred to, and too often overlooked. The lethal consequences of shaking and striking babies is often enough publicised. There can be little reduction in criminality these days for a claim that the danger was not realised.

On that basis, it could be said that many of these cases are not inadvertent or involuntary.

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<sup>862</sup> Phipps "Responding to Child Homicide", above n 834, at 535.

<sup>863</sup> *R v Mackness* CA160/03, 24 November 2003.

<sup>864</sup> Phipps "Malicious or Not? Proving Criminal Intent in Cases of Child Homicide" Children's Law Office <[childlaw.law.sc.edu./crimint.htm](http://childlaw.law.sc.edu./crimint.htm)>.

<sup>865</sup> *R v Leuta*; *R v Rauf*, above n 849.

As noted in ch 1, the distinction between murder and manslaughter is crucial for the defendant. In many instances of child homicide, the only thing that distinguishes manslaughter from murder, in terms of moral blameworthiness, is that the death occurs over a longer period of time rather than an instantaneous intent to kill or cause bodily injury.

*Proposed reform: homicide by abuse*

In the United States, some states have enacted specific provisions, known as “homicide by abuse” laws, which do not require that the prosecution prove intent to kill for a first-degree murder conviction to result.<sup>866</sup> These provisions vary in their application. Some provisions apply only if the defendant has engaged in a previous pattern of assault of the child in question. Under other provisions, it is simply sufficient for the abuse to result in death. Some provisions apply where the death occurs, “under circumstances manifesting an extreme indifference to human life”.<sup>867</sup> In addition, all 50 states have enacted legislation authorising the creation of Child Death Review Teams which examine the circumstances surrounding fatalities suspected to be the result of child abuse or neglect.<sup>868</sup>

It can seriously be argued that a death that results after years of abuse and neglect, particularly the death of a child, warrants the stigma and penalty as serious as that for murder. Such stigma and penalty is particularly required in light of the fact that a child is, by virtue of their status, unable to remove themselves from the situation or otherwise protect themselves in any way.

Increasing the potential number of murder convictions for child homicide would focus attention on the consequences of child abuse and neglect and would allow those who commit child homicide as part of a pattern of abuse to be attributed the same level of culpability as the more serious murders. Where death results after a period of abuse, the defendant should not benefit from the fact that at the time of inflicting the injury that caused death, they did not specifically intend to kill the child or did not have the requisite reckless

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<sup>866</sup> See Phipps “Responding to Child Homicide”, above n 834 at Appendix; Lieta Gurevich “Parental Child Murder and Child Abuse in Anglo-American Legal System (2010) 11(1) Trauma Violence Abuse 18 at 22.

<sup>867</sup> For example, Alaska (Alaska Stat § 11.41.100 (1993)); Minnesota (Minn Stat § 609.185 (Supp 1996); South Carolina (SC Code Ann § 16-3-85 (Law Co-op Supp 1995)).

<sup>868</sup> United States Advisory Board on Child Abuse and Neglect (1991) in 2000 National Victim Assistance Academy, ch 11, <[www.ojp.usdoj.gov/ovc/assist/nvaa2000/academy/chapter11.htm](http://www.ojp.usdoj.gov/ovc/assist/nvaa2000/academy/chapter11.htm)>.

state of mind required for murder. To that end, a “homicide by abuse” provision could be worded as follows:

Culpable homicide is murder where the offender, under circumstances manifesting reckless<sup>869</sup> indifference to human life, causes the death of a person under 16 years of age, and the person has previously engaged in a pattern or practice of assault or torture of the said person under 16 years of age.

Admittedly, cases of child homicide will continue to arise that will still constitute manslaughter, for example, where the test of “reckless indifference to human life” cannot be met, or where there is no prior history of abuse. However, cases in which the killing is the final result of a prolonged period of abuse, such as in most of the cases described above, should be caught by the proposed offence, regardless of whether the defendant intended death or foresaw that death might result and was reckless as to that outcome.<sup>870</sup> While under s 167 these are subjective tests, and it must be proved that the offender actually intended death, or actually foresaw the risk of death and continued regardless, implicit in the draft section above is that foresight of risk can be inferred from the “pattern or practice of assault or torture”, and the death itself is evidence of a continuation of the conduct despite the risk.

Homicide by abuse provisions are supported by concerns for consistency. As Phipps notes, and as I have argued elsewhere in this thesis, case law reflects the wide disparity of sentences that can be imposed for very similar types of conduct.<sup>871</sup> A 2011 study of all deaths classified as homicide in Utah between 1 January 2002 and 31 December 31 2007, showed that child homicide perpetrators were convicted at a similar rate and level of felony conviction to adult homicide perpetrators and that severity of sentencing was also similar. The Utah State Criminal Code provides that homicide is “child abuse homicide” if the actor causes the death of a person younger than 18 years and the death results from child abuse.<sup>872</sup> This suggests that child abuse homicide statutes do have some impact on achieving consistency, at least when compared against outcomes for defendants who kill other adults.

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<sup>869</sup> Many of the United States provisions require “extreme” or “gross” indifference, however reckless indifference is a lesser test to satisfy.

<sup>870</sup> This is the mens rea required under s 167 Crimes Act 1961.

<sup>871</sup> Phipps “Responding to Child Homicide”, above n 834, at 586.

<sup>872</sup> Utah State Code ch 152, §76-5-208 and 76-5-109. Amended by General Sess (2008) cited in HA Hewes and others “Judicial outcomes of child abuse homicides” (2011) 165(10) Arch Pediatr Adolesc Med 918 at 919.

### ***Criminal negligence – failure to protect***

In many jurisdictions, failure to protect one's child from violence makes a parent criminally liable if the omission is voluntary. In South Australia and England and Wales, this duty is extended to others, such as people who have assumed responsibility for the child or members of the child's household. In New Zealand the duty also applies to members of a victim's household by s 195A of the Crimes Act 1961. However, due to the psychological consequences of an abusive relationship, a person who has care of a child may not always be in a position to protect them. This applies both to mothers who are bound by the common law duty, as well as other household members who are bound by the statute.

### ***The duty to protect***

The enactment of s 195A followed a number of high profile child abuse cases. Most proximately connected, in the minds of the public at least, with failures in reporting was the case of three year old Nia Glassie who, in July 2007, was taken to hospital suffering severe injuries, from which she died on 3 August.<sup>873</sup> Her death came amid reports from neighbours about the abuse.<sup>874</sup> In view of the fact that this case provided some impetus for the enactment of s 195A, it is somewhat paradoxical that none of the people (other than her mother, Lisa Kuka) who allegedly could have protected Nia by reporting the abuse would be liable under s 195A, as it only applies to people living in the same household, or a person who is a staff member of any hospital, institution, or residence where the victim resides. Kuka's liability arose by virtue of her position as Nia's mother, under the common law duty to protect one's children.

As Herring notes, failure to protect statutes are nearly always used against women and often in cases where there is a history of domestic violence.<sup>875</sup> In Victoria, Australia, a proposal to enact a failure to protect law elicited much opposition on the basis of the adverse impact it would have on victims of domestic violence.<sup>876</sup> The duty to protect

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<sup>873</sup> See above at 169.

<sup>874</sup> Catherine Masters "Nia Glassie case: behind the neighbours' silence" *The New Zealand Herald* (online ed, Auckland, 19 November 2008).

<sup>875</sup> Jonathan Herring "Familial homicide, failure to protect and domestic violence: who's the victim?" (2007) *Crim LR* 923 at 929.

<sup>876</sup> See Michelle Griffin "Groups slam child protection law" *The Age* (online ed, Melbourne, 9 September 2011).

presumes the defendant has the capacity to act positively to protect the victim, but this has implications for defendants who are subjected to violence.

The enactment of s 195A had its imperative in a heightened awareness of the need for child protection, as shown in both the Parliamentary Debates and Select Committee report on the Bill.<sup>877</sup> However, the provision fails to recognise that often defendants may also be victims and that some mothers, due to the coercive control imposed exerted over them by intimate partners, can also be vulnerable.<sup>878</sup> This coercion may negate, to varying degree, the voluntariness element of a failure to protect charge. However, each case needs to be considered in light of its own particular facts. Not every woman who fails to protect her child is coerced; not all coerced women will fail to protect their children.

The psychological effects of abuse have already been outlined in chs 2 and 4 of this thesis. Of particular relevance is Stark's theory of coercive control, which assumes that the battered mother is psychologically "normal" and possesses an average level of parental competence, but this competence is affected by the coercion she faces from the abuser.<sup>879</sup> The logic of a battered mother's actions can be located in the dynamics of coercive control.<sup>880</sup> Stark argues that:<sup>881</sup>

... the only rational or ethical assumption on which protective services or justice can proceed, is that the child's safety and the mother's capacity to protect the child are compromised by the same source, the coercive strategies employed by the batterer. Thus, it is our failure to protect, not hers, that provides the proper basis for intervention.

Yet some commentators argue that a mother who fails to protect is no more a good parent than the person who inflicts the abuse. Liang and Macfarlane, for instance, suggest that a mother who intentionally places herself in an abusive relationship should not be characterised as a victim of that relationship.<sup>882</sup> However, arguments such as these can be readily dismissed on the basis that they misunderstand the reality of coercive relationships and assume that women voluntarily place themselves within them.

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<sup>877</sup> See (3 May 2011) 672 NZPD 18316 and Crimes Amendment Bill (No 2) 2011 (284-2) (Select Committee Report) at 1.

<sup>878</sup> See also ch 4.

<sup>879</sup> Evan Stark "A failure to protect: Unravelling 'the Battered Mother's Dilemma'" (1999-2000) 27 W St U L Rev 29 at 105.

<sup>880</sup> At 82.

<sup>881</sup> At 110.

<sup>882</sup> BA Liang and WL Macfarlane "Murder by omission: child abuse and the passive parent" (1999) 36 Harv J on Legis 397 at 443.



Liability under s 195A of the Crimes Act 1961 is contingent upon a failure to take reasonable steps to protect a victim from risk of death, grievous bodily harm, or sexual assault. A mother may be liable if her omission constitutes a “major departure” from the standard of care expected of a reasonable person to whom the duty applies – that is, gross negligence must be proved.<sup>883</sup> However, as Miccio observes, “in spite of neutral language, the reasonable parent or person is white, male, heterosexual and middle class.”<sup>884</sup> While the law applies equally to both mothers and fathers, defendants charged with failure to protect are almost always female, which cannot be solely explained by the fact that more women have custody of their children.<sup>885</sup> Society expects that a mother will go further in order to protect her child – the mother is expected to take *more than* reasonable steps, to place the child’s needs above her own.<sup>886</sup> Accordingly, there is a gender bias in the system that holds women accountable for failing to protect their children, but many fathers are never held accountable for similar omissions or failing to be involved in their children’s lives on any level.<sup>887</sup> Jacobs compares the cases of Pauline Zile, the first woman in Florida to be convicted for first degree murder based on a failure to protect her daughter from her partner’s violence, with that of David Schwarz, whose son was killed by his step-mother. No charges were laid against Schwarz, notwithstanding that he was living with the child and step-mother during the abuse.<sup>888</sup> Jacobs also reports the case of Kimberly Novy, convicted of the murder of her stepson. She was prosecuted on the basis that if she had not inflicted the injuries herself, then she was accountable for failing to protect him from the boy’s father, Keith Novy. Despite evidence that the child’s abuse began at least nine months prior to Kimberly meeting Keith Novy, Keith was not prosecuted in relation to his son’s death.<sup>889</sup> There are numerous other cases where the same gender bias is apparent.<sup>890</sup>

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<sup>883</sup> Crimes Act 1961, s 150A.

<sup>884</sup> GK Miccio “A reasonable battered mother? Redefining, reconstructing, and recreating the battered mother in child protective proceedings” (1999) 22 Harv Women’s LJ 89 at 110.

<sup>885</sup> JA Fugate “Who’s failing whom? A critical look at failure-to-protect laws” (2001) 76 NYU L Rev 272 at 274.

<sup>886</sup> MS Jacobs “Requiring battered women die: liability for mothers under failure to protect statutes” (1998) 88 J Crim L & Criminology 579 at 587.

<sup>887</sup> LE Daigle “Empowering women to protect: improving intervention with victims of domestic violence in cases of child abuse and neglect: a study of Travis County, Texas” (1998) 7 TJWL 287 at 291-292.

<sup>888</sup> Jacobs, above n 886, at 582-584.

<sup>889</sup> At 613-614.

<sup>890</sup> See, for example, Fugate, above n 885.

The expectation that a mother must protect her children from harm is especially complicated in situations where she is also being victimised by an intimate partner.<sup>891</sup> As Lindauer observes, “[b]eing a good mother is difficult. Being a good mother and a victim of domestic violence is even harder.”<sup>892</sup> The link between spousal abuse and child abuse is well established.<sup>893</sup> Cavanagh, Dobash and Dobash, in their study on the murder of children by fathers, found that violence against the victim’s mother was happening in 71 per cent of the relationships studied.<sup>894</sup> Stark argues that domestic violence against a mother may be the single most common context for child abuse or neglect.<sup>895</sup> However, domestic violence advocates claim that women are held unfairly responsible for failing to protect their children from a battering partner’s abuse.<sup>896</sup> Rather than establishing male perpetrators of domestic violence as accountable for the resulting child abuse, some evidence suggests that it has increased the visibility and accountability of abused women as mothers who failed to protect their children.<sup>897</sup> Consequently, a battered woman who kills her abuser may be better able to raise a legal defence than a battered woman charged with failing to protect her child.<sup>898</sup> Furthermore, some jurisdictions prosecute battered women for exposing their children to intimate partner violence.<sup>899</sup>

In his article, “A Failure to Protect: Unravelling ‘The Battered Mother’s Dilemma’”, Evan Stark tells the story of Lavonne Lazarra, a mother of five, charged with abuse and neglect of her children. Stark had been asked to assess whether domestic violence perpetrated against Lazarra by her partner, Miguel Sabastian, was a factor in her offending. Stark sets out in detail the history of the relationship between Lazarra and Sabastian, which began early in 1991. By September 1992:<sup>900</sup>

Lavonne was increasingly unable to function as an autonomous adult, neglecting basic household chores, losing state assistance and living for a time without basic comforts. The

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<sup>891</sup> MJ Landsman and CC Hartley “Attributing responsibility for child maltreatment when domestic violence is present” (2007) 31 *Child Abuse Negl* 445 at 446.

<sup>892</sup> M Lindauer “Damned if you do, damned if you don’t: why multi-court-involved battered mothers just can’t win” (2012) 20 *Am U J Gender & Soc Pol’y & L* 797.

<sup>893</sup> HR Skinazi “Not just a ‘conjured afterthought’: using duress as a defense for battered women who ‘fail to protect’” (1997) 85 *Cal L Rev* 993 at 995.

<sup>894</sup> Cavanagh and others, above n 839, at 739.

<sup>895</sup> Evan Stark “The battered mother in the child protective service caseload: developing an appropriate response” (2002) 23 *Women’s Rights Law Report* 107 at 109.

<sup>896</sup> Landsman and Hartley, above n 891, at 446.

<sup>897</sup> E Peled “Abused women who abuse their children: a critical review of the literature” (2011) 16 *Aggress Violent Behav* 325 at 328.

<sup>898</sup> Skinazi, above n 893.

<sup>899</sup> Lindauer, above n 892, at 798.

<sup>900</sup> Stark “A failure to protect”, above n 879, at 70.

focus of her life shifted to sheer survival: living like a virtual hostage, every element of Lavonne's life was oriented toward placating or resisting Miguel, minimizing the hurt he could do to her and the children.

Sabastian would wake Lazarra up whenever he pleased, either by initiating sex or by suffocating her so she would wake gasping for air. When she did wake, Sabastian would feign sleep. Other times he would slap her while she was sleeping. Eventually Lazarra would pretend to be asleep, which led to chronic fatigue.<sup>901</sup>

Of Lazarra's five children, Sabastian was the biological father of the youngest, Miguelito. Sabastian clearly favoured Miguelito but singled out Lazarra's second youngest child, Candy, as a target for his anger.<sup>902</sup> Candy was fathered by Sabastian's cousin, a man of whom Sabastian was particularly jealous as Lazarra's most recent partner before him. Lazarra began putting Candy in the cellar when Miguel wanted Candy "out of his sight".<sup>903</sup> Knowing that Candy was a particular target for Sabastian's violence, and feeling that Candy was "too young to be hit",<sup>904</sup> it is not unreasonable to view Lazarra's conduct as an attempt to protect Candy. This is not a view that prosecutors took, however, charging Lazarra with neglect for leaving Candy in the cellar unattended.

Herring chronicles the case of Sandra Mujuru who was convicted under s 5 of the Domestic Violence, Crime and Victims Act 2004 (UK) for failing to protect her daughter, Ayesha, from the violence inflicted by her partner, Jerry Stephens (Ayesha's father). Stephens was convicted of murder. Mujuru was found to have known of Stephens' propensity for violence since she knew he had been imprisoned for violence against a previous girlfriend. By leaving Ayesha in Stephens' care while she went to work, Mujuru was found to have failed to reasonably protect Ayesha.<sup>905</sup>

As Herring points out, the court gave little weight to Mujuru's circumstances as an asylum seeker fleeing violence in Zimbabwe. The sentencing Judge noted that Stephens was twice the age of Mujuru and characterised him as a dangerous man with a short fuse. Herring asks:<sup>906</sup>

As a young asylum-seeker should she really have been expected to know from which authorities to seek advice and how to access the appropriate services? Could she have done

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<sup>901</sup> At 72-73.

<sup>902</sup> At 73.

<sup>903</sup> At 75.

<sup>904</sup> At 73.

<sup>905</sup> Herring, above n 875, at 926.

<sup>906</sup> At 926.

this without endangering her child and herself by igniting her partner's 'dangerously short fuse'?

Also of relevance to these questions is the fact that on the day Ayesha's body was found, Stephens had assaulted one of his previous girlfriends by hitting her on the head with a frying pan and a vase.<sup>907</sup>

Regardless of the precise theory explaining a coerced woman's behaviour, it is clear that there are complex dynamics that may compel her to remain with her abuser.<sup>908</sup> Further, it is understandable why it may have been unreasonable for such a woman to interfere with a batterer's abuse of a child. Based on her experience, she may have reasonably feared that interference would either increase the abuse to the child or precipitate deadly violence against herself and the child.<sup>909</sup> Yet such fears, even though reasonable, are often ignored in legal decision-making. Herring refers to a case in which a woman was criticised by the Judge as "putting her interests first" where the partner said he would kill her if she left.<sup>910</sup> Fugate refers to the case of Karen Dalton, whose husband had conducted a regime of violence against her and her children, including putting a gun to her children's heads and threatening to kill her son if she tried to leave the relationship. Dalton was also aware that her husband had murdered at least two women. Yet the court took a dim view of her claims of coercion, demonstrated through its repeated use of quotation marks around what it referred to as her "defense of fear".<sup>911</sup>

In what is arguably a rare decision, in *Bone v HM Advocate*<sup>912</sup>, the High Court of Justiciary, Scotland, did take into account detailed evidence bearing on the question of the reasonableness of the appellant's inaction. Andrea Bone was charged with manslaughter by witnessing and countenancing her partner's abuse of her daughter. Bone was convicted and appealed, arguing that parental responsibility does not involve criminal responsibility where the appellant is powerless to intervene; and that in assessing the reasonableness of the alleged failure to protect, regard must be had to the particular circumstances of the appellant. In that case, there was evidence about the size and strength disparities between Bone and Alexander McClure (her partner), she was eight and a half months pregnant, was

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<sup>907</sup> At 926.

<sup>908</sup> Skinazi, above n 893, at 1004.

<sup>909</sup> At 1006.

<sup>910</sup> Herring, above n 875, at 927.

<sup>911</sup> Fugate, above n 885, at 291 and see *In Re Dalton* 98 Ill App 3d 902, 424 N E 2d 1226, 54 Ill Dec 323 (1981).

<sup>912</sup> *Bone v HM Advocate* 2005 SCCR 829 (HCJ).

affected by personality disorders (including dependent personality disorder) and possessed a low level of intellectual functioning. There was also evidence that she had not intervened at the time of the assaults because she believed it was not appropriate to argue in the presence of her daughter, but she had spoken to her partner afterwards about his violence. She was scared of McClure, and was isolated socially and geographically. The High Court of Justiciary agreed with Counsel for the appellant that the relevant test was not a wholly objective one:<sup>913</sup>

In the context of the question whether a parent witnessing an assault on a child could reasonably have acted to protect the child, it is not appropriate to test the matter by reference to a hypothetical reasonable parent; rather the test is whether the particular parent, with all her personal characteristics and in the situation in which she found herself, could reasonably have intervened to prevent the assault.

What is particularly interesting about this case, in light of the current context, is that while it was noted that Bone was scared of McClure, nothing in the judgment indicates he inflicted physical violence upon her, as opposed to her child. This lends support to Stark's theory that physical violence, by itself, may play a less significant role than coercion, in terms of impact on victims and their ability to protect their children.

Should coerced women be seen as helpless victims or as active perpetrators of offences against their children? As Chiu asks, “[a]re they purely agents, purely victims, or a combination of both?”<sup>914</sup> Chiu continues:<sup>915</sup>

If battered women are victims, then they do not contribute to the violence and should not be penalized in any way; as victims, they are too debilitated to make their own choices. On the other hand, if battered women are active agents, then policies should examine, and perhaps, even punish their choices.

Ultimately we might find that coerced women are victims, but not completely helpless ones.<sup>916</sup> This conclusion finds support in actual cases, such as that of Witika, whose daughter Delcelia, died alone while Witika and her boyfriend, Smith, were at a party.<sup>917</sup>

The Crown was unable to prove which of the accused actually committed the acts of violence against Delcelia, but charged them both, either as principal offenders or as parties through encouragement. On appeal against sentence, the Court of Appeal observed that

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<sup>913</sup> At [9].

<sup>914</sup> E Chiu “Confronting the agency in battered mothers” (2001) 74 S Cal L Rev 1223 at 1239.

<sup>915</sup> At 1240.

<sup>916</sup> At 1255.

<sup>917</sup> See above at 169-170.

both Witika and Smith committed acts of violence against Delcelia and were “equally culpable”.<sup>918</sup>

Witika also appealed against her conviction, arguing that the common law defence of duress applied to the charges of failing to provide medical treatment and her secondary participation in Smith’s abuse of Delcelia. The Court of Appeal dismissed the appeal, on the basis that a claim of duress must be founded on 24 of the Crimes Act 1961, which required that the threatener be present during the offending, and there were periods of time during which Smith was absent from the house. According to Justice Gault:<sup>919</sup>

... it is quite clear that there were substantial periods during which Smith was not present and Witika had opportunities to seek assistance and secure medical care for her child and otherwise bring an end to her ill-treatment. While those periods continued she failed in her duty. Her situation was no different from that of a person who has an opportunity to escape and avoid committing acts under threat of death or serious injury.

He continued:<sup>920</sup>

The position of battered women indeed calls for sympathy but there can be no justification for broadening the grounds on which the law should provide excuses for child abuse.

What should we make of Witika? A few more facts are illuminating. In her first interview with police on the day Delcelia died, Witika exonerated Smith from any responsibility. Two days later she recanted and blamed Smith for all of the injuries. In a third interview after the post-mortem results were made available she acknowledged some responsibility for failing to put a stop to Smith’s abuse of Delcelia. She also admitted to some punching of Delcelia. Witika’s prevarication is consistent with evidence that Smith had violently beaten her on a number of occasions. A doctor who examined Witika in September 1990 described her injuries as being close to 10 on a severity scale from 0-10. Further evidence of Witika’s mutability comes from her own diary, in which she wrote:<sup>921</sup>

I hit Delc really bad yesterday and it gave me a real fright and that’s when I knew I had to stop hitting her. Not for my sake but for hers.

I’m really happy with myself, cause I am learning to control my anger and that’s good, cause I’m not hitting Delc out of anger and I don’t want to any more either only for a good reason.

These entries, on one hand, show at least a consciousness of the riskiness of her conduct. But they also reveal a woman who tried to be a good mother to Delcelia. Witika, vilified

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<sup>918</sup> *R v Witika*, above n 830, at 440, 273.

<sup>919</sup> At 436, 284.

<sup>920</sup> At 436, 284.

<sup>921</sup> At 436, 276.

in mainstream news media, is not simply a perpetrator of child abuse but someone who made some attempts to alter her behaviour and protect her child. The status of mothers like Witika, and the many others charged with failures in respect of their children, is not dichotomous: they are not bad mothers or good mothers, perpetrators or victims, agents or helpless. They can be all of these things, both at different times and at the same time.

Even battered women may not see themselves as victims. The law usually perceives victimisation as a unilateral exercise of power, in which harm is caused to a “weak” victim. Part of the problem with using the term “victim” as a descriptor is that it downplays an individual’s strengths and capacities.<sup>922</sup> Agency, on the other hand, implies total freedom from victimisation, which is not always accurate either. Neither of these two concepts - agency or victimisation - completely takes account of women’s experiences of coercive relationships.<sup>923</sup> As Schneider notes:<sup>924</sup>

Portrayal of women as solely victims or agents is neither accurate nor adequate to explain the complex realities of women's lives. It is crucial for feminists and feminist legal theorists to understand and explore the role of both victimization and agency in women's lives, and to translate these understandings into the theory and practice that we develop.

For many years, the legal picture of the battered woman has been dominated by the concept of learned helplessness – a victim who, due to repeated cycles of violence, is unable to escape.<sup>925</sup> Contrary to this legal view, studies suggest that battered women make multiple attempts to leave.<sup>926</sup> Rigid depictions of battered women prevent the recognition of significant reactions to abuse, other than failing to protect. For example, some women act as a buffer between an abuser and the child; others reduce their working hours so they can spend more time at home.<sup>927</sup> Brown tells of one woman who used her sexuality to distract her partner from harming her son. Despite her efforts, he would interrupt sexual intercourse to continue to abuse the child. Her attempts at distraction were not accepted by the Court as actions taken to save the boy’s life.<sup>928</sup>

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<sup>922</sup> Jacobs, above 886, at 602.

<sup>923</sup> At 602.

<sup>924</sup> EM Schneider “Describing and changing: women's self-defense work and the problem of expert testimony on battering” (1992) 14 Women's Rights Law Report 213 at 239.

<sup>925</sup> Jacobs, above n 886, at 604.

<sup>926</sup> Miccio, above n 884, at 103.

<sup>927</sup> Jacobs, above n 886, at 604-605.

<sup>928</sup> G Brown “When the bough breaks: traumatic paralysis - an affirmative defense for battered mothers” (2005) 32 Wm Mitchell L Rev 189 at 239.

For some women, failure to protect may actually represent a survival strategy rather than a failure. Some women know only too well that interfering with an intimate partner during a violent episode may have engendered only more violence toward herself and her children.<sup>929</sup> Skinazi argues:<sup>930</sup>

Partner assault involves coercion and control over every aspect of a person's life. Structural inequalities, the systemic nature of women's oppression, and the harms associated with domination and resistance reinforce this power. Child abuse represents an extension of the batterer's coercive tactics from mother to child. Hence, if a mother believes that her chances to escape with her children are limited, given the backdrop of the assailant's previous conduct (i.e., hunting the family down and threatening to kill them if the mother does not return to him), her escape options may be restricted. In such a situation, the word "choice" certainly takes on a new meaning.

A coerced mother knows what her abuser is capable of when he threatens to harm her or the children if she disobeys or leaves. This explains why a mother may try to placate her abuser at almost any cost to save her children from harm, perhaps even staying with the partner or "allowing" the abuse, if she thinks it will prevent greater harm to her children.<sup>931</sup> Intervening or shielding a child from a violent and angry person is often not only dangerous, but lethal to the intervener and the child.<sup>932</sup>

It is important at this point to reiterate that not all mothers who are charged with failure to protect their children are victims of violence per se. A mother may believe that she and her child are better off financially by staying with an abusive partner, or she may have other reasons for staying. Lisa Kuka, Nia Glassie's mother, was convicted of failing to provide the necessities of life (medical treatment) and failure to protect her daughter, Nia, from violence. Kuka, who worked away from the home six days a week, admitted that she knew of but "turned a blind eye" to the violence in her home because her loyalties were to her partner, Wiremu Curtis, who was convicted (along with his brother) of Nia's murder.<sup>933</sup> There was no evidence raised at trial to suggest that Kuka was subjected to physical violence from Curtis or anyone else. As Stark suggests, however, violence is not the only tactic of control. Kuka did give evidence that when she argued with others in the house over their treatment of Nia, their excuses were "we look after her[,] you're at work, where

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<sup>929</sup> Skinazi, above n 893, at 1028.

<sup>930</sup> At 1030.

<sup>931</sup> At 995-996.

<sup>932</sup> At 996.

<sup>933</sup> *R v Kuka* [2009] NZCA 572 at [63].



are you[?]"<sup>934</sup> It is conceivable, then, that Kuka's economic situation and the recriminations levelled at her for her absence provided a context for her alleged failure to protect.

A final premise that ought to be acknowledged is that agency is not the same thing as control, and even playing an active role does not always connote blameworthiness.<sup>935</sup> Agency does not mean that coerced women have the ability to control their abuse. It is not justifiable to penalise coerced women every time they do not use their agency to end the abuse. The lives of abused women are complex, and not every action or choice such a woman makes is to avoid or affect future violence.<sup>936</sup>

*Proposed reform: defending coerced women charged with failure to protect*

In New Zealand, there are no codified defences or common law defences that operate to exculpate a mother charged with failing to protect her child from the violence of another. This thesis argues for the creation of an affirmative defence that recognises the realities of coerced mothers and operates to consider the totality of a woman's circumstances, available resources and the history of her partner's abusive behaviour, in considering whether she has, in fact, failed her child.

Despite the clear link between spousal abuse and child abuse and neglect, no consistent theory has yet been developed for the defence of mothers that is based on the connection between the abuse they receive and their ability to prevent harm to their children.<sup>937</sup> While public awareness of child abuse did increase at the same time as domestic violence awareness, the sad paradox is that what also increases is the likelihood of a mother being prosecuted for failure to protect.<sup>938</sup>

Everyone charged with a criminal offence has the right to defend herself. The current legal position in New Zealand exposes a coerced mother to prosecution for failure to protect, for which she is liable if her failure is seen as unreasonable, or as a major departure from a reasonable standard of care. There are no codified or common law defences that operate to exculpate her. As I will shortly argue, compulsion and necessity involve stringent tests and will rarely, if ever, apply in this context. Self-defence is clearly inapplicable,

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<sup>934</sup> At [63].

<sup>935</sup> Chiu, above n 914, at 1257-1258.

<sup>936</sup> At 1258.

<sup>937</sup> Jacobs, above n 886, at 585.

<sup>938</sup> At 585.

provocation has been repealed, and New Zealand does not have a defence of diminished responsibility.

The difficulties encountered in arguing either compulsion or necessity in the context of failure to protect charges is summarised in the following paragraphs. For the defence of compulsion to succeed it must be proved that a coerced mother was in fact faced with threats of immediate death or grievous bodily harm, from a person who is present when the offence is committed. The threat does not have to be explicit. She must believe that the threats will be carried out.<sup>939</sup> In a relationship characterised by coercive controlling violence, while a court could find threats of immediate death or grievous bodily harm, the defence is likely to fail on the requirement that the threatener be present when the offence is committed, as was the case in *R v Witika*.<sup>940</sup> This is particularly the case in failure to protect cases because of the ongoing nature of the offence. It is also difficult to prove the subjective belief of the coerced mother – the fact that she remains with her abuser is likely to be construed by a jury as evidence that she did not take the threats seriously.

Necessity has similar difficulties, even if it were to apply to threats from another person, contrary to the ruling in *Kapi v Ministry of Transport*.<sup>941</sup> Again, a court may find that the mother did believe that she faced imminent peril of death or serious injury (whether this is on reasonable grounds may be less easy). They are less likely to find that she had no realistic choice but to break the law, or that the failure to protect was proportionate to the peril. As mentioned previously, a mother is expected to place her child's needs above her own<sup>942</sup> and is at risk of being criticised for putting herself first for trying to avert a threat against her own life.<sup>943</sup>

Essentially, both compulsion and necessity presume that the defendant has options that are not necessarily available to the coerced mother, and ignore her ability to accurately perceive a real risk. As Skinazi observes:<sup>944</sup>

Consideration of the defendant's heightened ability to predict her partner's behavior toward herself and her children – a skill she has developed through a history of abuse with her partner – is crucial in determining whether the defendant's responses to his threats were, in fact, reasonable. Additionally, because in most of these cases, the paradigm “gun to the

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<sup>939</sup> See *R v Teichelman* [1981] 2 NZLR 64 (CA) and *R v Raroa* [1987] 2 NZLR 486 (CA).

<sup>940</sup> *R v Witika*, above n 830.

<sup>941</sup> *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA).

<sup>942</sup> Jacobs, above n 886, at 587.

<sup>943</sup> Herring, above n 875, at 927.

<sup>944</sup> Skinazi, above n 893, at 1003.

head,” or some other obviously extreme example of duress, is not present, or at least not apparent, a jury using an objective standard of reasonableness is not likely to believe that the defendant acted reasonably under a sufficiently imminent threat.

In addition, traumatic bonding<sup>945</sup> may mean that a victim of abuse becomes emotionally dependent on the abuser and is convinced that the violence has stopped or is about to.<sup>946</sup>

While the death of child might seem foreseeable to others, that is not necessarily so for women within the abusive relationship.<sup>947</sup> Brown argues that Dutton and Painter’s theory of traumatic bonding could be used as a psychological foundation for an affirmative defence of “traumatic paralysis”, the essence of which is the emotional bond a mother has with her abuser means she is her incapable of protecting herself or her children.<sup>948</sup>

Skinazi argues that in most United States jurisdictions the asymmetrical treatment of the reasonable person standard in duress as compared with self-defence leads to very different results.<sup>949</sup> Accordingly, she proposes a new duress standard as follows:<sup>950</sup>

The defense of duress is determined by considering whether, under the totality of the circumstances (including past abuse), the threat (implicit or explicit), or the use of force, was such that the actor believed she could not resist, and a reasonable person similarly situated could not resist.

Skinazi’s proposed duress standard stresses a responsible actor who possesses self-direction and exercises agency. It also distinguishes between mothers who hurt their children, and mothers who hurt their children in an effort to protect them.<sup>951</sup> Expert evidence is essential to explain to a jury that an abused or coerced woman develops survival skills, and in light of these skills, it may be reasonable to obey the abuser’s instructions.<sup>952</sup> The totality of a woman’s circumstances, available resources and the past pattern of her partner’s abusive behaviour, may mean she makes a fully controlled decision, based on reasonable inferences and involving intentional behaviour.<sup>953</sup> This latter point is important, as characterising her choices as involuntary may imply that she is psychologically impaired and unable to take care of her children.<sup>954</sup>

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<sup>945</sup> See ch 4 for a fuller discussion of the psychological effects of violence and coercion.

<sup>946</sup> Herring, above n 875, at 929.

<sup>947</sup> At 929.

<sup>948</sup> Brown, above n 928, at 239.

<sup>949</sup> Skinazi, above n 893, at 993.

<sup>950</sup> At 1024.

<sup>951</sup> At 1035.

<sup>952</sup> At 1010.

<sup>953</sup> At 1010.

<sup>954</sup> At 1010–1011.

I would argue, however, that because the defence ought to exculpate only women whose will is to some degree overborne by another, explicit reference to coercion ought to be made. Also, the use of the term “resist” in Skinazi's proposal unnecessarily limits the operation of the defence. While the duress defence usually counters crimes of commission,<sup>955</sup> what is crucial about coercion in respect of failure to protect is that it prevents the mother from *acting* as much as resisting.

In New Zealand, self-defence is currently composed of a similar hybrid test which asks whether, in the circumstances as the accused believed them to be, the force used in self-defence (or defence of another) was reasonable. Also, although envisaging different circumstances, the now repealed provocation defence constructed a hypothetical person, possessing the self-control of the “ordinary” person, yet otherwise having the characteristics of the accused. Potentially, these hybrid tests allow for a consideration of the totality of the circumstances faced by a coerced mother. Indeed, this was the test held to apply in *Bone v HM Advocate*.<sup>956</sup> It allows a jury to consider the totality of the circumstances – “all her personal characteristics and ... the situation in which she found herself”<sup>957</sup> – in determining whether a mother's alleged failure was a reasonable one.

In New Zealand, the offence of failing to protect a child from the violence of another takes on the nature of a strict or absolute liability offence due to the elements that must be proved and the absence of a defence. All that must be proved is the omission and that it was a major departure from the standard of care expected of a reasonable mother. Neither the defendant's actual conduct, nor her state of mind (apart from knowledge of the abuse)<sup>958</sup> factors into the analysis at all. As Ashworth observes, most of the controversy over strict liability offences stems from the absence of a fault requirement for conviction. For the same reason, he notes that there is much debate over the extent to which criminalising negligence is legitimate.<sup>959</sup> Many commentators take the view that, as Horder puts it, it should not be possible to “blunder into” conduct that is seen as morally wrong.<sup>960</sup> As has been observed

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<sup>955</sup> Brown, above n 928, at 235.

<sup>956</sup> See above at 184-185.

<sup>957</sup> *Bone v HM Advocate*, above n 912, at 167.

<sup>958</sup> *R v Kuka*, above n 933, at [58].

<sup>959</sup> Andrew Ashworth “Conceptions of overcriminalization” (2008) 5 Ohio St J Crim 407 at 411.

<sup>960</sup> Jeremy Horder “Gross negligence and criminal culpability” (1997) 47 UTLJ 495.

frequently in this thesis, the criminal law should only convict those who are culpable in some way and we should only label someone a “criminal” if they are blameworthy.

Another argument against the criminalisation of negligence in the context of failures by parents to protect their children is that where there are duties owed by doctors, employers, drivers and so on, there are also settled rules or codes of conduct which delimit the standards that such defendants are expected to observe. This is not the case in respect of parents, for whom there are few, if any, formal rules and a diverse range of practice.<sup>961</sup> Consequently, it is difficult for parents to know the standards they are expected to meet and could therefore be found grossly negligent, and liable for manslaughter if the child dies, through very little fault on their part.<sup>962</sup>

For similar reasons, an affirmative defence is preferable in the context of failure to protect charges than relying on evidence that negates mens rea. This is because evidence of the mother’s state of mind is irrelevant, once it is established that she owed a duty of care. While the court must prove knowledge of the abuse this knowledge is bound up with the question of whether the defendant failed to perform a legal duty and whether such failure was a major departure from the standard of care expected of a reasonable person or parent having such a legal duty. In other words, it is not relevant to subjective mens rea. Furthermore, courts have traditionally been reluctant to allow expert evidence on whether or not an accused was acting with intent, as this would be a matter on which the jury must ultimately decide, although s 25(2) of the Evidence Act 2006 states that expert evidence is not inadmissible simply for the fact that it breaches the “ultimate issue” rule.

Notwithstanding that there are valid arguments against the enactment of failure to protect statutes, such laws already exist and no doubt will continue to come into existence. I therefore suggest that, where such charges arise, from either common law or statutory duties, an affirmative defence ought to be available. This defence could take a similar form to that proposed by Skinazi, with some modification as follows:

A person charged with failure to protect a child or vulnerable adult from the violence of another is protected from criminal responsibility if she was acting under coercion. Coercion is determined by considering whether, under the totality of the circumstances (including past abuse), the threat (implicit or explicit), or the use of force, was such that the actor was

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<sup>961</sup> At 518–519.

<sup>962</sup> At 519.

coerced to the extent she was unable to resist or to take positive action and a reasonable person similarly situated could not resist or take positive action.

There is clearly a gap in the law in New Zealand, and possibly other jurisdictions, that could be filled by such an affirmative defence. It could potentially be expanded to apply to coerced women facing any charge, not just failure to protect.

In many cases, convicting a coerced mother for failure to protect will not benefit children, but re-victimises both mother and child who have both suffered enough abuse.<sup>963</sup> It is difficult to see what functions of the criminal law are served by criminalising coerced mothers who fail to protect their children. As Fugate argues, courts wrongly assume that the threat of imprisonment will encourage mothers to protect their children when they otherwise would not.<sup>964</sup> Even in cases where a child dies as a result of the abuse inflicted by another, little is achieved by convicting a coerced mother for manslaughter. Often, there are other children who will invariably be placed in care, exposing them to a greater risk of abuse and neglect. Studies show that there is a low chance of families being reunified after removal, and there are substantial risks to children in foster care.<sup>965</sup> Consequently, Murphy argues that courts should have a complete understanding of the mother's circumstances and if she has participated in the abuse or neglect of her children, courts should identify the contributing factors, particularly with a view to the possibility of domestic violence.<sup>966</sup> Arguably the preventative function of the criminal law is better served by focusing on those who actually inflict violence against children. Ultimately, a mother who has participated in the abuse or neglect of her children should be accountable for the resulting harm, but only to the extent to which her participation was truly voluntary.

### SPOUSAL REVENGE AND ALTRUISTIC KILLINGS

Distressing as they are, cases in which these intentional killings occur, appear to be relatively rare. What this category of cases has in common is that, where the perpetrator survives, he or she is liable for a murder conviction because of the clear evidence of intent to kill. The factor that links spousal revenge and altruistic killings is that each can be described as intended (albeit not necessarily pre-meditated). To that end these types of

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<sup>963</sup> Skinazi, above n 893, at 999.

<sup>964</sup> Fugate, above n 885, at 290.

<sup>965</sup> JC Murphy "Legal images of motherhood: conflicting definitions from welfare 'reform', family and criminal law" (1998) 83 Cornell L Rev 688 at 712.

<sup>966</sup> At 712.

killings are both considered in this section, even though, depending upon the particular circumstances, disparate degrees of moral blameworthiness may be involved.

### *Spousal revenge*

Spousal revenge killings are those in which the perpetrator's anger towards another person (usually a sexual partner) is displaced onto a child.<sup>967</sup> As Resnick points out, the prototype for spousal revenge killings can be located in Euripides's play *Medea*. Medea killed her two sons following her husband, Jason's, infidelity. She then told him: "[t]hy sons are dead and gone. That will stab thy heart".<sup>968</sup> A series of contemporary cases from New Zealand and abroad gives an overview of the characteristics of this type of child homicide.

In February 2018, former Texas accountant, John David Battaglia was executed for the 2001 murders of his two daughters, aged nine and six. Battaglia shot his daughters while his estranged wife, Pearle, could hear the killings through a speaker phone.<sup>969</sup>

Claudia, Tiffany and Holly Bristol were killed by their father, Alan Bristol, on 4 February 1994 in Whanganui, New Zealand. All died from carbon monoxide poisoning. The murders followed a custody dispute between Alan and his ex-wife, Christine Bristol.

In Melbourne, Australia, Darcey Freeman died when she was thrown from a bridge by her father, Arthur Freeman, on 29 January 2009. He was later sentenced to 32 years in prison for murdering Darcey. The sentencing Judge observed:<sup>970</sup>

Any motive which existed for the killing had nothing to do with the innocent victim. It can only be concluded that you used your daughter in an attempt to hurt your former wife as profoundly as possible.

Similar comments were directed at Robert Farquharson who killed his three sons by driving them into a dam. Justice Cummins observed, in sentencing Farquharson at first instance:<sup>971</sup>

... you wiped out your entire family in one act. Only the two parents remained: you, because you had always intended to save yourself; and their mother, because you intended her to live a life of suffering.

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<sup>967</sup> Wilczynski *Child Homicide*, above n 837, at 45.

<sup>968</sup> Resnick, above n 836, at 205 citing Whitney J Oates & Eugene O'Neill Jr (eds) *The Complete Greek Drama* (Random House, New York, 1938).

<sup>969</sup> "Accountant John David Battaglia who killed his daughters looks to avoid execution" *The New Zealand Herald* (online ed, Auckland, 1 February 2018).

<sup>970</sup> *R v Freeman* [2011] VSC 139 at [17].

<sup>971</sup> *DPP v Farquharson* [2007] VSC 469 at [7]-[8].

On 12 February 2014, also in Melbourne, Luke Batty was fatally beaten by his father, Greg Anderson, with a cricket bat in front of witnesses at a cricket practice. Greg Anderson was then shot by police after he incited them to do so. Anderson had, less than a year earlier, been arrested for threatening to kill his former partner, Rosie Batty, and for breaching an intervention order preventing him from going to her home.<sup>972</sup>

One month prior to Luke Batty's death, in Dunedin, New Zealand, Edward Livingstone shot his son Bradley, aged 9 and daughter Ellen, aged 6, as they lay in their beds. He then shot himself in the bedroom he used to share with his former wife, Katharine Webb. Contrary to police policy, Livingstone had been granted diversion for an earlier breach of a protection order, and was discharged without conviction for a second.<sup>973</sup> Ann Stevens, a lawyer who represented Ms Webb, said Ms Webb refuted the Coroner's suggestion that "best practice" by the relevant agencies might not have altered the tragic outcome. Ms Stevens said:<sup>974</sup>

That's probably ... the most distressing finding, because that implies there's an inevitability about this that we just can't accept. Inevitability comes with tides and with the sun rising but it doesn't come with human behaviour, in our view. As the report makes clear ... *these were choices that Mr Livingstone made, choices to murder his children* and those choices would be different, in our view, given different factors.

In 1992, Raymond Ratima killed his three sons, Piripi, Barney and Stacey, their uncle, 14-year-old Phillip Ferguson Jr, their aunt Nicola Ferguson, her partner Bevan Tepu, Nicola and Bevan's son Steven, and their couple's unborn baby. He also planned to kill his ex-partner, Toni, and her parents when they arrived home, but he was overpowered by his father-in-law. Ratima had been evicted from their home eight days earlier due to violence against Toni. He was sentenced to life imprisonment and at the time of writing remains in prison.

Kevin Little had separated from his partner, Chontelle Murphy, but refused to leave the house the couple shared. Ms Murphy said that Little threatened to take the couple's 7-month-old child, Alyssa, away from her, and told her that if she left him she would not get custody of Alyssa. Ms Murphy applied to the Family Court for an occupation order and interim custody of Alyssa, the couple's 7-month-old daughter. The court papers were

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<sup>972</sup> Melissa Davey "Luke Batty: killed by a father no one truly knew" *The Guardian* (online ed, Australia, 2 November 2014).

<sup>973</sup> *Livingstone* [2015] NZCorC 50, NZCorC 51, NZCorC 52.

<sup>974</sup> "Coroner releases report on Livingstone filicides-suicide" (23 June 2015) <[www.nzfvc.org.nz/news/coroner-releases-report-livingstone-filicides-suicide](http://www.nzfvc.org.nz/news/coroner-releases-report-livingstone-filicides-suicide)> (emphasis added).



served on Little on 23 March 2006. Two days later, Little drowned Alyssa in the bath. He claimed he had a seizure and dropped her in the bath but after hearing expert evidence from both the Crown and defence witnesses, the jury convicted him of murder. He was sentenced to life imprisonment with a 17-year minimum non-parole period.<sup>975</sup>

### *The psychology of spousal revenge*

Wilczynski, another researcher who has categorised child homicide according to the perpetrator's motivation,<sup>976</sup> names one category 'Retaliating', in which anger towards the perpetrator's sexual partner is displaced onto the child victim.<sup>977</sup> Wilczynski found that men were far more likely than women to commit this type of killing.<sup>978</sup> Dawson also found that where revenge and/or jealousy were identified as a motive for filicide (the killing of a child by its parent), filicidal fathers were significantly more common than filicidal mothers.<sup>979</sup>

Alder and Polk identify several features of a sub-category of paternal filicide which they refer to as "filicide-suicide", in which the perpetrator either attempts or is successful in killing themselves as well as the child victim. The most significant feature of this sub-category, according to Alder and Polk, is that the vast majority of perpetrators in this category are the biological fathers of the children they kill.<sup>980</sup> Another significant feature is that they occur in the context of separation and custody disputes.<sup>981</sup> In Alder and Polk's case-studies, men who committed filicide-suicide tended to be older than mother's de facto spouses who were responsible for fatal child maltreatment deaths, and for the most part were not previously physically violent toward their children.<sup>982</sup>

While there are other cases involving parents who intentionally kill their children, perhaps also in the context of marital breakdown, it cannot always be concluded that the killings were for the purposes of spousal revenge. In some cases, the perpetrator may be depressed, psychotic, or genuinely (if mistakenly) believed the children would be better off dead

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<sup>975</sup> *R v Little* CA 108/07 4 October, 9 October 2007.

<sup>976</sup> Wilczynski *Child Homicide*, above n 837.

<sup>977</sup> At 45.

<sup>978</sup> At 45.

<sup>979</sup> Myrna Dawson "Canadian Trends in Filicide by Gender of the Accused, 1961-2011" in Thea Brown, Danielle Tyson and Paula Fernandez Arias *When Parents Kill Children: Understanding Filicide* (Palgrave Macmillan, Switzerland, 2018) at 12.

<sup>980</sup> Alder and Polk, above n 835, at 78.

<sup>981</sup> At 78.

<sup>982</sup> At 78.

(altruistic killings). However, Carruthers notes that anger at a spouse, rather than the victim, is an important defining feature of spousal revenge killings.<sup>983</sup> Further a number of life stressors can usually be seen as present before such a homicide takes place, including unemployment, financial difficulties, and relationship breakdown.

After reviewing the research in this area, Carruthers offers a “folk psychological narrative” for explaining spousal revenge killings:<sup>984</sup>

... at a time of considerable life stress, the killer’s partner is perceived to do something, such as initiate a divorce, which strips the killer of all social power over their partner, or at least causes a personally significant loss such as the loss of children or the loss of social roles within the family. This feeling may be exaggerated by a bias toward blaming others for problems. This generates feelings of anger and a desire for revenge in order to harm and regain their social power. Alternatively, the rage is a result of loss of a sense of identity following the loss of a social role the killer feels constitutes their identity. A desire to harm the former partner is formed. Killing the child is identified as a drastic way to achieve this harm. The killer may have borderline personality disorder and may or may not attempt suicide after the killing.

Resnick agrees that the most common “precipitants” for spousal revenge homicides are spousal infidelity and child custody disputes.<sup>985</sup> In light of the fact that, as noted in ch 2, indicators of sexually proprietary and controlling behaviours include harming or threatening to harm the woman’s children,<sup>986</sup> it seems reasonable to suggest that spousal revenge homicides can be an extension of sexual proprietariness, even though the ultimate victim of the revenge is neither the target of the sexual proprietariness nor a sexual competitor.

In Johnson’s study, in cases where information was available about the nature of the perpetrator’s familial relationships, there were indications that he held a proprietary view of his wife and children, and these views existed prior to separation. Furthermore, there were indications that these proprietary views contributed to the breakdown of the couple’s relationship.<sup>987</sup> Johnson observes that further evidence for the existence of this proprietary attitude of men towards their partners comes from research which found that men often feel resentment and anger because their wives are able to access benefits to enable them to

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<sup>983</sup> G Carruthers “Making sense of spousal revenge filicide” (2016) 29 *Aggress Violent Behav* 30 at 32.

<sup>984</sup> At 33.

<sup>985</sup> Resnick, above n 836, at 205.

<sup>986</sup> Holly Johnson “When Feminism Meets Evolutionary Psychology: The Enduring Legacy of Margo Wilson” (2012) 16(4) *Homicide Stud* 332 at 338.

<sup>987</sup> Carolyn Harris Johnson *Come With Daddy: Child Murder-Suicide After Family Breakdown* (University of Western Australia Press, Western Australia, 2005) at 132.

live independently.<sup>988</sup> Wilczynski concluded from her study that retaliating cases seemed to be “a natural extension of the men’s power and control within their family and sexual relationships”.<sup>989</sup>

However, it is important to remember, as noted in ch 2, that not all behaviours are adaptive.<sup>990</sup> The inclination to invest discriminately in offspring may be evolved psychological adaptation, but spousal revenge homicidal motives are arguably “maladaptive byproduct[s] of the evolved psyche”.<sup>991</sup> Liem and Reichelmann, also relying upon the notion of men’s need for control over their spouses’ reproductive capacity, suggest that in an attempt to regain this control following withdrawal or estrangement, men may respond with lethal violence in which the children are seen as extensions of their mother.<sup>992</sup> In Liem and Reichelmann’s study, the term “spousal revenge” was applied to cases in which the perpetrator killed both the children *and* his partner but did not commit suicide. In that category of cases, the authors found that often the children were the perpetrator’s step-children rather than his biological children.<sup>993</sup> Liem and Reichelmann used the label “spousal revenge” because the “primary object of aggression is the (estranged) intimate partner”.<sup>994</sup> It seems, therefore, that the revenge in these cases can take the form of physical harm (killing the spouse) or psychological (killing the children and leaving the spouse bereft). From a moral blameworthiness perspective, some might argue the difference matters little. Others may argue, on the other hand, that killing children as a means to make their mother suffer in perpetuity is “murder most foul”.

An examination of the cases referred to earlier reveals that they bear some of the hallmarks of spousal revenge cases. At the time he killed his two daughters, John Battaglia was on probation for earlier harassment of his ex-wife, Pearle. Greg Anderson who killed his son, Luke Batty, in Melbourne, was estranged from Luke’s mother, Rosie Batty. Ms Batty told an inquest into Luke’s death that Anderson wanted to punish her. The inquest also heard

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<sup>988</sup> At 91, citing Elliott and Shanahan Research “Summary of Background Research for the Development of a Campaign Against Domestic Violence” (1988) Department of the Prime Minister and Cabinet, Canberra.

<sup>989</sup> Wilczynski *Child Homicide*, above n 837, at 46.

<sup>990</sup> Martin Daly and Margo Wilson “Family Violence: an evolutionary psychological perspective” (2000) 8 *Va J Soc Poly & L* 77 at 120.

<sup>991</sup> At 120.

<sup>992</sup> Marieke Liem and Ashley Reichelmann “Patterns of Multiple Family Homicide” (2014) 18(1) *Homicide Stud* 44 at 53.

<sup>993</sup> At 51; compare Alder and Polk, above n 835.

<sup>994</sup> Liem and Reichelmann, above n 992, at 51.

that while there was evidence that Anderson probably had an undiagnosed mental illness he “knew how to manipulate the court system frequently challenging intervention orders taken out against him” and that he “was a very intelligent man and very much in control of situations”.<sup>995</sup> Crucially, he had a decade-long history of violence toward Ms Batty, including threats to kill and a threat to cut off her foot, and had at one point held a knife to Luke and said “[t]his could be the one to end it all”.<sup>996</sup>

Livingstone had a prior conviction from Australia, for setting fire to a house occupied by his ex-girlfriend and her new partner. In New Zealand, on a supervised visit with his children, he gave them bullet casings to give to their mother. Unsurprisingly, Webb interpreted this as a threat. Witnesses testified that Livingstone had previously talked about killing both his children and their mother.<sup>997</sup> Although Webb had taken out a protection order against him, Livingstone had breached it on more than one occasion prior to the killings. The breakdown of their marriage followed from an incident in which he had raped her for over 5 hours.<sup>998</sup> Despite a protection order being issued to Livingstone following that incident, no rape complaint was actually made.

Little involves the breakdown of a relationship and potential loss of custody of a child. In sentencing Little, Gendall J observed that he made no contribution toward the cost of Alyssa’s funeral or headstone which was at odds with his expressions of affection for her. He also kept Murphy’s credit card for some months and incurred \$1,000.00 worth of debt on it which, in Gendall J’s view, indicated an uncaring attitude toward Murphy.<sup>999</sup>

In terms of Bristol, as Ruth Busch and Neville Robertson observe, the killing of his daughters “was the final act of a sustained campaign of violence and intimidation by Bristol against his estranged wife, Christine”.<sup>1000</sup> Freeman killed his daughter, Darcey, in the aftermath of a custody and access dispute and just prior to the killing had told his estranged wife, Peta Barnes, to say goodbye to her children, and that she would never see

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<sup>995</sup> Davey, above n 972.

<sup>996</sup> Davey, above, n 972.

<sup>997</sup> Timothy Brown “Livingstone inquest: Killer father deceived psychiatrist” *The New Zealand Herald* (online ed, Auckland, 21 April 2015).

<sup>998</sup> Blair Ensor and Martin van Beynen “Coroner’s probe: Why did Dunedin father Edward Livingstone kill his children?” (21 April 2015) <[www.stuff.co.nz/national/crime/67904722/Coroners-probe-Why-did-Dunedin-father-Edward-Livingstone-kill-his-children](http://www.stuff.co.nz/national/crime/67904722/Coroners-probe-Why-did-Dunedin-father-Edward-Livingstone-kill-his-children)>.

<sup>999</sup> *R v Little*, above n 975.

<sup>1000</sup> Ruth Busch and Neville Robertson ““I didn’t know just how far you could fight: contextualizing the Bristol Inquiry” (1994) *Waikato Law Review* 41 at 41.

her children again.<sup>1001</sup> There is no mention of any *violence* toward his estranged wife or the children prior to the killing, although Barnes told the court that Freeman had had mood swings and anger management issues, and there had been a prior incident post-separation in which Freeman had grabbed another child in the course of an argument and Barnes feared that Freeman was about to throw the child on the fire.<sup>1002</sup>

Similarly, there is no evidence that Farquharson was violent toward his ex-wife, Cindy Gambino, or his children, but the killing of his three sons did take place in the context of Gambino entering into a relationship with another man. The sentencing Judge's comments, directed at Farquharson, observed:<sup>1003</sup>

You had a burning resentment that you were financing your estranged wife's new life. She had the better house; the better car; the children – all financially provided or supported by you; and now she had a new relationship.

...

You had love for your children; but it was displaced by vindictiveness towards your estranged wife, which led you to these crimes.

While the Ratima case contains many of the elements of revenge killings, including employment and financial difficulties, and relationship breakdown, it differs somewhat from the other cases described above in two important ways. First, Ratima killed not only his own children, but other members of his ex-partner's family. Second, by all accounts his intention was to harm his ex-partner (and her parents) by killing them, rather than by leaving her alive to grieve the loss of her children.

### *Prosecuting (and sentencing) spousal revenge*

While some of the perpetrators of spousal revenge homicides also kill themselves, including Livingstone and Anderson, discussed above, those who do not commit suicide are liable to be charged with culpable homicide. Freeman was convicted of the murder of his daughter, Darcey, and sentenced to life imprisonment with a minimum non-parole period of 32 years. For the murder of his three children, Farquharson is serving a minimum sentence of 33 years' imprisonment. These are both Australian cases. Given that Bristol and Livingstone's suicides meant they were not amenable to justice for killing their children, we cannot know what sentences they would have been subject to in New Zealand

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<sup>1001</sup> *R v Freeman*, above n 970, at [7].

<sup>1002</sup> Patrick Carlyon & Paul Anderson "Explaining the inexplicable: How could Arthur Freeman kill Darcey" *Perth Now Sunday Times* (online ed, Perth, 29 March 2011).

<sup>1003</sup> *DPP v Farquharson*, above n 971, at [8], [16].

courts. Little, as noted above, was sentenced to life imprisonment with a 17-year minimum non-parole period. Ratima was sentenced to life imprisonment under an earlier sentencing regime and is still in prison.

While the sentencing of Little and Ratima do not provide a solid basis for extrapolation, we can obtain some guidance from other “intentional bad motive” cases where the circumstances reveal a similarly high degree of moral blame. Mark Lundy, who murdered his wife, Christine, and daughter, Amber, in 2000, was originally given a 17-year minimum non-parole period but this was increased on appeal to 20 years. Christine’s killing was, by all accounts, pre-meditated but it is possible that Amber’s death was unplanned and only occurred to prevent her from identifying Lundy. The Privy Council quashed his convictions, but he was again found guilty in 2015.<sup>1004</sup> Steven Williams intentionally killed his partner’s daughter, Coral Burrows, after a night smoking methamphetamine. He first beat Coral in “a blind rage”<sup>1005</sup>, then killed her intentionally with a tree branch to cover up the crime of earlier assaulting her.<sup>1006</sup> Following this, he disavowed all knowledge of her whereabouts. Williams pleaded guilty to murdering Coral and was sentenced to life imprisonment with a minimum non-parole period of 17 years, raised from 15 years on appeal.<sup>1007</sup> Bruce Howse was given a 28-year non-parole period, reduced on appeal to 25 years, on his life sentence for the murders of his stepdaughters, Saliel Aplin and Olympia Jetson. His motive for murder was that the complainants had made allegations of sexual offending against him.<sup>1008</sup> His sentence is one of the longest given under New Zealand’s Sentencing Act 2002. Sentencing regimes in Australian states clearly provide for longer sentences than permissible under New Zealand’s regime.

### *Proposed reform – aggravated murder*

In spousal revenge killings where the spouse is not harmed, the death of the child is a (perhaps) undesired consequence or by-product of the perpetrator’s intention to victimise their spouse in perpetuity. In New Zealand, as well as other jurisdictions, spousal revenge killings are categorised as “ordinary murder”, where the aggravating features will only be relevant to sentencing and not to conviction. As has been discussed at length elsewhere in

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<sup>1004</sup> See *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273, (2013) 26 CRNZ 699.

<sup>1005</sup> *R v Williams* (2004) 21 CRNZ 352 at 356.

<sup>1006</sup> At 354.

<sup>1007</sup> At 369.

<sup>1008</sup> *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433, (2005) 21 CRNZ 823.

this thesis,<sup>1009</sup> sentencing provisions limit the extent to which *moral* blameworthiness can be considered post-conviction, but do not by themselves determine the moral culpability of the defendant. In spousal revenge homicides, given the presence of intention to victimise a spouse by using a vulnerable child, an argument can be made for such killings to be elevated beyond the category of “ordinary” murder to a more serious offence which recognises the higher degree of moral blame involved. As Webb’s lawyer, Ann Stevens, noted (above), Livingstone chose to kill his children. In the absence of any evidence of psychosis or evidence that his will had been overborne to the extent that he was incapable of exercising a rational choice, his murder of his children to punish his ex-partner, was at the more serious end of the spectrum of moral culpability.

In New Zealand, “ordinary” murder is found in s 167 of the Crimes Act 1961, whereby the offender either intends to kill or intends to cause bodily injury he knows is likely to cause death and continues regardless of the risk of death. However, there is a more serious form of murder, which is contained in s 168 of the Crimes Act 1961 which essentially codifies the common law felony-murder rule, in which murders committed in the course of other serious crimes are deemed more serious. Section 168(1) provides that:

Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:  
(a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2) ...

The offences listed in subs 168(2) include murder, abduction, kidnapping, sexual violation, and so on – offences which are themselves at the serious end of the spectrum of criminal offences. Therefore, the New Zealand legislature has already recognised that some murders are more morally blameworthy than others. There seems to be no reason why an intentional murder of a vulnerable child in pursuit of vindictiveness towards a spouse ought not to be legally recognised as another category of more serious murders – aggravated murder, for example. Such cases do generally contain an element of “malice aforethought” even if the degree of forethought may be quite small. Even spur of the moment killings in these contexts do, in the absence of any psychosis or evidence of diminished capacity, establish a “bad motive”. While sexual proprietariness may have evolved from concerns about sexual fidelity and its impact upon reproductive success, in contemporary society we ought to resist any concession to it as a guiding factor in homicidal behaviour. These cases

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<sup>1009</sup> See, in particular, chs 1 and 2.

can be set apart from cases which involve a genuine desire to alleviate suffering, such as some of the “altruistic” killings described below.

Finally, while we ought not to criminalise, for example, someone who genuinely acts in self-defence, we should expect that defendants have the fortitude to resist very trivial threats. This also applies to resisting vengeful desires. Indeed, the fact that provocation as a defence has been repealed in New Zealand, and in England and Wales the legislature has at least attempted to remove sexual infidelity as a qualifying trigger,<sup>1010</sup> demonstrates that there is no room in law for sexual proprietariness as an exculpating factor.

### *Altruistic killings*

An organism behaves altruistically – in the evolutionary sense of the term – if it reduces its own fitness and augments the fitness of others.<sup>1011</sup>

There is some debate, in the field of evolutionary science, over whether altruism evolved for the benefit of the community rather than for the benefit of individual genes – since the object of evolution is, as discussed in ch 2, is to have equal or greater reproductive success than other individuals. I do not intend to weigh into this debate, however, since what this section of the chapter deals with is not evolutionary altruism, but psychological altruism – the motivational states that drive behaviour.<sup>1012</sup> What this means is that the defendant’s behavior in killing is guided by a desire to alleviate some real or perceived suffering. It does not mean that the killing is necessarily at the expense of the defendant’s interests (although it often is, at least where the victim is a child of the defendant).

In the context of this thesis, altruistic killings are those in which the defendant perceives that the child will be better off dead. For the purposes of this thesis, this category of defendant does not include those who are psychotic or legally insane. Included in this category are those who kill terminally ill or significantly impaired children and those who kill their children in the belief that they are at a serious risk of harm (for example, from another person). In Wilczynski’s study, altruistic killings were committed almost exclusively by women.<sup>1013</sup>

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<sup>1010</sup> See ch 4.

<sup>1011</sup> Elliott Sober and David Sloan Wilson *Unto Others: The Evolution and Psychology of Unselfish Behaviour* (Harvard University Press, USA, 1998) at 199.

<sup>1012</sup> At 199.

<sup>1013</sup> Wilczynski *Child Homicide*, above n 837, at 55.



Wilczynski divided altruistic killings into two sub-categories. The first she labelled “primary” altruistic killings – cases in which there is an actual degree of suffering in the victim and absence of secondary gain for the perpetrator. “Secondary” altruistic killings, on the other hand, did not involve actual suffering on the part of the victim, and no psychotic delusions on the part of the perpetrator, although the perpetrator could be described as “mentally ill”.<sup>1014</sup> Several social and psychological factors are seen as being at play in secondary altruistic killings including lack of support; stressful life events; difficult temperament in the victim; and “the reality of motherhood bearing little relation to the idealized societal view of it”.<sup>1015</sup>

Resnick also identifies two sub-categories of altruistic killings. The first is child homicide associated with suicide, where the perpetrator decides first to kill themselves, but then feel they cannot leave their children behind in “a cruel world”.<sup>1016</sup> Resnick’s second sub-category is child homicide to relieve or prevent (real or imagined) suffering.<sup>1017</sup> Where the suffering is real, the killing could be characterised as euthanasia; but more often the killing is the result of a delusion that the child is suffering or at risk of eternal damnation.<sup>1018</sup> It should be noted that in this category of child homicide, Resnick was specifically referring to filicide – which are homicides committed by parents. However, potentially the same or similar motives can exist in other relationships.

The case of Alex Fisher is one such example. Eric McIsaac murdered Alex, his ten-year-old half-brother, by hitting him twice in the head with a wood-splitter, while Alex slept. McIsaac had a “lifelong challenge with mental health problems”<sup>1019</sup> but not an “obvious, diagnosable mental illness”,<sup>1020</sup> nor was he found to be insane at the time of the killing. However, the sentencing Judge observed that McIsaac’s mental health issues centred on his fixation that Alex was being abused and that McIsaac himself had terminal cancer. While many would perhaps argue otherwise, it is possible that Alex’s murder fits within the category of altruistic homicides. McIsaac’s and Alex’s mother testified that the brothers had a loving relationship and got on well. There was no previous history of violence by

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<sup>1014</sup> At 56.

<sup>1015</sup> At 56.

<sup>1016</sup> Resnick, above n 836, at 205.

<sup>1017</sup> At 205.

<sup>1018</sup> At 205.

<sup>1019</sup> *R v McIsaac* [2016] NZHC 1544 at [15].

<sup>1020</sup> At [15].

McIsaac toward Alex which would suggest any other motive for the killing. McIsaac pleaded guilty to murder and was sentenced to life imprisonment with a minimum non-parole period of 14 years. The sentencing Judge took into account McIsaac's early guilty plea and his mental health issues in deciding that a minimum period of imprisonment of 17 years would be manifestly unjust. Another way of framing this could be to consider that McIsaac's motive (to end his brother's alleged abuse) mitigates McIsaac's moral blameworthiness.

In 2004, a Nelson father suffocated his 5-month-old daughter. She had been diagnosed with "incomplete lissencephaly" and her parents were advised that her brain would never develop beyond that of a 13-week-old foetus. The father was charged with murder and manslaughter in the alternative but was acquitted of both charges.<sup>1021</sup>

In 2016, Donella Knox sedated her disabled 20-year-old daughter, Ruby, before suffocating her. Ruby had severe autism spectrum disorder, was intellectually disabled and had other physical illnesses including spina bifida and hip pain. Prior to the killing Ruby had begun to act in violent and disruptive ways and was no longer being seen by the paediatric team because of her age. Knox was advised that nothing could be done for Ruby's pain. Knox pleaded guilty to murder and was sentenced to 4 years' imprisonment, life imprisonment being seen by the sentencing Judge as manifestly unjust. The sentencing Judge described the killing as part mercy and part self-defence. Justice Williams recognised that the relationship between Knox and Ruby was abusive, not in the normal sense, but because of the emotional tie to Ruby.<sup>1022</sup> In a similar case, *R v Albury-Thomson*,<sup>1023</sup> the defendant strangled her teenage autistic daughter after years of lack of assistance in caring for the child. A successful defence of provocation reduced Albury-Thomson's liability for murder to manslaughter. She was initially sentenced to 4 years' imprisonment, which was reduced on appeal to 18 months.

While there may be debate about McIsaac's moral blameworthiness, I think few would argue that the defendants in these latter three cases ought to be stigmatised as "murderers". Yet, while the Nelson father was acquitted, and Janine Albury-Thomson was convicted of

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<sup>1021</sup> Monique Devereux "Father cleared of brain damaged baby's murder" *The New Zealand Herald* (online ed, Auckland, 18 November 2004).

<sup>1022</sup> *R v Knox* [2016] NZHC 3136.

<sup>1023</sup> *R v Albury-Thomson* (1998) 1 NZCrimC 367 (1998) 16 CRNZ 79 (CA).

manslaughter, Donella Knox is legally classified as a murderer, due to her guilty plea (this is another case where the quality of legal representation may have been critical). As in the case of spousal revenge homicides, there ought to be capacity for the legal system to recognise that altruistic killings are not “ordinary murder”, but compared with spousal revenge killings, altruistic killings fall at the lower end of the spectrum in terms of degrees of moral blame. As has been noted elsewhere in this thesis, jury compassion ought to be legitimated: where a killing takes place in the context of a genuine desire to alleviate suffering, the verdict should be manslaughter (or a lesser offence) and not murder.

It has been argued that the altruism and mental illness categories of child homicide are highly associated and should not be studied separately.<sup>1024</sup> This may be clearer in some of the cases described above (McIsaac, in particular, perhaps) than others, but while these other cases do not have any hallmarks of psychosis or indeed, any psychological *disorder*, the stressors associated with parenting very unwell children could arguably fall within the category of “other impairment” discussed below, warranting a consideration of whether diminished responsibility or extreme mental or emotional distress ought to apply in these cases.

### UNWANTED CHILDREN, PSYCHOSIS, AND OTHER IMPAIRMENT

Social constructionism emphasises that illness is a product of the interaction between biology and socio-cultural perspectives; that the meaning of experience of illness is shaped by cultural and social systems, rather than being universal and invariant to time and place.<sup>1025</sup> Further, Oberman convincingly argues that:

The law’s binary approach to mental illness, in which one either is sane or insane, competent or incompetent, or able-bodied or disabled, simply fails to accommodate the vast majority of women who struggle with postpartum mental illness. The fact of the matter is that organic mental illness alone cannot account for much of what goes wrong for mothers who find themselves at the intersection of madness and the law.<sup>1026</sup>

While Oberman refers specifically to mental illness in women, the law’s binary approach also extends to other defendants. In the context of this thesis, this includes people other than mothers who commit child homicide, although in Fairfax Media’s database, the cases

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<sup>1024</sup> See, for example, Agata Debowska, Daniel Boduszek and Katie Dhingra “Victim, perpetrator, and offense characteristics in filicide and filicide-suicide” (2015) 21 *Aggress Violent Behav* 113 at 121.

<sup>1025</sup> Peter Conrad and Kristin K Barker “The Social Construction of Illness: Key Insights and Policy Implications” (2010) 51(5) *J Health Soc Behav* 567.

<sup>1026</sup> Michelle Oberman “‘Lady Madonna, children at your feet’: tragedies at the intersection of motherhood, mental illness and the law” (2003) 10 *Wm & Mary J Women & L* 33.

involving mentally disordered perpetrators mostly concerned biological parents of the children they killed. The following discussion includes cases in which the perpetrator of the child homicide is psychotic and/or legally insane, and those in which infanticide is a potential verdict. The discussion also considers the innumerable other cases in which – for any number of reasons – the perpetrator’s ability to reason is impaired, including cases in which the child victim is characterised as an “unwanted” child. It should be noted that some of the cases which have been legally classified as infanticide could also fall into the category of “unwanted” children.

As discussed in ch 1, two New Zealand cases are particularly apposite in demonstrating that there are defendants who may not have possessed criminal intent were precluded from availing themselves of the insanity, or any other, defence. This has significant consequences for defendants in New Zealand, where there is no defence of diminished responsibility.

In 2005, Sharon Harrison-Taylor was convicted of the murder of Gabriel, one of her eight-month-old twin boys, by a combination of smothering and strangulation.<sup>1027</sup> Harrison-Taylor admitted killing Gabriel by hitting him and holding him down in his cot. The defence raised infanticide, which was not accepted by the jury. The jury also found that the killing was murder and not manslaughter. Harrison-Taylor was sentenced to life imprisonment with a minimum parole period of 12 years.<sup>1028</sup>

At her trial, one expert gave evidence that Harrison-Taylor suffered from a borderline personality disorder. Another expert claimed she had a dissocial personality disorder. Regardless of the classification, it was clear that she had a history of psychiatric problems. Harrison-Taylor reported sexual abuse by family members and drug abuse during her teenage years, and at the time of the killing Harrison-Taylor was suffering from chronic pain, taking painkillers, and was exhausted from lack of sleep.<sup>1029</sup>

In 1999, Desiree Wright killed her eight-month-old son, River, by smothering him. She was initially charged with murder but when the Crown obtained expert opinion establishing that Wright suffered from MSBP, it accepted Wright’s plea of guilty to manslaughter.

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<sup>1027</sup> See chs 1 and 2.

<sup>1028</sup> *R v Harrison-Taylor* HC Auckland CRI-2004-092-001510, 12 September 2005.

<sup>1029</sup> *R v Harrison-Taylor*, above n 1028.

Wright was sentenced to seven years imprisonment, reduced on appeal to four years. As in Harrison-Taylor's case, the mental disorder suffered by Wright fell short of the legal defence of insanity. However, as the Court of Appeal noted in that case:<sup>1030</sup>

For a person so affected to crave [sympathetic care and attention] at the expense of her helpless little child indicates a derangement of personality, the causes of which may not always be apparent but the manifestation of which evidences *serious mental disorder*.

Even though Wright was not able to avail herself of insanity, the outcome in her case was far less severe than that imposed on Harrison-Taylor. Proposed reform in this area, discussed below, will potentially equalise the position of defendants in similar positions.

### ***Unwanted children***

Smithey found that in neonaticides – the killing of a child within the first 24 hours of birth<sup>1031</sup> – the perpetrator is almost always the mother, and the motivation is to conceal the pregnancy.<sup>1032</sup> As discussed in ch 2, when conditions are poor (lack of resources, low support) then parents sometimes make choices about which children to invest resources in.<sup>1033</sup> So, abandonment (along with abuse and homicide) are all within the range of possible behaviours when conditions are unfavourable.<sup>1034</sup> Oberman notes that while women who commit neonaticide come from the full range of socio-economic backgrounds, it is their personal financial resources that render them vulnerable, rather than the financial position of their family.<sup>1035</sup> Ciani and Fontanesi found that the risk of a child being killed by its biological mother is highest in the first 24 hours of birth, and particularly so if the mother is young, has no other children, and exists in “critical social and economical conditions”.<sup>1036</sup> Their study confirmed other research in this area which shows that the mother rarely commits suicide following the death of the baby, and the killing occurs more in the context of abandonment or lack of assistance than by violent killing.<sup>1037</sup> While some women suffocate or strangle the baby to prevent it from crying, many babies drown in the

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<sup>1030</sup> *R v Wright* CA478/00, 2 May 2001 at [7] (emphasis added).

<sup>1031</sup> Alder and Polk, above n 835, at 1.

<sup>1032</sup> Martha Smithey “Infant Homicide: Victim/Offender Relationship and Causes of Death” (1998) 13(3) *J Family Viol* 285 at 287.

<sup>1033</sup> Randolph Roth “Biology and the Deep History of Homicide” (2011) 51 *Brit J Criminol* 535 at 538.

<sup>1034</sup> At 538.

<sup>1035</sup> Michelle Oberman “Understanding Infanticide in Context: Mothers who kill, 1870-1930 and Today” (2002) 92 *J Crim L & Criminology* 707 at 710.

<sup>1036</sup> Andrea S Camperio Ciani and Lilybeth Fontanesi “Mothers who kill their offspring: Testing evolutionary hypothesis in a 110-case Italian sample” (2012) 36 *Child Abuse Negl* 519 at 524.

<sup>1037</sup> At 525.

toilet while the mother is either passed out or trying to clean up the evidence of birth.<sup>1038</sup>

Ciani and Fontanesi conclude:<sup>1039</sup>

This framework confirms the evolutionary prediction that neonaticidal mothers are trying to cope with unwanted offspring, so they may survive and eventually reproduce again in more favourable conditions.

As Oberman notes, the patterns surrounding neonaticides are remarkably consistent and distinct from those surrounding the killings involving older children.<sup>1040</sup> However, not all “unwanted children” are neonates. John Tauwhare was 11 months old when his mother, Paula Tauwhare, fed him salt which ultimately killed him. The sentencing Judge, McGechan J, said:<sup>1041</sup>

You wanted to return to Auckland, probably to be with your boyfriend, the father of the child, and from some point in time ... you decided to make the child ill, thinking it would then be taken from you, probably by Social Welfare, and you would be free to go without having this child which had become a nuisance to you and which you no longer wanted.

The United States case of Susan Smith also stands out, at first glance, as being a case in which a mother killed her older children to escape the burden of caring for them and so as to further a relationship with a man who did not want children. Smith rolled her car into a lake with her children strapped in their car-seats. She initially told police she had been car-jacked but later admitted rolling her car into the lake. She said that she had intended to kill herself but had changed her mind at the last moment.<sup>1042</sup> Resnick suggests that if her evidence is to be believed, the case is actually one of “altruistic” (attempted) suicide, rather than unwanted child.<sup>1043</sup> In any event, there are very few, if any, reported cases involving older children which could properly fall into this category of unwanted child. Where there is a parental “strategy” to divert resources to other children, the homicide would most likely fall into fatal child maltreatment or neglect, as discussed above.

How should criminal justice systems deal with these cases of child homicide? As already mentioned, these killings are more likely to occur more in the context of abandonment or lack of assistance than by violent killing,<sup>1044</sup> although there may be some difficulties in ascertaining the precise cause of death in these cases. This also may be one factor affecting

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<sup>1038</sup> Oberman “Understanding Infanticide”, above n 1035, at 710.

<sup>1039</sup> Ciani and Fontanesi, above n 1036, at 525.

<sup>1040</sup> Oberman “Understanding Infanticide”, above n 1035 at 709.

<sup>1041</sup> *R v Tauwhare* HC Greymouth T1/93, 23 July 1993.

<sup>1042</sup> Resnick, above n 836, at 205.

<sup>1043</sup> At 205.

<sup>1044</sup> Ciani and Fontanesi, above n 1036, at 525.

official statistics of incidence of neonaticide. The Fairfax Media database demonstrates that in several cases in which there was at least prima facie evidence of neonaticide, no charges were laid. In terms of societal responses to neonaticide, Oberman observes that this occurs in a wide variety of ways:<sup>1045</sup>

Despite the consistently harsh rhetoric of outrage that these cases generate, some juries and judges are quite lenient with these defendants. It is not unusual for those who investigate these cases to elect not to file criminal charges, or for women convicted of neonaticide to receive probation rather than a prison sentence . . . On the other hand, many of these women receive exceptionally harsh punishments and are forced to serve lengthy sentences for their crimes.

Oberman suggests that this range of responses may stem from the polarised abortion debate in which those who oppose abortion may condemn neonaticide outright, while those who are pro-choice may be more likely to be sympathetic to the defendant as they consider the circumstances surrounding her pregnancy. Either way, Oberman argues that the American public has very strong reactions to neonaticides and tends to view them as incomprehensible, isolated aberrations rather than as commonplace, patterned killings.<sup>1046</sup> In fact, Oberman argues that the *comprehensibility* of these killings is a defining feature:<sup>1047</sup>

[N]eonaticide may be seen as a ‘mothering’ decision. Typically, these cases involve young pregnant women, who determine, correctly or not, that they would be completely cut off from their social support network were they to disclose their pregnancies. More importantly, they are convinced that they would be exiled from their families, their homes, and their communities were they to attempt to parent their child alone. The terrifying thought of parenting with no money, limited education, few job options, and no one to love and care for them, surely contributes to the panic and denial of pregnancy typically manifested by this population.

Oberman’s idea here of neonaticide as a comprehensible “mothering decision” contains echoes of Jones notion of “time-shifted rationality”<sup>1048</sup> – seemingly irrational behaviour sometimes results from using old techniques (that were useful in the EEA) to solve new problems.<sup>1049</sup> Does viewing these killings through this lens change our view of the moral blameworthiness involved? What principles of responsibility attribution are relevant here? Lacey might ask whether the defendant chose the conduct or had a fair opportunity to avoid

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<sup>1045</sup> Oberman “Understanding Infanticide”, above n 1035, at 711.

<sup>1046</sup> At 712.

<sup>1047</sup> At 712, citing Cheryl Meyer and Michelle Oberman *Mothers who kill their children: Understanding the Acts of Moms from Susan Smith to the ‘Prom Mom’* (NYU Press, New York, 2001).

<sup>1048</sup> See ch 2.

<sup>1049</sup> Owen D Jones “Time-shifted Rationality and the Law of Law’s Leverage: behavioral economics meets behavioral biology” (2001) 95 NWU L Rev 1141 at 1172.

it.<sup>1050</sup> Tadros would look for “motivating reasons”: a rational explanation for why the agent acted.<sup>1051</sup> A practical approach might be one which relies upon these ideas and recognises the context in which the killing took place as mitigating full responsibility. As Oberman notes, these killings are patterned,<sup>1052</sup> so rather than leaving the facts of these cases to the whim of the jury, creating a specific offence or partial defence based upon this pattern, should be relatively straightforward. For example, it could be that where a killing takes place in the first 24 hours of birth in a defendant’s attempt to divest herself of an unplanned and unwanted child, the verdict should be manslaughter (or a lesser offence) and not murder. Unlike infanticide, the mitigation does not depend upon the biological effects of childbirth or lactation, but rather the social forces operating on the defendant at the time. A defence could be structured along the same lines as diminished responsibility in England and Wales although the requirement that the abnormality in mental functioning arises from a “recognised medical condition” might have to be deleted.<sup>1053</sup>

Wilczynski also observed that a common reason to kill a child is because the child is unwanted. In her study, almost all of the cases in this category involved female perpetrators.<sup>1054</sup> Wilczynski’s study drew on three samples – an English sample, and two Australian samples. Wilczynski classified cases in this category according to the age of the victim as well as the stage at which the child became unwanted. The categories were children unplanned and unwanted since the time of conception; older unwanted children; and children wanted by the parent at conception but not after the birth. The first category formed the largest group, most of which were neonaticides.<sup>1055</sup> In the English sample, only one perpetrator was male – a father who killed his 20-year-old daughter’s incestuously conceived child. In general, Wilczynski’s neonaticide cases bore similar features to those identified by Oberman.<sup>1056</sup> There was one case in which the child was wanted at conception but not after birth, which involved a baby born with Down Syndrome who was rejected from birth by her father who killed her at the age of two weeks.<sup>1057</sup> Some of these

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<sup>1050</sup> Nicola Lacey “Space, time and function: intersecting principles of responsibility across the terrain of criminal justice” (2007) 1 *Crim Law and Philos* 233; see ch 2.

<sup>1051</sup> Victor Tadros *Criminal Responsibility* (Oxford University Press, Oxford, 2005) at 28; see ch 2.

<sup>1052</sup> Oberman “Understanding Infanticide”, above n 1035, at 712.

<sup>1053</sup> See also chs 3 and 4.

<sup>1054</sup> Wilczynski *Child Homicide*, above n 837, at 48.

<sup>1055</sup> At 48.

<sup>1056</sup> Oberman “Understanding Infanticide”, above n 1035, at 707.

<sup>1057</sup> Wilczynski *Child Homicide*, above n 837, at 52.



scenarios pose interesting questions in the context of this thesis: is there a difference in moral blame between a father who kills an incestuously-conceived child and a young mother who kills to conceal a pregnancy? What about between a young mother who kills to conceal a pregnancy versus a father who kills a child with Down Syndrome, or some other, non-fatal condition?

Oberman observes, in the context of mothers who kill generally, that mental health issues are central to societal responses to this kind of offence. She says that while there is great variation in neonaticides in terms of charges laid, where mothers kill older children they are almost always charged with murder.<sup>1058</sup> However, in terms of case disposition for these mothers, there is great variation, ranging from the death sentence to probation.<sup>1059</sup> Oberman has identified a pattern underlying these outcomes which aligns with what is referred to as the “mad” versus “bad” phenomenon.<sup>1060</sup> The mad category does not just refer to confirmed insanity diagnoses but extends to a broad range of circumstances, such as those in which Smith, referred to above, found herself. While Smith was characterised by the media as a “bad” woman who killed her two sons intentionally so that she could marry a rich man, the jury did not accept this version of her, once it discovered her father’s suicide, her molestation by her step-father, and her depression and anxiety. While the jury could have sentenced her to death, it instead sentenced her to life imprisonment with the possibility of parole.<sup>1061</sup> Tauwhare, above, was charged with murder but convicted of manslaughter. She was sentenced to one year and nine months imprisonment. McGechan J took into account her personal circumstances, characterised (somewhat indelicately) as follows:<sup>1062</sup>

You are still only 22. Your mother died very early and you lived away from your father from that point. I am afraid your history became one of neglect, institutional care, foster care, special schools and, in the end, you were on the loose and probably on the streets in Auckland. You have been, it can fairly be said, one of life’s casualties. You are not insane, but you do have the misfortune of a low intellectual level ... summed up as ‘borderline’ handicapped. Your reading level for example is only about 8½. You have no life skills. You have no work skills. You have very poor communication skills ... I suspect you have only a limited understanding of what is happening to you now, and you certainly need help.

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<sup>1058</sup> Oberman “Understanding Infanticide”, above n 1035, at 714.

<sup>1059</sup> At 714.

<sup>1060</sup> At 714, citing Ania Wilczynski “Images of Women Who Kill Their Infants: The Mad and the Bad” (1991) 2 *Women & Crim Just* 71.

<sup>1061</sup> At 715.

<sup>1062</sup> *R v Tauwhare*, above n 1041.

Outcomes like these lend further support to the idea that we ought to give courts as many options as possible to be compassionate.

### ***Psychosis and insanity***

In August 2015 Evelyn Sen killed her four-year-old daughter, Maggie, by giving her an overdose of antidepressants. Psychiatrists gave evidence that Sen was psychotic, paranoid and depressed, and she believed Maggie to be possessed by “unclean spirits”. Sen was found not guilty of murder by reason of insanity and an order was made that she be detained indefinitely as a special patient.<sup>1063</sup> In September 2003, John Te Huia slit the throats of his daughter, Natalia, 18 months, and step-daughter, Tiana aged 4, and killed their mother, Angelina Poli. Te Huia (then known by the name Stanley Smith) suffered from an unshakeable delusion that the Mongrel Mob were out to harm them and his family, so he had “beaten them to it”. He was initially convicted of murder, but the Court of Appeal quashed his convictions and held that he was insane at the time of the killings, and should have been acquitted on that ground.<sup>1064</sup> In a rare case, both of Dane Gibson’s parents were found not guilty of murder by reason of insanity. In May 1994, Dane's mother, Janice Gibson, beat him with a concrete paving stone because she said that God told her to. Her husband, Lindsay Gibson, restrained Dane while his wife hit him. During the trial, the jury was told that the Gibsons believed their son had been possessed by a demon, and that they were exorcising him.<sup>1065</sup> A psychiatrist gave evidence that the pair were suffering from a psychotic illness known as folie a deux (madness of two).<sup>1066</sup>

In New Zealand, s 23 of the Crimes Act 1961 creates a presumption that everyone is sane at the time of doing or omitting any act. A defendant can rebut this presumption by proving, on the balance of probabilities, that they were suffering from a disease of the mind or natural imbecility to such an extent that it rendered her incapable of either understanding the nature and quality of the act or of knowing that the act was morally wrong, having regard to the commonly accepted standards of right and wrong. The defence of insanity is

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<sup>1063</sup> *R v Sen* [2016] NZHC 2443.

<sup>1064</sup> *R v Smith* (1995) 1 NZCrimC 266, (1995) 12 CRNZ 616 (CA).

<sup>1065</sup> Fairfax Media “Faces of Innocents”, above n 833.

<sup>1066</sup> Lyn Humphreys “Law change avoids ‘insane’ cases” (18 March 2003) <[www.stuff.co.nz](http://www.stuff.co.nz)> archived at <[archive.indymedia.org.nz/article/65467/law-change-avoids-insane-cases](http://archive.indymedia.org.nz/article/65467/law-change-avoids-insane-cases)>.

based upon the belief that those who lack the power of reason should not be criminally responsible.<sup>1067</sup> As Liu puts it:<sup>1068</sup>

Premised on concepts of free will and personal responsibility, our legal system recognizes that, when an individual is incapable of having the requisite criminal intent or mens rea at the time the act was performed, a just society cannot hold that person criminally liable.

Stevens J noted in *R v Makahili*:<sup>1069</sup>

A finding of not guilty on the ground of insanity will ensure that someone who has no criminal intent or capacity to form a criminal intent due to mental illness is not regarded or treated as a criminal.

What is crucial to the defence is a lack of *reasoning*, rather than the disease itself:<sup>1070</sup>

... it is unimportant whether the relevant incapacity is due to degeneration of the brain, or to some other form of mental derangement, or to a physical disorder, such as arteriosclerosis or brain tumour, provided it has the effect of impairing the *reasoning* process.

Accordingly, Simester and Brookbanks observe that the defence is not designed for the therapeutic benefit of the defendant but as a way of attributing criminal responsibility and to protect the public from potential recurrence of dangerous behaviour from the defendant.<sup>1071</sup> This can lead to difficulties when psychiatrists are relied upon to provide evidence of disease of the mind:<sup>1072</sup>

Because a psychiatrist operates from a professional desire to assist in the alleviation of subjective mental distress, she may have difficulty in accepting the law's insistence that only mental states which affect the accused's rationality are fit candidates for inclusion within this archaic legal category.

To date, the following have been held by New Zealand courts to constitute disease of the mind (although the defendants in the cases may not necessarily have been found insane): schizophrenia or paranoid schizophrenia<sup>1073</sup>; insane automatism (psychogenic automatism)<sup>1074</sup>; "severe personality disorder", or psychopathy<sup>1075</sup>; schizo-affective disorder, characterised by psychosis<sup>1076</sup>; schizophrenia characterised by delusion and

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<sup>1067</sup> Kimberly Waldron "Postpartum psychosis as an insanity defense" (1990) 21 Rutgers Law J 669 cited in Lita Linzer Schwartz and Natalie K Isser *Endangered Children: Neonaticide, Infanticide, and Filicide* (CRC Press, Boca Raton, 2000) at 103.

<sup>1068</sup> MS Liu "Postpartum psychosis: A Legitimate Defense for Negating Criminal Responsibility?" (2002) 4 SCHOLAR 339.

<sup>1069</sup> *R v Makahili* HC Auckland CRI-2008-092-1873, 4 September 2008.

<sup>1070</sup> AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Brookers, Wellington, 2012) at 334.

<sup>1071</sup> At 335.

<sup>1072</sup> At 335.

<sup>1073</sup> *R v Makahili*, above n 1069; *R v Ahlquist* HC Auckland CRI- 2007-004-009742, 4 December 2008; *R v Manuele* HC Wellington CRI-2006-032-1144, 7 February 2007 *R v Johansen* HC Christchurch CRI-2005-009-002760, 22 September 2005.

<sup>1074</sup> *R v Ericsson* HC Wellington AP52/93, M17 & 18/93, 31 March 1993.

<sup>1075</sup> *R v Dixon* [2007] NZCA 398.

<sup>1076</sup> *R v NHM* HC Rotorua CRI-2006-063-1548, 14 September 2007.

auditory hallucinations<sup>1077</sup>; acute depressive condition<sup>1078</sup>. On the other hand, the following have been held to *not* constitute disease of the mind: Munchausen's Syndrome by Proxy<sup>1079</sup>; dissocial personality disorder<sup>1080</sup>; borderline personality disorder<sup>1081</sup>; personality disorder with predominant antisocial and narcissistic traits<sup>1082</sup>; narcissistic personality disorder<sup>1083</sup>; personality disorder (not otherwise specified)<sup>1084</sup>.

In *R v Clark*<sup>1085</sup> Woodhouse P held that the decision must always be for the jury, rather than the experts. A verdict that is inconsistent with the evidence is not necessarily grounds for a finding that the verdict was unreasonable. But a jury's verdict still must be founded on the evidence. In *R v Rotana*<sup>1086</sup> it was held that, even though the jury had a right to disagree with the experts, there must be a rational basis for doing so. In that case, the jury's verdict was quashed on appeal on the basis that it was unreasonable having regard to the substantial evidence of the defendant's insanity. Since 2003, it is no longer necessary to have a jury trial to determine insanity. In cases where the psychiatric evidence is clear and undisputed, a Judge can make a finding of insanity with the agreement of the parties. Section 20(2) of the Criminal Procedure (Mentally Impaired Persons) 2003 provides:

- (2) Before or at a [ ] trial, the Judge must record a finding that the defendant is not guilty on account of his or her insanity if—
  - (a) the defendant indicates that he or she intends to raise the defence of insanity; and
  - (b) the prosecution agrees that the only reasonable verdict is not guilty on account of insanity; and
  - (c) the Judge is satisfied, on the basis of expert evidence, that the defendant was insane within the meaning of [section 23](#) of the Crimes Act 1961 at the time of the commission of the offence.

Section 20(2) reduces the potential for juries to convict of murder against the weight of the evidence, as happened in the Stanley Smith/John Te Huia case above, and *R v Rotana*.<sup>1087</sup>

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<sup>1077</sup> *R v McNicholas* HC Hamilton CRI-2008-019-003488, 4 December 2008.

<sup>1078</sup> *R v Misimo* CA182/91, 18 November 1991.

<sup>1079</sup> *R v Wright*, above n 1031.

<sup>1080</sup> *R v Harrison-Taylor*, above n 1028.

<sup>1081</sup> *R v Harrison-Taylor*, above n 1028; *R v van Haaren* [2008] NZCA 91.

<sup>1082</sup> *R v Frost* HC New Plymouth CRI-2007-043-471, 21 February 2008.

<sup>1083</sup> *R v Parker* HC Wellington CRI-2007-485-16, 14 May 2007.

<sup>1084</sup> *R v van Haaren*, above n 1082.

<sup>1085</sup> *R v Clark* (1983) 1 CRNZ 132 (CA) at 133.

<sup>1086</sup> *R v Rotana* (1995) 12 CRNZ 650 (CA) at 655.

<sup>1087</sup> At 655.

### *The problem of personality disorders*

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) defined a personality disorder as "an enduring pattern of inner experience and behaviour" that significantly diverges from the expectations of the individual's culture.<sup>1088</sup> These fall within 10 types: paranoid personality disorder, schizoid personality disorder, schizotypal personality disorder, antisocial personality disorder, borderline personality disorder, histrionic personality, narcissistic personality disorder, avoidant personality disorder, dependent personality disorder and obsessive-compulsive personality disorder. The subsequent edition of the DSM (DSM-5, 2013) retained a similar definition but included an alternative hybrid dimensional-categorical model in a separate chapter (Section III) to encourage further study on how this new methodology could be used to assess personality and diagnose personality disorders in clinical practice.<sup>1089</sup>

As Simester and Brookbanks observe, the law as it relates to insanity is "unconcerned with disorders which simply produce disturbed *behaviour*".<sup>1090</sup> As a result:<sup>1091</sup>

... neurotic disorders, including such conditions as anxiety states, obsessional states, hysteria, and various mood (affective) disorders are normally excluded from the category 'disease of the mind'.

Therefore, insofar as the legal system is concerned, there is no clear view on the status of personality disorders within the disease of the mind schemata:<sup>1092</sup>

On one view, personality or behavioural disorders classified as "psychopathy" or "neuroses" will not suffice. Other writers suggest that severe personality disorders may be included because they are regarded as functional psychoses. The real issue is simply whether there is medical evidence that the condition should be regarded as a mental illness, regardless whether the defence is able to satisfy the additional tests in s 23(2).

Interestingly, a study of homicidal women in Finland found that all of those who had committed neonaticide (the killing of a newborn) had personality disorders and accordingly were held to be not fully responsible for their acts.<sup>1093</sup>

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<sup>1088</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* (4th ed, American Psychiatric Association, 1994).

<sup>1089</sup> Waugh and others "Psychological Assessment With the DSM - 5 Alternative Model for Personality Disorders: Tradition and Innovation" (2017) 48(2) *Prof Psychol: Res Pract* 79.

<sup>1090</sup> Simester and Brookbanks, above n 1070, at 334.

<sup>1091</sup> At 335.

<sup>1092</sup> At 340 (footnotes omitted).

<sup>1093</sup> H Putkonen and others "Finnish female homicide offenders, 1982-92" (1998) 9 *J of Forensic Psychiatr* 672 cited in Schwartz and Isser, above n 1067, at 110.

In Australia, under the Criminal Code Act 1995 (Cth), the definition of “mental impairment” includes “severe personality disorder”. Bronitt and McSherry suggest that even though antisocial personality disorder is the disorder most linked to criminal conduct, the weight of psychiatric opinion is that it should not be associated with mental impairment, on the basis that those with antisocial personality disorders are able to deal with reality and are able to reason.<sup>1094</sup> Yet possession of the mens rea for murder is not about the capacity to reason, or even about the capacity for intent. It is about *actual* intent. And if, by virtue of a personality disorder, severe or otherwise, a defendant did not actually intend to kill or cause bodily injury, or did not have a conscious appreciation that death could well result, it would certainly be unfair to not allow that evidence to create a reasonable doubt. This is especially so when we consider that voluntary intoxication can negate mens rea.<sup>1095</sup>

On the other hand, one of the problems with personality disorders is that they can be used as a convenient label for people for whom there is no other label. To that end, the label is contentious and potentially stigmatising.

### ***Infanticide***

Infanticide is a form of diminished responsibility, in that it provides a partial defence to a murder or manslaughter charge, where a mother who kills a child does so because she has not fully recovered from the effects of giving birth. In New Zealand, and in England and Wales,<sup>1096</sup> it can be both an offence and a defence, which leads to an anomaly in terms of the burden of proof.<sup>1097</sup>

In *R v O’Callaghan* Quilliam J observed:<sup>1098</sup>

What s 178(3) has done is to recognise that the effects of childbirth, as set out in the subsection, may amount to or be equivalent to a disease of the mind for the purposes of s 23 when otherwise that might not be regarded as a logical or acceptable medical concept.

Wilczynski observes that infanticide provisions are underpinned by two contradictory assumptions:<sup>1099</sup>

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<sup>1094</sup> Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* (4<sup>th</sup> ed, Thomson Reuters, Sydney, 2017) at 256.

<sup>1095</sup> ES Steelman “A question of revenge: Munchausen’s Syndrome by Proxy and a proposed diminished capacity defense for homicidal mothers” (2002) 8 *Cardozo Women’s LJ* 261 at 292.

<sup>1096</sup> In England and Wales infanticide is governed by the Infanticide Act 1938 (UK).

<sup>1097</sup> Simester and Brookbanks, above n 1070, at 590-591.

<sup>1098</sup> *R v O’Callaghan* (1984) 1 CRNZ 185 (HC) at 186 per Quilliam J.

<sup>1099</sup> Wilczynski, above n 837, at 149.

On the one hand, mothers are presumed to be naturally benign, tender and nurturing, and therefore incapable of harming their children unless mentally disturbed. On the other hand, there are fears that women's very biology makes them inclined towards murderous attacks on their children, and that this requires special provision within the criminal law.

As a result, there are unique features of infanticide legislation which are contrary to traditional criminal law principles, such as the presumption of sanity.<sup>1100</sup>

The medical basis of infanticide legislation has been criticised on the basis that it is outdated and does not accurately reflect causes of infant killing. It relies upon antiquated opinion about the effects of lactation and childbirth.<sup>1101</sup> Further, in some jurisdictions at least, the level of mental disturbance required is lower than that required elsewhere in criminal law.<sup>1102</sup> It is now generally recognised that social and psychological stresses play a more significant role in maternal infant-killing than mental disturbance and physiological factors,<sup>1103</sup> there being little evidence that hormonal or chemical imbalances are at play.<sup>1104</sup> However, the defence does require a disturbance of the mind:<sup>1105</sup>

Infanticide is an area of sentencing which requires recognition of the circumstance that there is a lesser degree of moral culpability born of the fact that there must be the established presence of disturbance of the mind before this offence is available to the prisoner. It is also generally recognised that the risk of repetition, and therefore any threat that an offender might pos[e] to the community, is not ongoing because it is an offence which is linked to a particular mental condition and one which, thankfully, is capable of treatment.

Despite the acceptance that that there is no association between lactation and mental disturbance, there may be some *temporal* association between childbirth and risk of certain types of mental disorder.<sup>1106</sup> Wilczynski identifies three main mental conditions that potentially arise in this context. The first is what is referred to as "baby blues" which involves mild and transient emotional reactions such as tearfulness and mild anxiety. These reactions are not considered an illness, and it is estimated that between 50 and 70 per cent of women experience them in first week after childbirth.<sup>1107</sup> The second category is post-natal depression which can occur in the first few months after childbirth and is akin to other types of depression. Approximately 10 per cent of mothers suffer from post-natal depression with a higher prevalence closer to birth.<sup>1108</sup> The third category is referred to as

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1100 At 149.

1101 Bronitt and McSherry, above n 1094, at 336.

1102 Wilczynski, above n 837, at 155.

1103 At 156-157.

1104 Bronitt and McSherry, above n 1094, at 336.

1105 *R v RLT* HC Dunedin CRI-2008-012-005987, 18 December 2008.

1106 Wilczynski, above n 837, at 155.

1107 At 155.

1108 At 155.

puerperal (or postpartum) psychosis which usually has a rapid onset with symptoms including paranoid delusions, anxiety, sleep disturbance and depression.<sup>1109</sup> One to two mothers out of every thousand develop puerperal psychosis in the first few weeks following childbirth.<sup>1110</sup> There is debate over whether postnatal depression and puerperal psychosis constitute separate disorders given they are very similar to non-postpartum disorders.<sup>1111</sup> Further, even though puerperal psychosis is thought to be primarily hormonal, very few women who kill their children suffer from the disorder.<sup>1112</sup>

Despite the many criticisms that have been levelled at the defence of infanticide, Brennan argues that we do need to bear in mind why the defence was created in the first place, which was to avoid the farce of putting a woman through a murder trial and conviction and spectre of a death sentence when “everybody knew that this sentence would be reprieved”.<sup>1113</sup> Brennan argues:<sup>1114</sup>

Mothers who murder their infants have long been recognised as a special type of offender who, in most circumstances, should be viewed with more compassion than censure. This is arguably still the case, particularly where mentally or emotionally distressed mothers kill their infants in tragic circumstances. Thus, while infanticide legislation certainly has its faults, its dubious medical rationale being only one of them, and while it may not be a suitable approach to take in every case of maternal infant murder, the offence/defence of infanticide does, by offering a more compassionate route, provide for a more expeditious means of dealing with troubled women who kill their infants in pitiable situations. Ultimately, the infanticide statutes appear to serve the criminal justice system quite well in their current form by allowing for special lenient treatment for deserving mothers.

Accordingly, it may be rash to do away with infanticide. However, cases in which it might be relevant could perhaps be classified within the category of “other impairment” discussed below. In 1997 the New South Wales Law Reform Commission argued that infanticide should be subsumed within the defence of diminished responsibility, arguing that this “would have the advantage of not limiting the type of mental disturbance which might give rise to the defence”.<sup>1115</sup>

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1109 At 155.

1110 At 155-156.

1111 At 156.

1112 At 156.

1113 Karen Brennan “Beyond the Medical Model: A Rationale for Infanticide Legislation” (2007) 58(4) NILQ 505 at 519.

1114 At 534.

1115 New South Wales Law Reform Commission *Partial Defences to Murder* (Report 83, 1997) at 3.30 cited in Lorana Bartels and Patricia Eastal “Mothers who kill: the forensic use and judicial reception of evidence of postnatal depression and other psychiatric disorders in Australian filicide cases” (2013) 37 Melb Univ Law Rev 297 at 304.



### *Other impairment*

There is sufficient anecdotal evidence to suggest that many parents who kill their children are suffering from sometimes quite acute mental distress. There may be factors impacting on a defendant's ability to think rationally, which may not amount to any recognised disorder. Oberman notes that the vast majority of women in her study of mothers who kill were experiencing some form of extreme emotional distress at the time of their crimes.<sup>1116</sup> Yet their illness may not meet one of the fundamental legal tests for insanity, namely the requirement that the illness constitute a "disease of the mind".

Given that insanity, for the purposes of the Crimes Act, is a legal, not medical, construct, a woman who kills her child even while suffering from a serious mental disorder, may not always avail themselves of a defence. While the mental disorder may, in some circumstances, be a factor to be considered in sentencing, disorders falling short of "disease of the mind"<sup>1117</sup> do not mitigate culpability for the offence. This has the consequence that a defendant who might suffer from "an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture ... manifested in impulse control"<sup>1118</sup> (for example) is as legally culpable for the offence as someone not suffering any such disorder. This is because the prosecution must prove the mental elements required for murder (either intent to kill or intent to cause injury known to cause death). If there is no evidence which casts a reasonable doubt on whether or not the accused possessed those mental states, then conviction for murder will most certainly result.

However, while the insanity defence is set at a very high threshold, it is not my position that this threshold be lowered to take account of a plethora of mental illnesses. It is possible to lower the culpability threshold in other ways, but we need to consider what the unintended consequences of lowering a culpability threshold might be. Are there consequences to taking away a person's right to be responsible? What are possible ways forward for achieving equity of disposal while recognising degrees of culpability?

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<sup>1116</sup> Oberman "Understanding Infanticide", above n 1035, at 713 citing Cheryl Meyer and Michelle Oberman *Mothers who kill their children: Understanding the Acts of Moms from Susan Smith to the 'Prom Mom'* (NYU Press, New York, 2001).

<sup>1117</sup> The defence of insanity is not solely dependent upon a finding of "disease of the mind". As set out in s 23(2), the disease of the mind or natural imbecility must also be of such extent to render the actor incapable of either understanding the nature and quality of their act or of knowing that the act was morally wrong, having regard to the commonly accepted standards of right and wrong.

<sup>1118</sup> From the definition of "personality disorder" in American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* (4th ed, American Psychiatric Association, 1994).

In the context of MSBP, Steelman asks whether the law should address it as a particularly vicious form of child abuse, or as a psychiatric disease that prevents a defendant from exercising proper judgment?<sup>1119</sup> Some clearly take the former view, arguing, in the context of “Medical Child Abuse” (MCA), also known as MSBP or FDOIA:<sup>1120</sup>

Pediatricians should not take into account the apparent intentions of the caregiver when there are clinical grounds to suspect MCA. Nor should they rule out the possibility of MCA on the basis of the caregiver’s psychiatric history. MCA is no different in principle to any other form of child cruelty.

This thesis considers the question in broader terms – where a disorder falling short of legal insanity prevents a defendant from exercising proper judgment, should that be relevant to moral blameworthiness? Steelman suggests that the criminal justice system views MSBP as a form of behaviour rather than a disease. In the desire to punish a defendant for their bad act, the relevance of the defendant’s true mental state is ignored.<sup>1121</sup> The law fails to ensure justice because it does not consider the possibility that the defendant may have been operating under diminished capacity.<sup>1122</sup> This leads to wide variation in sentencing.<sup>1123</sup>

Virtually relying upon the “luck of the draw,” sentences for mothers who killed their children while suffering from postpartum psychosis vary from probation to between eight and twenty years imprisonment.

As Barton observed:<sup>1124</sup>

The same murder by the same mother could receive different treatment depending upon the jurisdictions laws, particular jury, or even the beliefs of a particular judge.

Writing about neonaticide, Schwartz and Isser make the point that while many cases appear at least superficially similar, there are often circumstances unique to the individual that point against rational thinking at the time of the baby’s birth. Schwartz and Isser argue that those circumstances need to be considered in determining the charge as well as being relevant to sentencing decisions.<sup>1125</sup>

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<sup>1119</sup> Steelman, above n 1095, at 264.

<sup>1120</sup> Gregory Yates and Christopher Bass “The perpetrators of medical child abuse (Munchausen Syndrome by Proxy) – A systematic review of 796 cases” (2017) 72 *Child Abuse & Negl* 45.

<sup>1121</sup> Steelman, above n 1095, at 282.

<sup>1122</sup> At 290.

<sup>1123</sup> Liu, above n 1068.

<sup>1124</sup> B Barton “Comment: when murdering hands rock the cradle: an overview of America’s incoherent treatment of infanticidal mothers” (1998) 51 *South Methodist Univ Law Rev* 591 cited in Schwartz and Isser, above n 1067, at 111.

<sup>1125</sup> Schwartz and Isser, above n 1067, at 104.

### *Proposed reform – absence of mens rea*

Steelman argues, in the context of MSBP that:<sup>1126</sup>

... evidence of ... an abnormal mental condition that does not constitute legal insanity, should be admissible to prove that the mother could not or did not have the specific intent or state of mind to murder her child.

One of the ways in which consistency in outcomes can be achieved, in terms of convictions at least, is by allowing juries to be instructed that they may take an accused's mental disorder (whether it amounts to "disease of the mind" or not) into account in determining whether the accused acted with the requisite intent. This is consistent with the law as it relates to evidence of voluntary intoxication, to the extent that such intoxication can be evidence from which it can be inferred that the accused did not form the required mens rea for the crime charged. In both cases, it is the *fact* of intent, rather than the *capacity* for intent that is relevant. Allowing such evidence (where available and relevant) in child homicide cases allows a defendant's mental state at the time of the offence to be given due weight, without going so far as to constitute a defence of diminished responsibility. It would acknowledge that not every case of child homicide involves mental or emotional impairment. However, in cases where there is a "credible narrative" of impairment, evidence as to any mental disorder may create a reasonable doubt as to her criminal intent. "Credible narrative" is the language used in determining whether self-defence should go to a jury and there is a strong case for adopting it in this context. The case of Harrison-Taylor, above, provides a good example where there was a credible narrative of impairment and/or mental disturbance from which a properly instructed jury could have found that the defendant was not fully accountable for her actions.

As argued in ch 3 with reference to young defendants, many defences are argued on the basis that an accused did not have the mens rea for the offence relied upon. It is therefore vital that defence lawyers make use of expert witnesses to provide the court with information on the implications of mental disorder on culpability to support an argument that mens rea was not present.<sup>1127</sup> This evidence has a counter-intuitive function which is essential in demonstrating to a jury that an offender's actions may not be consistent with

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<sup>1126</sup> Steelman, above n 1095, at 264-265.

<sup>1127</sup> Patricia Puritz and Katayoon Majd "Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice" (2007) 45 Fam Court Rev 466 at 474-475.

the requisite mens rea. See ch 3 for a fuller discussion on these arguments and the admissibility of expert evidence on mental states and behaviour.

### *Proposed reform – extreme mental or emotional disturbance*

Another means of mitigating the harshness of the classical model of criminal justice in cases is the adoption of a defence of extreme mental or emotional disturbance (EMED). A few United States jurisdictions adopt a version of the Model Penal Code provision for this defence which reduces a murder charge to a manslaughter charge if the:<sup>1128</sup>

... murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Oberman notes that this provision reflects a modernisation of the “heat of passion” defence to homicide.<sup>1129</sup> Another name for the heat of passion defence is provocation, which provided for reduced charges if the defendant could show that he or she was provoked by some external stimulus that prompted an immediate violent reaction.<sup>1130</sup> In New Zealand this would have arguably fallen within the defence of provocation, and in the same way that New Zealand’s defence of provocation utilised a hybrid subjective-objective test, the Model Penal Code takes into account the circumstances from the viewpoint of the accused.<sup>1131</sup> There must be a reasonable explanation for the extreme emotional disturbance, but juries are also required to determine the reasonableness of the defendant’s response to the circumstances, from the defendant’s viewpoint.<sup>1132</sup>

Wong argues that EMED is broad enough to encompass women suffering from postpartum psychosis and goes further to suggest that EMED could apply to cases of “slow provocation” in which sleep deprived, stressed, overworked, unsupported mothers are pushed slowly to the breaking point.<sup>1133</sup> This approach would benefit filicidal mothers whose psychosis was not severe enough to satisfy the test for insanity but there is also no reason why it cannot be extended to other defendants who are pushed to the breaking point by other factors.

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<sup>1128</sup> Model Penal Code (US), § 210.3(1)(b).

<sup>1129</sup> Michelle Oberman ““Lady Madonna”, above n 1026, at 64.

<sup>1130</sup> Abigail Wong “Filicide and mothers who suffer from postpartum mental disorders” (2006) 10 Mich St U J Med & L 571 at 584.

<sup>1131</sup> Michelle Oberman ““Lady Madonna”, above n 1026, at 64.

<sup>1132</sup> At 64.

<sup>1133</sup> Wong, above n 1130, at 585.

Unlike provocation, EMED does not require an immediate response to the provoking event. Nor does the provoking event have to be external to the defendant.<sup>1134</sup> This makes the defence appropriate to cases in which a defendant kills as a result of long standing internal emotional stresses.<sup>1135</sup> Ford argues that:<sup>1136</sup>

The fact that these stresses are often socially and externally induced provides further support for their reasonableness as provocative or extremely disturbing events.

However, some commentators have identified potential problems with the use of an EMED defence for filicidal mothers. It is argued that the fact that criminal behaviour has its roots in an individual's social, economic or cultural background applies more widely than the context of mothers who kill. As Oberman notes, allowing such factors to mitigate legal responsibility can have a destabilising effect on the whole legal system, rooted as it is in the classical model which focuses on the conduct not the individual. Yet Oberman's response to this concern is that perhaps:<sup>1137</sup>

... our entire jurisprudence of criminal responsibility needs to be reworked in view of contemporary understandings of the interplay between mental illness and human behavior.

This is precisely my point. However, it is important in this "reworking" to be cautious about the potential for exploitation. For example, we ought to guard against the possibility that an EMED type defence could be used by, for example, a defendant who kills their children where the primary motive is spousal revenge, notwithstanding that there may also be extreme mental and emotional distress. Likewise, we would not want an EMED-type defence to be relied upon to mitigate a "spousal infidelity" killing. Ford suggests that fears about the potential for abuse of the defence can be tempered by not considering mitigating factors unless society is confident that the defendant is not dangerous.<sup>1138</sup> To that we could add, "or unless society is confident that the defendant is deserving of mercy".

Oberman notes concern that all women would be pathologised if the legal system recognised that mental illness may be partly due to the conditions in which a mother attempts to raise her child. Oberman thinks this is unlikely, but even it were so, the law might be able to influence change but bringing into focus what might be done to alter the circumstances in which many of these killings occur. Further, I suggest that EMED could

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<sup>1134</sup> Janet Ford "Susan Smith and other homicidal mothers" (1996) 3 Cardozo Women's LJ 521 at 532.

<sup>1135</sup> At 532.

<sup>1136</sup> At 542.

<sup>1137</sup> Oberman "Lady Madonna", above n 1026, at 66.

<sup>1138</sup> Ford, above n 1135, at 546.

and should apply even where there is no evidence of mental disorder per se, but where there is clear evidence of *disturbance*; and further that the defence ought not just to apply to mothers, or indeed, women.

One further problem that arises with the EMED defence in New Zealand is the fact that the legislature has already repealed the provocation defence. There were thought to be a number of problems with the defence, one of which was the confusion surrounding the hybrid subjective-objective test that it imposed.<sup>1139</sup> It is unlikely at this stage that the legislature would be willing to re-enact a provision that has its roots in a provocation defence, particularly one that could be availed by an accused who kills an unfaithful partner or who kills in response to a sexual advance.

### *Proposed reform – diminished responsibility*

In Australia, the majority of jurisdictions include within the purview of insanity or mental illness/impairment, situations in which the defendant could not control their conduct.<sup>1140</sup> In addition, some Australian jurisdictions also provide for a defence of diminished responsibility or substantial impairment, which essentially apply where the defendant was suffering from an abnormality of mind that substantially impaired their mental capacity.<sup>1141</sup> This defence has been successful where defendants have suffered from severe depression and, interestingly, personality disorders.<sup>1142</sup>

The elements of the English and Scots diminished responsibility defences have already been canvassed in ch 3, but in the particular context of this chapter, it is worth restating the words of Lord Justice General Rodger (for the High Court of Justiciary) in *Galbraith v HM Advocate (No 2)*:<sup>1143</sup>

While the plea of diminished responsibility will be available only where the accused's abnormality of mind had substantial effects in relation to his act, *there is no requirement that his state of mind should have bordered on insanity.*

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<sup>1139</sup> See the line of cases beginning with *R v McGregor* [1962] NZLR 1069 (CA) and including *R v McCarthy* [1992] 2 NZLR 550, (1992) 8 CRNZ 58 (CA), *R v Campbell* [1997] 1 NZLR 16, (1996) 14 CRNZ 117 (CA), *R v Rongonui* [2000] 2 NZLR 385 (CA) and *R v Makoare* [2001] 1 NZLR 318, (2000) 18 CRNZ 511 (CA).

<sup>1140</sup> Bartels and Easteal, above n 1115, at 301-302.

<sup>1141</sup> At 303.

<sup>1142</sup> At 303.

<sup>1143</sup> *Galbraith v HM Advocate (No 2)* 2001 SLT 953 (HCJ) at [54] (emphasis added).

On the other hand, it was observed in the same case that Scots law does not recognise psychopathic personality disorder as a basis for diminished responsibility.<sup>1144</sup> Regardless, the theory behind a defence of diminished responsibility, were it to be adopted in New Zealand, would be to provide a means of dealing with mental, and arguably other, impairments that do not meet the strict insanity test, or indeed would not necessarily meet the diminished responsibility tests in other jurisdictions. Because New Zealand does not currently provide for diminished responsibility we have a blank slate upon which we can write a “bespoke” defence to suit the particular gap that currently exists in the law. Indeed, there is no requirement that such a defence centres on the concept of “abnormality of mental functioning” or “abnormality of mind” as the defences in England and Wales and Scotland do. There is, therefore, scope for other circumstances, such as those faced by Knox above, for example, to diminish the responsibility of the defendant.

#### SUMMARY

There is no limit to the circumstances in which child homicide occurs. Just as the circumstances of killings vary, so does moral culpability. Presently the criminal justice system lumps most of these cases together, with the result that Knox, who killed her severely disabled, violent and disruptive daughter after years of caring for her, is labelled a murderer in the same way as Little who intentionally drowned his daughter after being served custody papers. As Ford observes:<sup>1145</sup>

Death resulting from child abuse may, in some cases, exemplify a situation in which an impulsive and unintended murder is actually more culpable and dangerous than a planned and intended killing of one's child.

Even when we compare Knox’s case to that of the Nelson father who was acquitted of murder and manslaughter after killing his 5-month-old daughter who had been diagnosed with “incomplete lissencephaly”, we could argue that Knox’s moral culpability was at least on the same plane by virtue of the fact that she had suffered years of the extreme stress involved in taking care of her daughter. Similarly, how is Harrison-Taylor’s intentional killing of her infant son more morally blameworthy than a neonaticide or infanticide case? Given that Harrison-Taylor had other children to care for, including Gabriel’s twin, her

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<sup>1144</sup> At [54].

<sup>1145</sup> Ford, above n 1134, at 525.

conduct, can be viewed as a “mothering decision” in much the same way as neonaticide and infanticide cases (albeit that these are misguided decisions).

A related problem is that when there are potential alternative categorisations for child homicide (infanticide, for example) there is an inconsistent approach to determining what cases should fall into those categories. Partially this is a result of prosecutorial discretion so if more options were available to prosecutors as a sorting tool this would undoubtedly reduce the inconsistencies. The same argument applies to judges and juries – giving them more options with which to label the defendant’s conduct will lead to outcomes which are commensurate with the defendant’s moral blameworthiness and therefore more just.



# Chapter 6: Recommendations and Conclusion

This thesis concludes by returning to the James Bulger case and the regret of juror Vincent Moss that there were few options available to him and his fellow jurors in determining the culpability of Jon Venables and Robert Thompson for killing the young boy.<sup>1146</sup> This thesis had its genesis in this lament which led to the formulation of the italicised question set out in the thesis statement below:

The criminal justice system in New Zealand is underpinned by an assumption of individual rationality which is not always supported. Thus, the legal regime for apportioning blame in cases of culpable homicide is insufficient to recognise the different degrees of moral blame which can exist when one individual kills another. This leads to inconsistent outcomes for factually similar cases, contrary to the rule of law which requires equality before the law. This thesis will consider the question of *whether changing the definitions of murder and manslaughter will allow courts to legitimately recognise all relevant mitigating circumstances in determining guilt, and whether there are other options for reform that might better deliver justice in the round.*

While the Venables and Thompson trial took place in England, New Zealand criminal law currently operates within similar, if not more stringent, constraints, as the preceding chapters have attempted to demonstrate. This chapter will summarise the proposals for reform set out in those chapters and suggest some ways in which those reforms could potentially be implemented (alongside other proposals) into a coherent scheme for more accurately pinpointing degrees of moral blame in culpable homicide cases. I acknowledge that there are alternative frameworks that may achieve the same or similar results. Ultimately it is for the legislature to decide what, if any, changes ought to be made to the criminal law.

This chapter will begin by briefly revisiting the theoretical framework of this thesis to demonstrate the critical link between science and the law and its application to culpable homicide, before proposing new degrees of culpable homicide and its defences.

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<sup>1146</sup> Vincent Moss, juror in the trial of Jon Venables and Robert Thompson for the murder of James Bulger, cited in Gitta Sereny *Cries Unheard: The Story of Mary Bell* (Macmillan, London, 1998) at 123.

## SCIENCE AND THE LAW

One of the major issues at the centre of this thesis is the extent to which human action (in the context of this thesis, the killing of one human being by another human being) is necessarily the result of the exercise of free will. It is not disputed that human action is the product of an extensive range of causes, among which free will dominates. However, other causes may have more explanatory power than previously thought, to an extent that, in some cases, may exclude a finding that a defendant's action in killing another person was truly voluntary. The criminal law has always recognised some such circumstances. This thesis argues that circumstances in which free will may be diminished are much wider than the criminal law has historically acknowledged. Scientific research, as canvassed in ch 2, has disclosed a number of factors which may negate a finding of free in will in some circumstances, and amplify it in others.

The reason for exploring the underpinnings of undesirable behaviour is so that we can regulate that behaviour. It is helpful to look for explanations before we look to solutions. Despite the fact that there are a multitude of socio-cultural theories explaining homicide, very few societies have managed to curb its incidence. The question here is whether evolutionary and other scientific theories will assist in that endeavour.

Evolutionary theorists do not focus on homicide per se, but rather on general patterns in human behaviour.<sup>1147</sup> For Jones, law is a lever for moving human behaviour in directions it would not go on its own. Accordingly, law's fulcrum is the behavioural model upon which it relies.<sup>1148</sup> Based upon the foregoing, it is conceivable that the behavioural model provided by evolutionary and other psychologies can at least supplement the models that the law has traditionally relied upon.

It is important to note, however, that law's reliance on evolutionary theory is not universally supported. Wax suggests that evolutionary theory offers only meagre payoffs in terms of implications for legal policy.<sup>1149</sup> Others go further – Leiter and Weisberg argue that the

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<sup>1147</sup> Owen D Jones "Law and Biology: Toward an Integrated Model of Human Behavior" (1997) 8 J Contemp Legal Issues 167 at 176.

<sup>1148</sup> Owen D Jones "Time-shifted Rationality and the Law of Law's Leverage: behavioral economics meets behavioral biology" (2001) 95 NWU L Rev 1141 at 1187-188.

<sup>1149</sup> Amy L Wax "Evolution and the bounds of man" (2004) 23(6) Law & Phil 527 at 531.

law and evolutionary biology is a “fad” with a short shelf life.<sup>1150</sup> Even Jones, whose work has been heavily criticised by Leiter and Weisberg, acknowledges that the question of whether biology plays a role in behaviour is different to that of whether it ought to play a role *in criminal justice*.<sup>1151</sup> Jones draws attention to the naturalistic fallacy and observes that we cannot simply move from facts (biology) to normative conclusions without passing through a prism of human values.<sup>1152</sup> However, he does note that genetic information can be put to any number of purposes, including mitigating responsibility.<sup>1153</sup>

I suggest that it is this determination of responsibility which answers in the affirmative the question of whether biology ought to play *a* role (in addition to other factors) in the criminal justice system. As discussed in ch 2, the question often asked by decision-makers in homicide cases (among others) is “*why* did the defendant do it?” Understanding the motivations behind homicide allows us to draw conclusions about the degree of moral blame involved in that killing, as the examples in the following paragraphs demonstrate.

Where a mother kills her child while she is suffering from substantial impairment (perhaps for a combination of reasons – lack of support and resources, physical or mental illness) – these factors *explain* the killing and *mitigate* responsibility because we, as members of society, appreciate that she ought not to be held fully accountable for her actions because these factors are beyond her control and impair her ability “to determine or control [her] conduct”.<sup>1154</sup> Similar arguments can be made in respect of a mother who fails to protect her child from the violence of another – the coercive control experienced by the mother substantially impairs her ability to determine or control her conduct. The psychological effects of prolonged abuse *explain* her failure to act and are therefore relevant to determinations of moral blame.

Evolutionary theory suggests that because biologically unrelated infants cannot contribute to an individual’s reproductive success, they do not evoke the same solicitousness as a genetic relative.<sup>1155</sup> This has some explanatory power in the context of fatal child

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<sup>1150</sup> Brian Leiter and Michael Weisberg “Why evolutionary biology is (so far) irrelevant to legal regulation” (2010) 29(1) Law & Phil 31 at 34.

<sup>1151</sup> Owen D Jones “Behavioral Genetics and Crime, in Context” (2006) 69 LCP 81 at 94-95.

<sup>1152</sup> At 94.

<sup>1153</sup> At 94.

<sup>1154</sup> This is the wording used in the Scottish diminished responsibility provision.

<sup>1155</sup> Owen D Jones “Evolutionary Analysis in Law: An introduction and application to child abuse” (1997) 75 NCL Rev 1117 at 1177-178.

maltreatment committed by mother's boyfriends. Such killings are not part of a deliberate strategy to divest a perpetrator of an unwanted dependant, but they can demonstrate a reckless indifference particularly if the killing is preceded by a history of assault or torture towards the victim. This reckless indifference makes the killing more morally blameworthy than other types of child homicide, even those in which there may be intent to kill, such as a "substantial impairment" type of killing as described above. On the other hand, a defendant who commits spousal revenge homicide is likely to be seen as more morally blameworthy than one who commits a recklessly indifferent child maltreatment homicide, because of the intention to victimise their spouse by using an innocent child. Further, while male sexual proprietariness may, at least partially, *explain* spousal revenge homicides, it does not excuse or mitigate them. On the contrary, moral blameworthiness is exacerbated by the deliberate and malicious use of a child to achieve their nefarious purpose.

A final example is killing in self-defence. Self-preservation is a deep driver of human behaviour, so it is argued that homicide in the context of self-defence is "fitness-enhancing".<sup>1156</sup> In other words, self-defensive reactions are adaptive.<sup>1157</sup> So when a defendant kills another, in the honest belief their own life was at stake, the killing is explained by evolutionary theory and, I should add, moral responsibility is mitigated because the legal system accepts the validity of that explanation.

At the heart of this thesis is the idea that homicide, like any criminal offence, is human behaviour. There are myriad reasons for why people kill but looking at the deeper motivations for the killing rather than what is apparent on the surface can lead to a better ability to more accurately reflect moral blame.

## PROPOSALS FOR REFORM

Figure 2 is a pictorial overview of the range of proposed offences (degrees of culpable homicide and other offences) and defences to culpable homicide. The dotted lines represent alternative possibilities. Because of the existence of these alternative possibilities, were any of these proposals to come into effect, some cross-referencing would need to be incorporated.

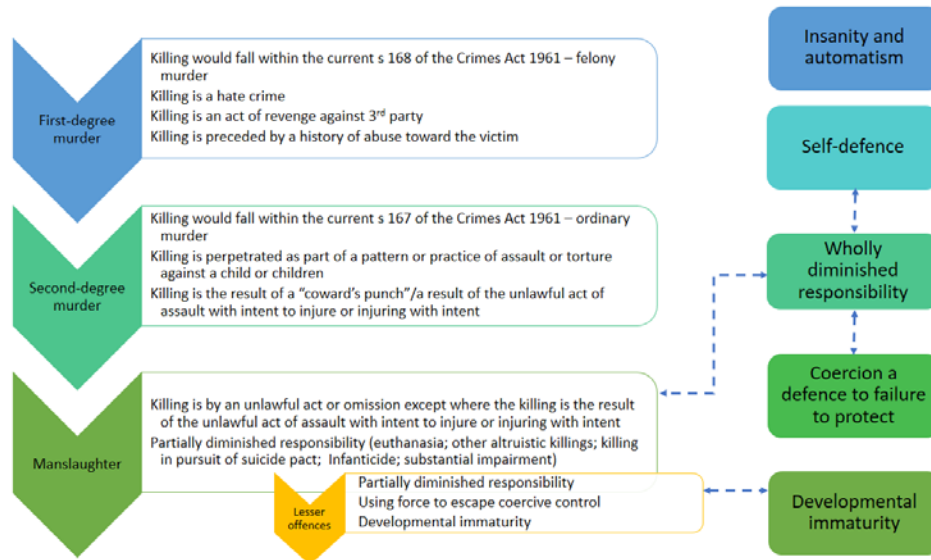
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<sup>1156</sup> Theodore Y Blumoff "The neuropsychology of justifications and excuses: some problematic cases of self-defense, duress, and provocation" (2010) 50(3) *Jurimetrics* 391 at 393.

<sup>1157</sup> At 421.

I will discuss each of the proposals in more detail below.

Figure 2: Proposed degrees of culpable homicide, lesser offences, and defences



The proposals set out in this chapter may vary slightly in their wording and scope than the proposals set out in the preceding chapters. The proposals identified in chs 3-5 are broadly drawn while the proposals set out in this chapter have been re-drafted to create a coherent, internally consistent, regime. This chapter, for the sake of completeness, necessarily includes a discussion of other types of homicides that are not specifically addressed in chs 3-5 including, for example, “one punch” killings; killings following a pattern of abusive or coercive behaviour; killings that are hate crimes; and euthanasia. It will be apparent that these proposals do not include absence of mens rea arguments which are mooted in chs 3 and 4. This is because the law already provides for these arguments to be made – in many cases without much success from the perspective of defendants. For this reason I suggest structural change is imperative.

It must be emphasised that the proposal set out here is only one way of apportioning blame for culpable homicide, reflecting as it does a particular view of moral blameworthiness. However, this view would, I think, be supported by others. There is a suggestion that New Zealanders’ attitudes toward law and order issues may not be as hardline as once

thought.<sup>1158</sup> At the same time that wide-ranging reforms are proposed to reduce our prison population, there are indications that the “tough on crime” sentiment is shifting.<sup>1159</sup> Further, as mentioned in ch 2, when the public is better informed, it is less likely to take an unjustly punitive approach.<sup>1160</sup> Euthanasia (and other altruistic killings, for that matter) are useful examples of where many would not seek to convict or stigmatise someone who acted genuinely to assist another. At the other end of the spectrum, many may also feel that someone who kills a child to victimise another parent is worthy of a higher degree of condemnation than, say, someone who perpetrates a fatal child maltreatment homicide. It is this element of condemnation and stigmatisation (or lack thereof) that is important here, rather than the length of sentence.

However, even if these particular weightings of moral blame are not supported, the framework set out below does provide a flexible template into which other conceptions of moral blame can be imported.

### *Degrees of culpable homicide*

Because the United States employs a “degrees of murder” framework, its range of approaches provide a good starting point for the development of a regime appropriate to the New Zealand context which better reflects degrees of moral blame identified in the preceding chapters. Title 18 of the United States Code Annotated (USCA), the United States federal criminal code, provides the following definitions of murder:<sup>1161</sup>

- (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.  
Any other murder is murder in the second degree.
- (b) Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

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<sup>1158</sup> Laura Walters “Is New Zealand’s attitude towards law and order changing?” (27 July 2018) <[www.stuff.co.nz/national/politics/105215188/is-new-zealands-attitude-towards-law-and-order-changing](http://www.stuff.co.nz/national/politics/105215188/is-new-zealands-attitude-towards-law-and-order-changing)>.

<sup>1159</sup> Walters, above n 1158.

<sup>1160</sup> David A Green “Public opinion versus public judgments about crime: correcting the ‘Comedy of Errors’” (2006) 46(1) *Brit J Criminol* 131 at 132.

<sup>1161</sup> 18 USCA § 1111.

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

- (c) For purposes of this section--
- (1) the term "assault" has the same meaning as given that term in section 113;
  - (2) the term "child" means a person who has not attained the age of 18 years and is-
    - (A) under the perpetrator's care or control; or
    - (B) at least six years younger than the perpetrator;
  - (3) the term "child abuse" means intentionally or knowingly causing death or serious bodily injury to a child;
  - (4) the term "pattern or practice of assault or torture" means assault or torture engaged in on at least two occasions;
  - (5) the term "serious bodily injury" has the meaning set forth in section 1365; and
  - (6) the term "torture" means conduct, whether or not committed under the color of law, that otherwise satisfies the definition set forth in [section 2340\(1\)](#).

The United States Model Penal Code (MPC) provides:<sup>1162</sup>

- (1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:
  - (a) it is committed purposely or knowingly; or
  - (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.
- (2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

Section 210.3(1)(b) MPC provides:<sup>1163</sup>

- (1) Criminal homicide constitutes manslaughter when:
  - (a) it is committed recklessly; or
  - (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
- (2) Manslaughter is a felony of the second degree.

Finally, the MPC also provides for negligent homicide:<sup>1164</sup>

- (1) Criminal homicide constitutes negligent homicide when it is committed negligently.
- (2) Negligent homicide is a felony of the third degree.

It has been suggested that the MPC is:<sup>1165</sup>

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<sup>1162</sup> Model Penal Code § 210.1, Criminal Homicide.

<sup>1163</sup> Model Penal Code Model Penal Code § 210.3, Manslaughter.

<sup>1164</sup> Model Penal Code § 210.4, Negligent Homicide.

<sup>1165</sup> Paul H Robinson and Markus D Dubber "The American Model Penal Code: A Brief Overview" (2007) 10(3) New Crim L Rev 319 at 320.

... the closest thing to being an American criminal code. The federal criminal code is too unsystematic and incomplete in theory and too irrelevant in practice to function as a national code ... And the code and its commentaries have been the intellectual focus of much American criminal law scholarship since the code's promulgation.

The following proposed degrees of culpable homicide structure draws on both the USCA and the MPC as each provides useful templates from which to build a framework that reflects the degrees of moral blame that have been identified in this thesis and other degrees which have not been specifically addressed in the preceding chapters. Therefore, categories such as killing as a hate crime, killing following a history of abuse, one-punch killings and others are included in this proposal for the sake of completeness.

### *First-degree murder*

It is proposed here that first-degree murder includes the following elements:

- a) Where the killing is one which would fall within the current s 168 of the Crimes Act 1961 – in other words, felony murder**

Section 168 provides:

#### **168 Further definition of murder**

- (1) Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:
- (a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2) of this section, or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:
  - (b) if he or she administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:
  - (c) if he or she by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath.
- (2) The offences referred to in subsection (1) are those specified in the following provisions of this Act, namely:
- (a) section 73 (treason) or [section 78](#) (communicating secrets):
  - (b) [section 79](#) (sabotage):
  - (c) [section 92](#) (piracy):
  - (d) [section 93](#) (piratical acts):
  - (e) [section 119 to 122](#) (escape or rescue from prison or lawful custody or detention):
  - (f) [section 128](#) (sexual violation):
  - (g) [section 167](#) (murder):
  - (h) [section 208](#) (abduction):
  - (i) [section 209](#) (kidnapping):
  - (j) [section 231](#) (burglary):
  - (k) [section 234](#) (robbery):
  - (l) [section 267](#) (arson).



Most of the states in the United States have retained the common law felony murder rule.<sup>1166</sup> In New Zealand, in *R v Tuhoro*, it was observed that:<sup>1167</sup>

Section 168 reflects a policy deeming persons to be guilty of murder when they have intentionally inflicted serious injury for the purpose of facilitating the commission of specified offences at the higher end of the scale. Uniquely, in relation to definition of murder, foresight of a killing is not required; the provision is explicit in that respect. At common law death caused in the commission of a felony involving personal violence was murder ...

The MPC does not explicitly retain the common law felony murder rule, but it does provide for a presumption of recklessness and indifference if the murder occurs in the commission of a felony. The USCA requires that all murder is killing with malice aforethought but is silent on the question of whether *foresight of death* is necessary for a first-degree murder. It is my view, as already stated in this thesis, that there are problems with the current operation of s 168, particularly in the contexts of secondary parties and young offenders. It is suggested here, therefore, firstly that first-degree murder requires, at the very least, foresight of death; and secondly that the age of prosecution for first degree murder should not be lower than 18 years.

#### **b) Where the killing is a hate crime**

Section 9(1) of the New Zealand Sentencing Act 2002 sets out a list of aggravating factors that must be taken into account “to the extent that they are applicable in the case”. I have argued elsewhere in this thesis that the nature of a conviction is important because of the stigma and social reaction associated with, for example, a conviction for murder rather than manslaughter. To that end, at least one of the aggravating factors identified in s 9(1) would better reflect moral blame if considered at the conviction stage rather than at sentencing. Section 9(1)(h) provides that it is an aggravating factor where an offender commits an offence:

... partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

- (i) the hostility is because of the common characteristic; and
- (ii) the offender believed that the victim has that characteristic ...

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<sup>1166</sup>

At 320.

<sup>1167</sup>

*R v Tuhoro* [1998] 3 NZLR 568, (1998) 15 CRNZ 568 (CA) at 573.

Although killing as a hate crime is not within the scope of this thesis, insofar as degrees of moral blame go, I suggest there are parallels here with revenge killings. That is, a killing driven partly or wholly because of hostility toward that person based on a characteristic such as those captured within s 9(1)(h) evidences a “bad motive” on the same plane as the spousal revenge killers identified in ch 5 and the other “bad motive” cases where the circumstances reveal a similarly high degree of moral blame. These include Mark Lundy, who murdered his wife, Christine, and daughter, Amber, in 2000; Steven Williams who intentionally killed Coral Burrows to cover up the crime of earlier assaulting her; Bruce Howse who killed Saliel Aplin and Olympia Jetson to punish them for, or prevent them from, making allegations of sexual offending against him.

(c) **Where the killing is an act of revenge against third party**

Where a victim is killed, partially or wholly, for the purpose of effecting revenge against a third party (even where the third party is themselves a victim), this ought to be first-degree murder. It does not matter that the death of a victim was not desired, so long as it was intended or foreseen as a consequence of the defendant’s intention to victimise the third party. The language employed in the USCA definition of first degree murder is apt to describe these kinds of killings: with “malice aforethought” (in other words, intent), “willful”, “deliberate”, “malicious” and “premeditated”.

As discussed in ch 5, the intentional murder of a vulnerable child as an act of vengeance against a spouse is in the category of more serious murders. Such cases do generally contain an element of “malice aforethought” even if the degree of forethought may be quite small. However, even spur of the moment killings in these contexts do establish a “bad motive”, which aggravates the killing. A number of these types of killings are preceded by sexual proprietariness or coercive controlling behaviour on the part of the perpetrator which, it is argued, aggravates the killing. At a time where violence against women is overwhelmingly perpetrated by men and, more often than not, in the context of marital breakdown,<sup>1168</sup> this

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<sup>1168</sup> In the four years from 2009 to 2012, 76 per cent of intimate partner violence-related deaths were perpetrated by men, 24 per cent were perpetrated by women; 1 in 3 women experience physical and/or sexual violence from a partner in their lifetime; fifty per cent of Intimate Partner Violence deaths occur at the time of actual or intended separation; 76 per cent of recorded assaults against females are committed by an offender that is identified as family: <[www.areyouok.org.nz/family-violence/statistics](http://www.areyouok.org.nz/family-violence/statistics)>.

type of killing ought to be highlighted as malicious and stigmatised by a first-degree murder conviction.

A question arises as to whether the killing of a child as an act of revenge against a non-spouse also ought to fall within this provision. There is no reason why it should not, so long as the death of the child was intentional. Where the death of the child was not intended, but that of another person, then it may be difficult to establish the right amount of malice required for first-degree murder. Take, for example, the case of Jhia Harmony Te Tua, aged 2 years old, who was killed by a bullet intended for her father, in the context of gang retaliation. The perpetrator fired the gun into the house, presumably unaware that Jhia was asleep on a couch inside.<sup>1169</sup> While the murder charges were laid on the basis of either s 167(c) (transferred malice) or s 167(d) (unlawful object), transferred malice would arguably be an insufficient basis for a first-degree murder conviction under the scheme proposed in this thesis. This would be because the perpetrator did not intend to use the child as a means of retaliation. It is this intention to exact revenge via the child's death that makes the killing first-degree murder.

**(d) Where the killing is preceded by a history of abuse toward the victim**

As noted in ch 4, cases in which victims of violence or coercion kill their abusers are relatively rare. On the other hand, the number of women who are killed by men identified as their current or former partners is estimated to range between roughly two-thirds to three-quarters of femicide.<sup>1170</sup> Intimate partner violence is a serious issue in many countries, but New Zealand is said to have one of the worst rates of family violence in the world. The impact of family violence homicide extends far beyond the primary victims, such as leaving children to grow up without their mother, and the fracturing of families. Sometimes these homicides are even witnessed by children. Over the years many public campaigns have been directed at the issue including the "It's not okay" campaign. The aim of this thesis is not to solve the problem of intimate partner or family violence, but one way of saying "it's not okay" is legal condemnation of the conduct. Where a defendant kills a current or former partner following a pattern of abusive behaviour (including violence and

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<sup>1169</sup> *R v Check* [2009] NZCA 548.

<sup>1170</sup> See above at ch 4.

coercive and controlling conduct) this pattern of behaviour elevates the moral blameworthiness of the conduct.

England and Wales and Scotland have both enacted versions of a coercive control-type offence, and while some question whether criminalising coercive control is the right response to intimate partner violence,<sup>1171</sup> one potential benefit of criminalising abusive and coercive behaviour is that convictions for the offence could be relied upon as aggravating factors which uplift a subsequent killing to first-degree murder. In this sense such killings are arguably on the same moral plane as spousal revenge killings.

Walklate and others express concern about drawing a line between benign relationship behaviour, such as wanting to know what the other party is doing, and behaviour which can properly be called surveillance or stalking.<sup>1172</sup> These are legitimate concerns and, were New Zealand to create an offence of coercive control, it would need to be carefully drafted in an attempt to draw such a line. Of critical importance, in the context of the current discussion, is a victim's experience of the behaviour in question. If a victim is sufficiently concerned about the behaviour to make a complaint to the police (assuming the complaint originates from her) and she is at some later point killed by the defendant, then the complaint (if substantiated by a conviction) is evidence of non-benign behaviour which should justify conviction for first-degree murder.

### *Second-degree murder*

It is proposed here that second-degree murder includes the following elements:

- a) Where the killing is one which would fall within the current s 167 of the Crimes Act 1961 – in other words, ordinary murder**

Section 167 of the Crimes Act 1961 provides:

Culpable homicide is murder in each of the following cases:

- (a) If the offender means to cause the death of the person killed:
- (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
- (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed:

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<sup>1171</sup> Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch "Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories" (2018) 18(1) *Criminol Crim Justice* 115 at 117 and see ch 4.

<sup>1172</sup> At 119.

- (d) If the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting any one.

The USCA provides that second-degree murder is any murder that is not first-degree. A killing under s 167 *may* meet the USCA's definition of a federal first-degree murder if certain characteristics were present, such as an intention to kill by poisoning or lying in wait etcetera. Interestingly, first-degree murder under the USCA includes premeditation which under New Zealand's current regime would constitute "ordinary" murder as long as none of the features prescribed in s 168 are present. Premeditation is always a question of degree; questions arise about the point at which the degree of premeditation ought to elevate the killing to first-degree murder. This is not a question I attempt to answer here, as I propose that second-degree murder should include those cases currently captured by s 167 but not s 168. Section 167 ought also to capture cases involving defendants aged under 18 years unless a defence of developmental delay applies, as discussed below.

**b) Where the killing is perpetrated as part of a pattern or practice of assault or torture against a child or children**

The above wording is taken from the USCA,<sup>1173</sup> which defines "child" as a person who has not attained the age of 18 years and is under the perpetrator's care or control; or is at least six years younger than the perpetrator. The term "pattern or practice of assault or torture" means assault or torture engaged in on at least two occasions. Under the federal criminal code, such a killing is first-degree murder. The provision also defines as first-degree murder every "murder perpetrated ... committed in the perpetration of, or attempt to perpetrate, any ... child abuse ...". The provision defines "child abuse" as "intentionally or knowingly causing death or serious bodily injury to a child". The MPC does not contain an explicit provision to cover fatal child maltreatment but does provide that murder is a first-degree felony where it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life".<sup>1174</sup>

Given the difficulties, identified in ch 5, of prosecuting child homicide as murder (rather than manslaughter), it is suggested here that New Zealand enact a "homicide by abuse" provision along the following lines:<sup>1175</sup>

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<sup>1173</sup> 18 USCA § 1111.

<sup>1174</sup> Model Penal Code § 210.1, Criminal Homicide.

<sup>1175</sup> See ch 5.

Culpable homicide is second degree murder where the offender, under circumstances manifesting reckless indifference to human life, causes the death of a child, and the person has previously engaged in a pattern or practice of assault or torture of the said child.

As noted in ch 5, a number of the United States “homicide by abuse” provisions require “extreme” or “gross” indifference or, as in the MPC, “manifest” indifference. However, given that the present proposal classifies such killings as second- rather than first-degree murder, it is suggested that *reckless* indifference ought to be the standard – this is a lower standard than the United States provisions require, but recklessness is consistent with the mens rea standard required under s 167 and, under this proposal, the mens rea for second-degree murder. The reason for categorising fatal child maltreatment as second- rather than first-degree murder is that, while these killings are more morally blameworthy than manslaughter, they do not necessarily involve the same degree of malice that is inherent in, for example, spousal revenge homicides.

**c) Where the killing is the result of a “coward’s punch”/a result of the unlawful act of assault with intent to injure or injuring with intent**

Presently, even within the limits of the current regime, there is huge variation in the circumstances that give rise to manslaughter charges. Section 160(2) of the Crimes Act 1961 provides:

- (2) Homicide is culpable when it consists in the killing of any person—
  - (a) By an [unlawful act](#); or
  - (b) By an omission without lawful excuse to perform or observe any legal duty; or
  - (c) By both combined; or
  - (d) By causing that person by threats or fear of violence, or by deception, to do an act which causes his or her death; or
  - (e) By wilfully frightening a child under the age of 16 years or a sick person.

Where a defendant commits the actus reus of culpable homicide by an assault, for example, but does not have the mens rea required for murder, they will be guilty of manslaughter. This applies not only to defendants who commit relatively innocuous assaults as well as those who assault with more malicious intent. One example of such defendants is what are referred to as “one-punch killers” – as the phrase suggests, these defendants hit their victims only once, but with lethal force. Another term that is apt to describe such assaults is “king hits”.

Tyrone Palmer was convicted of manslaughter for the 2016 death of Matthew Coley. Palmer appealed against the sentence of 22 months imprisonment. In setting out the facts of the case, the Court of Appeal observed:<sup>1176</sup>

This was a regrettably familiar offence; a one-punch manslaughter in which the victim was felled by an unexpected punch to the head and landed heavily on the ground, suffering predictable traumatic brain injury that led to his death.

Coley was punched once in the head, with considerable force. He did not see it coming and had his hands at his sides at the time. He fell back and struck his head on the ground. He died a few days later from “acute subdural haemorrhage”.<sup>1177</sup> Shortly after the assault, Palmer described it to others as “a king hit”.<sup>1178</sup> The Court of Appeal declined to set aside the sentence but imposed post-release conditions on the defendant. This case is complicated by the fact that the defendant, Palmer, was 16-years-old at the time of the killing and had an IQ score of 81. He had also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). On the night of the killing he had taken LSD and cannabis. These factors, particularly his age, low IQ and ADHD, arguably mitigate his liability. However, where these mitigating factors are not present, a question does arise about whether these types of killings ought to be categorised as more serious than a manslaughter conviction connotes.

In 2013, Grenville McFarland, at the time a Combat Weapons Specialist for the Navy, was 27 years old when he killed Tarun Asthana, after Asthana had slapped McFarland’s companion on the buttocks. McFarland punched Asthana once in the face with “significant force”.<sup>1179</sup> Asthana fell backwards striking his head “heavily” on the ground.<sup>1180</sup> McFarland was sentenced to two years and four months’ imprisonment.

In 2011, Matthew Larson, then aged 23, punched Steve Radnoty inside a McDonald’s Restaurant in Dunedin. Radnoty died a few hours later. Larson pleaded guilty to manslaughter and was sentenced to three years in jail. Larson had 27 previous convictions, including one for violence, in which he assaulted a female.<sup>1181</sup> It is concerning to discover

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<sup>1176</sup> *Palmer v R* [2016] NZCA 541 at [2].

<sup>1177</sup> At [5].

<sup>1178</sup> At [4].

<sup>1179</sup> *R v McFarland* [2014] NZHC 1106 at [5].

<sup>1180</sup> At [5].

<sup>1181</sup> “3 years jail for McDonalds manslaughter” (6 July 2011) <[www.newshub.co.nz/nznews/3-years-jail-for-mcdonalds-manslaughter-2011070613](http://www.newshub.co.nz/nznews/3-years-jail-for-mcdonalds-manslaughter-2011070613)>.

that in August of 2018, Larson was sentenced to two years and ten months in prison for injuring with intent to injure a man with whom he had argued over a spilt drink.

The difficulty in prosecuting these killings as murder is that the prosecution must prove, at a minimum, that the perpetrator intended to cause bodily injury to the victim that the perpetrator knew was likely to cause death and continued with the punch regardless of that risk. This is a subjective test – the perpetrator must have had an actual appreciation<sup>1182</sup> of a “real risk, a substantial risk, something that might well happen”.<sup>1183</sup> Usually perpetrators of this type of killing are prosecuted for manslaughter, because of the difficulty of proving, beyond a reasonable doubt, that the perpetrator did actually know of the risk.

In Australia, a campaign, initiated by professional boxer Danny Green, has attempted to change the discourse around this type of attack by rebranding the king hit as a “coward’s punch”.<sup>1184</sup> In New Zealand there have been calls for longer sentences to be imposed on perpetrators of this type of killing.<sup>1185</sup> In February 2018, Northland MP Matt King put a proposed law into the ballot called the Crimes (Coward Punch Causing Death) Amendment Bill. It proposes to insert a new section – s 168A – into the Crimes Act 1961, as follows:<sup>1186</sup>

168A Assault causing death

- (1) Every one is liable to imprisonment for a term not exceeding 20 years who—
  - (a) assaults any other person with intent to hit the other person with any part of the person’s body or with an object held by the person; and
  - (b) the assault is not authorised or excused by law; and
  - (c) the assault causes the death of the other person.
- (2) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.
- (3) In proceedings for an offence under subsection (1) it is not necessary to prove that the death was reasonably foreseeable.

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<sup>1182</sup> *R v Harney* [1987] 2 NZLR 576 (CA) at 579.

<sup>1183</sup> *R v Piri* [1987] 1 NZLR 66 (CA) at 79.

<sup>1184</sup> The Hon Peter Dutton MP “Stop the Coward's Punch Campaign” (press release, 25 May 2018).

<sup>1185</sup> See, for example, Nicholas Jones “Create ‘king hit’ offence and scrap revenue-gathering speed cameras – Winston Peters” *The New Zealand Herald* (online ed, Auckland, 14 October 2016).

<sup>1186</sup> Crimes (Cowards Punch Causing Death) Amendment Bill 2018.



In Dunedin, the death of Steve Radnoty prompted a police campaign directed at young men aged between 16 and 18 years, to encourage them to make positive choices when confronting situations.<sup>1187</sup>

As with fatal child maltreatment deaths,<sup>1188</sup> the publicity around “one-punch deaths” and “king hits” is likely to raise awareness of their potentially lethal consequences. So, the question arises whether, in that context of increased awareness, someone who kills another by assaulting them with intent to injure or injuring them with intent to cause grievous bodily harm ought not to be guilty of an offence that connotes a higher degree of moral blame than manslaughter. Bear in mind that currently the category of manslaughter can include cases where a person dies as a result of a defendant’s careless driving, or where a defendant fails to adequately supervise a child in their care, or where a surgeon’s conduct in treating a patient is a major departure from the standard of care expected of a reasonable surgeon. Where a defendant kills a victim by deliberately assaulting them, not intending to kill but nonetheless intending them some harm that is more than merely transitory and trifling,<sup>1189</sup> some might consider the killing more morally blameworthy than manslaughter cases constituted by criminal negligence. The higher degree of moral blame is attributed to the *intention to cause harm* by assaulting someone.

Section 189 of the Crimes Act 1961 creates the offence of injuring with intent:

**189 Injuring with intent**

- (1) Every one [is liable](#) to imprisonment for a term not exceeding 10 years who, with intent to cause grievous bodily harm to any one, injures any person.
- (2) Every one [is liable](#) to imprisonment for a term not exceeding 5 years who, with intent [to injure](#) any one, or with reckless disregard for the safety of others, injures any person.

Section 193 of the same act creates the offence of assault with intent to injure:

**193 Assault with intent to injure**

Every one [is liable](#) to imprisonment for a term not exceeding 3 years who, with intent [to injure](#) any one, [assaults](#) any person.

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<sup>1187</sup> Rosie Manins “King-hit initiative welcome” *Otago Daily Times* (online ed, Dunedin, 19 February 2014).

<sup>1188</sup> See ch 5.

<sup>1189</sup> The definition of “injure” in s 2(1) of the Crimes Act 1961 means to cause “actual bodily harm”. This latter phrase has been held to mean harm that is more than merely transitory and trifling: *R v Donovan* [1934] 2 KB 498 (Crim App); *R v McArthur* [1975] 1 NZLR 486 (SC).

The maximum sentence available under these provisions is ten years, the minimum three, although actual sentences tend to be beneath the maximum. However, these are sentences for perpetrators of assault, not manslaughter – in other words, their victims did not die. Of the three cases referred to above where the defendants were convicted of manslaughter, the longest sentence imposed was three years, the shortest 22 months. It sends a somewhat mixed message to society that defendants can be sentenced to similar sorts of sentences, regardless of whether death has resulted.

I must stress that what is problematic here is not the length of sentence. Contrary to the suggestion from Winston Peters<sup>1190</sup> and others<sup>1191</sup>, I do not believe that longer sentences are the answer, particularly in these times of over-populated prisons. What I am suggesting is that it is the moral censure that is critical. One-punch killings, where it can be proved that the defendant intended to injure or was reckless as to whether injury occurred, are in a different category of killing to what are truly “involuntary” killings, such as the criminal negligence cases identified above. If the victim did not die, these defendants would be liable for a s 189 or 193 offence at the very least. To that end, it is proposed that they constitute second-degree murder rather than manslaughter. The provision could be worded as follows:

Culpable homicide is also second-degree murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

- (a) where the offender, with intent to cause grievous bodily harm to any one, injures any person and death ensues from such injury; or
- (b) where the offender, with intent to injure any one, or with reckless disregard for the safety of others, injures any person and death ensues from such injury; or
- (c) where the offender, with intent to injure any one, assaults any person and death ensues from such assault.

### *Manslaughter*

It is proposed here that manslaughter includes the following elements:

- (a) Where the killing is by an unlawful act or omission except where the killing is the result of the unlawful act of assault with intent to injure or injuring with intent**

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<sup>1190</sup> Nicholas Jones “Create ‘king hit’ offence and scrap revenue-gathering speed cameras – Winston Peters” *The New Zealand Herald* (online ed, Auckland, 14 October 2016).

<sup>1191</sup> Peter de Graaf and David Fisher “Big read: Victim of ‘coward’s punch’ tells of ambush blow’s lasting impact - and the MP who came to his aid” *The New Zealand Herald* (online ed, Auckland, 19 February 2018).

At present in New Zealand, manslaughter covers all cases of culpable homicide which are not murder (killing in furtherance of a suicide pact is also manslaughter). So, where there has been a culpable homicide under s 160(2) by an unlawful act or an omission without lawful excuse, etcetera,<sup>1192</sup> without the mens rea for murder under s 167 or s 168, then manslaughter is the only available verdict.

As discussed above, criminally negligent deaths that do not involve intention to injure ought to remain within the category of manslaughter. While many criminally negligent deaths are the result of omissions to act, this proposal also applies to unlawful acts (except for s 189 or 193). Deaths following simple assault, for example, or careless driving causing death, ought not to be prosecuted as second-degree murder. There is a question, addressed more fully below, as to whether every instance of criminal negligence ought to expose a defendant to a manslaughter charge, or whether some lesser form of culpability might better reflect the moral blame involved.<sup>1193</sup>

#### **(b) Partially diminished responsibility (the manslaughter iteration)**

Other jurisdictions, including England and Wales, Scotland, and some Australian states, employ defences of diminished responsibility, as discussed in previous chapters. Both the English and Welsh and Scottish iterations of the defence require some “abnormality of the mind”. In this sense the defence operates by diminishing moral responsibility based upon an impairment of mental functioning. Where diminished responsibility or substantial impairment applies in Australia, the defences have been successful where defendants have suffered from severe depression and personality disorders.<sup>1194</sup> However, there is no reason why a defence ought not to diminish moral responsibility on grounds other than mental impairment, as discussed below. The question is how to frame the provision so that it captures what it is designed to. As pointed out in ch 5, because New Zealand does not already have a specific defence of diminished responsibility, there is a blank slate upon which we can write a “bespoke” defence to suit the particular gaps that currently exist in the law of culpable homicide.

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<sup>1192</sup> See s 160(2) above at 239.

<sup>1193</sup> See below at 261-262.

<sup>1194</sup> Lorana Bartels and Patricia Eastaer “Mothers who kill: the forensic use and judicial reception of evidence of postnatal depression and other psychiatric disorders in Australian filicide cases” (2013) 37 *Melb Univ Law Rev* 297 at 303.

*i.* Euthanasia

As I have suggested elsewhere in this thesis,<sup>1195</sup> killings that are committed out of a genuine desire to alleviate suffering are unlikely to be conceived as highly morally blameworthy even by those who do not support legalisation of euthanasia. The debate continues in New Zealand, with David Seymour's Bill still in progress, so any recommendations in this regard could be either supported or thwarted with the conclusion of that process. For present purposes, until or unless there are legislative changes to decriminalise euthanasia, it is enough to say that a defendant who acts to genuinely assist someone who has previously expressed a wish to die, should not be liable for anything more than a manslaughter conviction, and a lesser offence is an alternative option. Under the proposal set out here, a person who kills another in this context would have their culpability for murder reduced on the basis of diminished responsibility.

*ii.* Other altruistic killings

This is likely to be another contentious category. The circumstances in which a defendant acts altruistically include euthanasia, but there are other cases where the victim may not express a wish to have their life ended, but nonetheless the defendant is, at least partially if not wholly, motivated to end the victim's suffering, and potentially their own. Some of the cases discussed in ch 5 provide examples. These include Knox who killed her 20-year-old daughter, Ruby, who had several severe disabilities and was violent; Albury-Thompson who strangled her teenage autistic daughter after years of lack of assistance in caring for the child; and a father who suffocated his 5-month-old daughter who had been diagnosed with an illness that was incompatible with life. It is critical to recognise that not all victims may have the capacity to express their wishes or communicate in conventional ways. In the wake of Ruby Knox's death, an autism advocate has spoken out about the fact that what has been notably absent from the case and its aftermath is Ruby's voice.<sup>1196</sup> So we do need to be alive to the reality that when these tragedies occur, the focus ought not to be solely on the circumstances of the defendant but also that in some way, the perspectives of the victim (to the extent that it can be ascertained in retrospect) and other family members, are factored into the equation. One way of doing this is already provided for in the criminal justice

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<sup>1195</sup> See ch 2.

<sup>1196</sup> Jennifer Eder "The one voice that might have saved Ruby Knox" (6 August 2018) <[www.stuff.co.nz/national/health/105917817/the-one-voice-that-might-have-saved-ruby-knox-but-noone-was-listening](http://www.stuff.co.nz/national/health/105917817/the-one-voice-that-might-have-saved-ruby-knox-but-noone-was-listening)>.

system via victim impact statements, but that process is currently relevant only at the sentencing, rather than culpability, stage. Ought there to be scope for the views of family members to be given at the trial stage?

Another difficulty presented by this category of cases is how to frame a statutory provision that can take account of cases like those mentioned above while excluding non-genuine cases. Of course, whether a case is genuinely altruistic or not is a matter of personal judgment but, in reality, courts make these sorts of judgments all the time. When a defendant claims self-defence, for example, the court must decide whether or not to believe that the defendant had an honest belief in circumstances justifying the use of deadly force.

Like euthanasia, a genuinely altruistic killing should not attract anything more than a manslaughter conviction at the most. In many ways such killings are comparable to killing in furtherance of a suicide pact, as discussed below. Neither case requires a recognised disorder (or biological factor as in infanticide) which bears on culpability (although these may also be present).

*iii.* Killing in pursuit of suicide pact

Section 180 of the Crimes Act 1961 provides that killing in furtherance of a suicide pact is manslaughter, not murder. It states:

**180 Suicide pact**

- (1) Every one who in pursuance of a suicide pact kills any other person is guilty of manslaughter and not of murder, and [is liable](#) accordingly.
- (2) Where 2 or more persons enter into a suicide pact, and in pursuance of it 1 or more of them kills himself or herself, any survivor is guilty of being a party to a death under a suicide pact contrary to this subsection and [is liable](#) to imprisonment for a term not exceeding 5 years; but he or she shall not be convicted of an [offence](#) against [section 179](#).
- (3) For the purposes of this section the term suicide pact means a common agreement between 2 or more persons having for its object the death of all of them, whether or not each is to take his or her own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him or her in pursuance of the pact unless it is done while he or she has the settled intention of dying in pursuance of the pact.
- (4) It shall be for the person charged to prove that by virtue of subsection (1) he or she is not liable to be convicted of murder, or that by virtue of subsection (2) he or she is not liable to be convicted of an [offence](#) against [section 179](#).
- (5) The fact that by virtue of this section any person who in pursuance of a suicide pact has killed another person has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of a third person who is a party to the homicide and is not a party to the suicide pact.

I propose that killing in pursuit of a suicide pact is manslaughter, not murder, but manslaughter on the basis of diminished responsibility as discussed above.

iv. Infanticide

Section 178 of the Crimes Act 1961 currently provides for both the offence and defence of infanticide:

- (1) Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the [offence](#) the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter, and [is liable](#) to imprisonment for a term not exceeding 3 years.
- (2) Where upon the trial of a woman for the murder or manslaughter of any child of hers under the age of 10 years there is evidence that would support a verdict of infanticide, the jury may return such a verdict instead of a verdict of murder or manslaughter, and the defendant shall be liable accordingly. Subsection (2) of [section 339](#) shall be read subject to the provisions of this subsection, but nothing in this subsection shall affect the power of the jury under that section to return a verdict of manslaughter.
- (3) Where upon the trial of a woman for infanticide, or for the murder or manslaughter of any child of hers under the age of 10 years, the jury are of opinion that at the time of the alleged [offence](#) the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she was insane, the jury shall return a special verdict of acquittal on account of insanity caused by childbirth.
- (4) If the jury returns a special verdict under subsection (3), the [Judge](#) must order that the woman be examined by 2 [medical practitioners](#) and the following provisions apply:
  - (a) pending the receipt by the Judge of certificates from the medical practitioners, the woman must be detained in a place that the Judge thinks appropriate, and that place must be one of the following:
    - (i) a [hospital](#) within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992:
    - (ii) a [facility](#) within the meaning of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:
    - (iii) a prison:
  - (b) if each of the medical practitioners certifies that the woman is no longer insane and that she is in no need of care and treatment in a hospital within the meaning of the [Mental Health \(Compulsory Assessment and Treatment\) Act 1992](#) or in a facility within the meaning of the [Intellectual Disability \(Compulsory Care and Rehabilitation\) Act 2003](#), the Judge must order that the woman be discharged from custody immediately:
  - (c) unless each of the medical practitioners certifies in accordance with paragraph (b), [sections 23 to 29](#) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 apply, so far as they are applicable, as if the references in those sections to the Court were references to the Judge.
- (5) If, under subsection (4)(c), the [Judge](#) makes an order that the woman be detained in a [hospital](#) as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or as a special care recipient under the

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, [section 33](#) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 applies.

- (6) Repealed
- (7) Nothing in this section shall affect the power of the jury, upon the trial of any woman for infanticide or for murder or manslaughter, to return a verdict, otherwise than under this section, of acquittal on account of insanity; and where any such verdict is returned the provisions of the [Criminal Procedure \(Mentally Impaired Persons\) Act 2003](#) shall apply accordingly.
- (8) The fact that by virtue of this section any woman has not been or is not liable to be convicted of murder or manslaughter, whether or not she has been or [is liable](#) to be convicted of infanticide, shall not affect the question whether the homicide amounted to murder or manslaughter in the case of any other party to it.

In New Zealand, infanticide is already a form of diminished responsibility, providing a partial defence to murder or manslaughter charge, where a mother who kills a child does so because she has not fully recovered from the effects of giving birth. While the medicalisation of infanticide has been criticised, and it is now generally recognised that social and psychological stresses play a more significant role than physiological factors,<sup>1197</sup> Brennan argues that infanticide does offer a more compassionate means of dealing with troubled women who kill their young children.<sup>1198</sup> In 1997 the New South Wales Law Reform Commission (NSWLRC) argued that infanticide should be subsumed within the defence of diminished responsibility. The NSWLRC suggested that doing so would not limit the type of mental disturbance which might give rise to the defence.<sup>1199</sup> For these reasons, I would include within the category of infanticide, set out below under the proposed diminished responsibility provision, that where a woman causes the death of her child within the first 24 hours of its life (in other words, where she commits neonaticide), that there is a presumption that the balance of her mind was disturbed for the purposes of the section. As discussed in ch 5, neonaticides are patterned killings so rather than leaving the facts of these cases to the vagaries of the courts, creating a partial defence based upon this pattern is a pragmatic approach which recognises the context in which the killing took place as mitigating full responsibility.

While it could be argued that the 24-hour period following birth is an arbitrary boundary, in reality the law creates these kinds of distinctions in all sorts of circumstances. Indeed, of particular relevance in the context of the killing of children, under the present law, a child

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<sup>1197</sup> Ania Wilczynski *Child Homicide* (Oxford University Press, London, 1997) at 156-157.

<sup>1198</sup> Karen Brennan "Beyond the Medical Model: A Rationale for Infanticide Legislation" (2007) 58(4) NILQ 505 at 534.

<sup>1199</sup> New South Wales Law Reform Commission *Partial Defences to Murder* (Report 83, 1997) at 3.30 cited in Bartels and Easteal, above n 1196, at 304.

does not become a “human being” for the purposes of the homicide provisions until “it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not”.<sup>1200</sup> Hence, killing an *unborn* child is not homicide, although under s 182 of the Crimes Act 1961 “[e]very one is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he or she would have been guilty of murder if the child had become a human being”. On that basis, there is already an arbitrary line between when a child is or is not considered a human being, which is subject to intense debate in which many argue that the killing of an unborn child is murder, regardless of the age of the foetus. Debate may ensue regarding the presumption of diminished responsibility in neonaticide cases, but this ought not to be a factor which militates against enacting it.

Section 178(3) provides for a court to make a finding of insanity by reason of the defendant “not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation”. If this provision is to be retained, and I suggest it should, it should be subsumed within the existing defence of insanity. Presumably the effects of giving birth or the effect of lactation etcetera to the extent that the defendant is insane would constitute puerperal psychosis, that is, a disease of the mind.<sup>1201</sup>

#### v. Substantial impairment

The theory behind a defence of partially diminished responsibility, were it to be adopted in New Zealand, would be to provide a means of dealing with mental, and arguably other, impairments that do not meet the strict insanity test, or indeed would not necessarily meet the diminished responsibility tests in other jurisdictions.

It is proposed here that a defence of substantial impairment ought to be subsumed into partially diminished responsibility, reducing a murder conviction to manslaughter. The definition of “substantial impairment” ought to be broadly drawn to encompass not only mental disorders falling short of insanity but also other factors which diminish

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<sup>1200</sup> Crimes Act 1961, s 159.

<sup>1201</sup> See ch 2.



responsibility such as the psychological effects of severe trauma,<sup>1202</sup> violence, or coercive control.<sup>1203</sup>

On the basis of the foregoing discussion, I propose that a partially diminished responsibility provision ought to be enacted which will operate to reduce a second-degree murder conviction to manslaughter:

#### **Partially diminished responsibility**

- (1) A person who would otherwise be convicted of second-degree murder is instead to be convicted of manslaughter on grounds of diminished responsibility if:
  - (a) The killing arose out of the defendant's genuine desire to alleviate the deceased's physical suffering due to a terminal illness where there is a credible narrative of the deceased's desire to end their life; or
  - (b) The killing arose out of the defendant's honest and reasonable belief that the killing was necessary to end the suffering of the deceased; or
  - (c) The killing is in pursuit of a suicide pact entered into by the defendant and the deceased. For the purposes of this section the term suicide pact means a common agreement between 2 or more persons having for its object the death of all of them, whether or not each is to take his or her own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him or her in pursuit of the pact unless it is done while he or she has the settled intention of dying in pursuance of the pact; or
  - (d) The defendant causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the [offence](#) the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation. Where the defendant causes the death of any child of hers within the first 24 hours of the child's life there is a presumption that the balance of her mind was disturbed within the meaning of this section.
  - (e) The person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind, including mental disorder. Abnormality of the mind may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma,<sup>1204</sup> violence, or coercive control. Abnormality of the mind need not be a recognised medical condition.<sup>1205</sup>
- (2) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
  - (a) constitute abnormality of the mind for the purposes of subsection (1)(e), or
  - (b) prevent such abnormality from being established for those purposes.
- (3) It is for the person charged with murder to establish, on the balance of probabilities, that any of the conditions set out in subsection (1)(a)-(e) are satisfied.
- (4) In this section, "conduct" includes acts and omissions.

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<sup>1202</sup> This definition is drawn from *Galbraith v HM Advocate (No 2)* 2001 SLT 953 (HCJ) at [54].

<sup>1203</sup> Note that this is one proposed method of dealing with victims of violence who kill their abusers. Other, alternative proposals, will be discussed below.

<sup>1204</sup> This definition is drawn from *Galbraith v HM Advocate (No 2)*, above n 1204, at [54].

<sup>1205</sup> Compare the English and Welsh provision.

Subsections (1)(a)-(d) above are obviously drafted to attribute culpability to euthanasia, altruistic killings, killings in pursuit of suicide pacts, and infanticide, respectively. Subsection (e) is designed to provide for diminished responsibility arising from some form of “substantial impairment”, characterised as “abnormality of mind” which ought not to be narrowly or medically construed. Examples of what may constitute “abnormality of mind” are included in the provision to make it resoundingly clear that the factors giving rise to the “abnormality” need not arise in the individual but can be caused by external events, such as those faced by defendants like Donella Knox, or by a combination of external events and internal characteristics, such as those faced by Harrison-Taylor. The subsection also explicitly includes the effects of violence and coercive control which means that the defence can be utilised by defendants such as Wihongi to place their culpability on the same level as defendants such as Wickham.

### *Lesser offences*

There is nothing in New Zealand’s law that mandates a conviction for culpable homicide in every case where one person has caused the death of another. So, there is nothing to prevent the creation of offences which are less morally blameworthy than any of the degrees of culpable homicide set out above.

### *Lesser offences due to diminished responsibility*

The diminished responsibility provision set out above, under manslaughter, only operates to reduce second-degree murder to manslaughter. In other words, it only partially excuses a defendant. This is because in many cases the circumstances only warrant partial mitigation. However, there will be cases where greater mitigation is deserved. For that reason, depending upon the particular circumstances, the manslaughter iteration of diminished responsibility ought to provide the potential for conviction for *lesser* offences (such as assault or injuring with intent and so on). To that end, where the defendant is found to be guilty of manslaughter on the basis of diminished responsibility, courts could be asked to consider whether the defendant’s culpability is such that they should be instead convicted of any lesser offence. The provision could be inserted into the diminished responsibility section set out above, with the following wording:

Where a defendant is convicted of manslaughter on the basis of any of the conditions set out in subsection (1)(a)-(e) above, the court may substitute a conviction for any lesser offence, if satisfied that a manslaughter conviction is manifestly unjust taking into consideration all of the circumstances of the case.

This provision borrows the language from s 104 of the Sentencing Act 2002 which provides for a court, in certain circumstances, to impose a minimum period of imprisonment of at least 17 years unless it is satisfied that it would be manifestly unjust to do so. Such a provision, in allowing the court to take account of all the circumstances of the case, could provide a means of dealing with some of the concerns identified above in relation to the ability of victims to communicate their wishes (where this is applicable).

### *Using force to escape coercive control*

Another example of a potential non-homicide offence identified in this thesis is the offence of using force to escape coercive control, as discussed in ch 4.

This would be a conduct crime (focusing on the use of force) rather than a result crime (wherein there must be a death), meaning a defendant could be liable for an assault-type offence, even if death did not result. The proposed offence, set out in ch 4 and reproduced below, mirrors the first two steps of the offence proposed by the New Zealand Law Commission in its report *Victims of family violence who commit homicide*, namely that:<sup>1206</sup>

- (a) the defendant was a victim of family violence perpetrated by the deceased;
- (b) as a result of the family violence, the defendant considered they had no option other than to seriously injure or kill the deceased – that is, the defendant was acting to defend themselves or another in circumstances as they perceived them to be; ...

However, rather than “family violence” I propose that centring the offence around the effects of coercive control is more appropriate, given the suggestion by Stark that it is not violence per se that overrides the victim’s free will. The elements of the offence would require that:

- (a) the defendant was in a relationship characterised by the exercise of coercive control from another person; and
- (b) as a result of the coercive control, the defendant considered they had no option other than to seriously injure or kill that other person – that is, the defendant used force because she honestly believed she had no other way of escaping that relationship or protecting herself or another person; and
- (c) the defendant used force against that other person.

Because of the contextual nature of coercive control, and because it consists of a pattern of behaviour rather than specific incidents, it is proposed that coercive control ought not to be defined in the provision. Rather it should be left to the courts to determine whether or not the relationship was characterised by the exercise of coercive control, and they should be

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<sup>1206</sup> Law Commission *Victims of family violence who commit homicide* (NZLC IP39, 2015) at [8.36].

able to rely on the evidence of experts – potentially practitioners working in the field of intimate partner violence – to assist them in making this determination.

One of the potential problems with the creation of this offence is that it may not be fair to convict someone for using force when there really was no alternative option available to them. Similarly, the defence of diminished responsibility, discussed above, only reduces second-degree murder to manslaughter (unless the court substitutes a conviction for any lesser offence on the basis of manifest injustice, as suggested above). For this reason, alternative proposals are identified below whereby self-defence is amended to explicitly remove the imminence requirement; or that a separate full defence of killing to escape coercive control be enacted; or that a defence of wholly diminished responsibility be created.

### *Lesser offences due to developmental immaturity*

The defence of developmental immaturity, below, provides for the possibility of conviction for lesser offences where a defendant is found not guilty of a culpable homicide offence. The defence provides that the court may proceed to consider whether the prosecution has met its burden of proof with respect to any lesser offences, such as any relevant non-fatal offences against the person.

## ***Defences***

### *Insanity and automatism*

Section 23 of the Crimes Act 1961 provides for the defence of insanity:

- (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
- (2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—
  - (a) Of understanding the nature and quality of the act or omission; or
  - (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.
- (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.
- (4) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

Section 23, and its earlier iterations, were developed from the M’Naghten Rules which arose out of *M’Naghten’s Case*<sup>1207</sup>. For the purposes of the defence, insanity is a legal, not medical, concept. Similarly, the term upon which it relies, “disease of the mind” is a legal term. Section 23 includes what is known as automatism – “action without conscious volition”<sup>1208</sup> – where the automatism is due to a disease of the mind, and therefore falls within the meaning of s 23(2)(a) where the defendant did not understand the nature and quality of the act or omission. Automatism is not always caused by a disease of the mind. In cases where the automatic state is caused by some factor external to the defendant, such as a blow to the head, the automatism is said to be a condition imposed on the defendant which renders their actions involuntary. This is referred to as “sane automatism” and entitles the defendant to a complete acquittal.<sup>1209</sup> Where the line is drawn between “internal” and “external” causes of automatism is arbitrary, and the determination in any individual case often falls to be decided on policy grounds.<sup>1210</sup>

Despite the fact that, as noted in ch 5, the definition of “disease of the mind” excludes a number of disorders, I would not recommend statutorily changing the definition but rather the decision as to whether a particular disorder meets the definition ought to remain with judges. However, as discussed in ch 5 and above, some impairments which do not meet the definition of “disease of the mind” ought to be covered by diminished responsibility – “substantial impairment” – reducing a murder charge to manslaughter, or some lesser offence as outlined above.

I would, however, amend s 23 to explicitly incorporate s 178(3) of the Crimes Act 1961 which provides for insanity by reason of the defendant “not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation”. This section would not affect the operation of infanticide as diminished responsibility, as set out above. Section 23 could be amended by inserting a new subs (2A) to read:

For the purposes of subs (2) of this section, disease of the mind includes not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation.

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<sup>1207</sup> *M’Naghten’s Case* (1843) 10 Cl & Fin 200, 8 ER 718 (HL).

<sup>1208</sup> *R v Cottle* [1958] NZLR 999 (CA) at 1011.

<sup>1209</sup> See *R v Cottle*, above n 1208 and *Police v Bannin* [1991] 2 NZLR 237, (1991) 7 CRNZ 55 (HC).

<sup>1210</sup> See *R v Yesler* [2007] 1 NZLR 240, (2006) 23 CRNZ 263 (HC).

## *Self-defence*

Section 48 of the Crimes Act 1961 provides:

### **48 Self-defence and defence of another**

Every one is [justified](#) in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Present difficulties with the operation of self-defence have been discussed elsewhere in this thesis. I would propose that the defence could be retained with the amendment proposed by the New Zealand Law Commission to the effect that where a person kills as a response to family violence, s 48 may apply even if the threat to the accused is not “imminent”.<sup>1211</sup> This would be to provide a safeguard against overcriminalisation of victims of violence who kill their abusers, in the event that the other recommendations proposed in this thesis (such as the diminished responsibility iterations) prove to be under-inclusive of those types of circumstances.

As Wake and Reed observe, where two individuals respond in similar ways, it should not matter that one defendant may be a victim of violence from an intimate partner and the other subject to coercion from, say, a fellow gang member.<sup>1212</sup> In other words, coercion may exist in other, non-intimate relationships, as well. Any amendment to self-defence should recognise this, and could be achieved by simply adding a subsection to the existing defence, as follows:

### **Self-defence and defence of another**

- (1) Every one is [justified](#) in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.
- (2) Where the force referred to in subsection (1) is in response to coercion, that subsection may apply even where the person is responding to a threat that is not imminent.

This amendment would not provide for an automatic acquittal where a defendant kills her abuser, but it would make the test in the section easier to satisfy by rebutting the presumption that the defendant did not fear for her life and was not justified in using force just because her abuser may not have posed an immediate threat.

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<sup>1211</sup> Law Commission *Understanding family violence: reforming the criminal law relating to homicide* (NZLC R139, 2016), at [7.39], [7.47].

<sup>1212</sup> Nicola Wake and Alan Reed “Reconceptualising the contours of self-defence in the context of vulnerable offenders: a response to the New Zealand Law Commission” (2016) 3(2) *JICL* 1 at 27. See ch 4.

Another way of accommodating the wide range of circumstances in which a defendant may have an honest belief in circumstances justifying the use of deadly force is to enact a provision similar to that enacted in Canada following the decision in *R v Lavallee*.<sup>1213</sup> As set out in ch 4, the new Canadian iteration of self-defence allows courts to take into account a non-exhaustive list of factors in determining the reasonableness of the defensive act as set out in s 34(2):<sup>1214</sup>

- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
  - (a) the nature of the force or threat;
  - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
  - (c) the person's role in the incident;
  - (d) whether any party to the incident used or threatened to use a weapon;
  - (e) the size, age, gender and physical capabilities of the parties to the incident;
  - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
  - (f.1) any history of interaction or communication between the parties to the incident;
  - (g) the nature and proportionality of the person's response to the use or threat of force; and
  - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

Subsection (f.1) – “any history of interaction or communication between the parties to the incident” – could be useful in cases where the coercion or threat is posed by people in non-intimate relationships such as other gang members; and the subsection in its entirety would provide a court with much greater guidance in determining whether or not the defendant's defensive act was reasonable, and therefore justified.

### *Wholly diminished responsibility (the defence iteration)*

As previously discussed, the diminished responsibility provision set out above (the manslaughter iteration), only operates as a partial defence to reduce second-degree murder to manslaughter. While I have provided for the possibility of conviction for lesser offences, above, there will also be cases where a defendant ought to be completely excused. There should be few such cases, where the defendant is attributed no responsibility for a killing, but to leave those circumstances unaccounted for is to undermine a regime that is intended to apportion responsibility fairly in as many cases as possible. For that reason, I propose

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<sup>1213</sup> *R v Lavallee* [1990] 1 SCR 852.

<sup>1214</sup> Criminal Code, RSC 1985, c C-46, s 34(2).

the adoption of a general defence of wholly diminished responsibility, that depends upon the concept of “substantial impairment” as in the manslaughter iteration, but which provides scope for a full acquittal similar to the present ability of a court to discharge without conviction in ss 106 and 107 of the Sentencing Act 2002. The defence could be drafted as follows:

### **Defence of wholly diminished responsibility**

- (1) Where a person's ability to determine or control conduct for which the person would otherwise be convicted of culpable homicide was, at the time of the conduct, substantially impaired by reason of abnormality of mind, including mental disorder, to the extent that the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence, the court may discharge the person without conviction.
- (2) A discharge under this section is deemed to be an acquittal.
- (3) Abnormality of the mind may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma, violence, or coercive control. Abnormality of the mind need not be a recognised medical condition.
- (4) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
  - (a) constitute abnormality of mind for the purposes of subsection (1)(e), or
  - (b) prevent such abnormality from being established for those purposes.
- (5) In this section, “conduct” includes acts and omissions.
- (6) For the avoidance of doubt, this section does not apply to the following:
  - (a) killings provoked, partially or wholly, by sexual infidelity, alleged or otherwise, on the part of the victim or any other person; or
  - (b) killings provoked by a sexual advance made by the deceased, whether of the same or different gender to the defendant, that does not amount to criminal conduct on the part of the deceased; or
  - (c) killings that, apart from this section, would be first-degree murder.

Subsection (6) is included to avoid the risk that the defence could be exploited by defendants who it was not intended to exculpate, such as a defendant who kills in response to sexual infidelity or one who kills in response to an unwanted sexual proposition. Similarly, a defendant who kills their children where the primary motive is spousal revenge ought not to be able to avail themselves of “substantial impairment” notwithstanding that they may also be suffering psychological trauma in the context of marital breakdown.

However, there could be some difficulties with this exclusion. An example where it might prove problematic is a case in which a victim of violence kills her abuser following years of violence and coercive control. The killing may have been immediately preceded by a discovery of infidelity on the part of the abuser, which should not affect the operation of the diminished responsibility defence. While it may be necessary to specify that killings provoked *solely* by sexual infidelity (for example) are excluded from the defence, it would be relatively easy for defence counsel to structure their defence in such a way as to avoid



such a suggestion. On balance it is probably better to retain the exclusions. Defendants who kill under those circumstances will still be able to avail themselves of the manslaughter iteration to reduce a potential first- or second-degree murder conviction to manslaughter, along with the existing insanity defence in relevant cases.

As already mentioned, the circumstances in which there ought to be a full acquittal for homicide are rare. However, a successful self-defence claim results in a full acquittal so the law ought to also provide for the same outcome in cases which may be wholly excused or justified on other grounds.

### *Coercion as a defence to failure to protect*

While the general defence of diminished responsibility, set out above, does apply to omissions as well as acts, as an alternative, a specific affirmative defence of coercion is proposed. As canvassed in ch 5, this could be framed as follows:

A person charged with failure to protect a child or vulnerable adult from the violence of another is protected from criminal responsibility if they were acting under coercion. Coercion is determined by considering whether, under the totality of the circumstances (including past abuse), the threat (implicit or explicit), or the use of force, was such that the actor was coerced to the extent they were unable to resist or to take positive action and a reasonable person similarly situated could not resist or take positive action.

As discussed in ch 5, criminal failure to protect charges are almost always proffered against mothers as opposed to fathers, and often in cases where there is a history of domestic violence.<sup>1215</sup> However, the defence as proposed is not gender-specific and available to anyone charged with a failure to protect offence if the test set out in the section is met. As with the defence of diminished responsibility (as well as the manslaughter iteration) the focus is on the defendant's ability to control their own conduct (or resist the coercion from others). It is not the presence of coercion which is determinative of outcome, but the extent to which the defendant's action or omission was truly voluntary. Unlike the diminished responsibility provisions outlined here, however, an objective element has been incorporated into coercion as a defence to failure to protect. This is consistent with criminal negligence provisions already in place in New Zealand – particularly s 150A of the Crimes Act 1961:

**150A Standard of care applicable to persons under legal duties or performing unlawful acts**

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<sup>1215</sup> Jonathan Herring “Familial homicide, failure to protect and domestic violence: who's the victim?” (2007) Crim LR 923 at 929.

- (1) This section applies in respect of—
  - (a) the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157; and
  - (b) an unlawful act referred to in section 160 where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.
- (2) For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.

While it is true that there are no settled rules or codes of conduct that set out the standards that parents are expected to meet,<sup>1216</sup> this is an argument against criminalisation of parental failures, which can be unduly harsh for that reason. However, in the context of a defence, assessing the defendant’s failure against “reasonable people similarly situated” is helpful to the defendant by recognising the circumstances in which they found themselves, but also recognises that not all failures to protect ought to be excused. Just as the force used in self-defence must be reasonable in the circumstances as the defendant believed them to be, so must a defendant’s failure to protect a child in their care. On the other hand, killing under insanity or abnormality of mind (as required by diminished responsibility), will not be reasonable (albeit that it might be excusable).

The cases that fall to be considered under this head are what are generally referred to as criminally negligent deaths. Similar cases are those in which a parent is liable for manslaughter for failing to supervise a child around water or the “forgotten baby syndrome” cases where children are unintentionally left in hot cars.<sup>1217</sup> While under the proposals set out in this thesis, these latter cases would be categorised as manslaughter, there are arguments against this degree of criminalisation. As noted in ch 5, there is debate as to whether it is legitimate to criminalise negligence.<sup>1218</sup> It is worth noting the words of Sir Duncan McMullin in his 1995 report to the Minister of Justice regarding whether there should be a change to the standard of care relevant to the duties in ss 155 and 156 of the Crimes Act 1961:<sup>1219</sup>

... There is the philosophical argument that manslaughter is an inappropriate crime for acts of mere carelessness as distinct from gross negligence or recklessness.

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<sup>1216</sup> See ch 5.

<sup>1217</sup> See ch 2.

<sup>1218</sup> Andrew Ashworth “Conceptions of overcriminalization” (2008) 5 Ohio St J Crim 407 at 411.

<sup>1219</sup> Sir Duncan McMullin, Report of Sir Duncan McMullin to Hon Douglas Graham, Minister of Justice, on Sections 155 and 156 of the Crimes Act 1961 (Wellington, 1995) at [12.1].

Further, Sir Duncan observed, in the context of s 156 of the Crimes Act 1961 which imposes duties on persons in charge of dangerous things, that the section:<sup>1220</sup>

... means that a motorist who kills a pedestrian crossing the road while the motorist's attention is diverted for a few seconds by an advertising hoarding, can be found guilty of manslaughter. Fortunately the Police have taken a common sense view in applying the law and charge only the worst cases of driving causing death with that crime. But a prosecution for manslaughter nonetheless remains open. One could multiply examples in other walks of life where a single act of forgetfulness or inattention could on the present law result in a prosecution for manslaughter.

Sir Duncan's words here are apt to describe the case of a parent who turns their back for the very short space of time in which a child can drown, or a parent who genuinely forgets their child is in the car. There is little evidence of a common-sense view taken to prosecutions of this type of case in recent years at least and even if there was, as Sir Duncan notes, a prosecution for manslaughter is still a possibility. It is not entirely clear how reform here could be achieved, given that the law still ought to include the possibility of manslaughter convictions where the omission is particularly grievous. Perhaps this an instance of where proper directions to juries become critical. In relation to the meaning of "major departure" in s 150A of the Crimes Act 1961, in *R v McKie*<sup>1221</sup> Justice William Young said that Judges are likely to tell juries that:<sup>1222</sup>

...they should only convict if satisfied that, having regard to the risk of death involved, the conduct of the accused was so bad as to amount, in the judgment of the jury, to a crime.

In *JF v Police*<sup>1223</sup> Justice Toogood observed that in determining whether a departure was major, by reference to community standards:<sup>1224</sup>

...the seriousness of the appellant's breach of duty and the circumstances in which the appellant was in when it occurred are highly relevant and, when looked at as a whole, the conduct must be so bad as to justifiably be considered criminal.

These principles need to be underscored, particularly in cases where the death occurs from a moment's inattention or forgetfulness.

### *Developmental immaturity*

As the law currently stands, the only "defences" available only to children and young people are contained in ss 21 and 22 of the Crimes Act 1961:

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1220 At [12.1].

1221 *R v McKie* HC Dunedin T13/00, 31 July 2000.

1222 At [30].

1223 *JF v Police* [2013] NZHC 2729, (2013) 26 CRNZ 764.

1224 At [39].

## 21 Children under 10

- (1) No [person](#) shall be convicted of an [offence](#) by reason of any act done or omitted by him or her when under the age of 10 years.
- (2) The fact that by virtue of this section any [person](#) has not been or is not liable to be convicted of an [offence](#) shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

## 22 Children between 10 and 14

- (1) No person shall be convicted of an offence by reason of any act done or omitted by him or her when of the age of 10 but under the age of 14 years, unless he or she knew either that the act or omission was wrong or that it was contrary to law.
- (2) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

As discussed in ch 3, children and young people who kill do not always act with the foresight or reasoning of someone who has reached full maturity and yet, in New Zealand and elsewhere, when they are charged with murder or manslaughter they are tried as adults. Yet the moral blameworthiness of a child who kills could be indistinguishable from that of a child who commits any other type of offence, so it seems irrational, and inconsistent with basic principles of criminal responsibility, to only prosecute them for culpable homicide or serious offences. It is also inconsistent with contemporary research on adolescent brain development which, as canvassed in ch 3, suggests that adolescence is a developmental stage, during which the brain is still under construction.<sup>1225</sup> Of particular relevance is the finding that the prefrontal cortex is the last region of the brain to fully develop, and this process extends well beyond adolescence,<sup>1226</sup> and the regions of the brain that are responsible for impulse control, risk assessment, decision-making and emotion take the longest to mature.<sup>1227</sup> All of this challenges the previously-held assumption that brain development was complete at puberty.<sup>1228</sup>

The cases discussed in ch 3 demonstrate the potential for inconsistent outcomes in cases where young people have killed. Some of these defendants will remain in prison for a

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<sup>1225</sup> Wisconsin Council on Children and Families *Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System* (2006) at 13.

<sup>1226</sup> Robert M Sapolsky “The frontal cortex and the criminal justice system” (2004) 359 *Philos Trans R Soc Lond B Biol Sci* 1787 at 1792.

<sup>1227</sup> Jay D Aronson “Neuroscience and Juvenile Justice” (2009) 42 *Akron L Rev* 917 at 923.

<sup>1228</sup> Sara B Johnson, Robert W Blum and Jay N Giedd “Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy” (2009) 45 *J Adolesc Health* 216 at 216.

number of years for acts that they committed when they were essentially children. And once they enter the adult system the chances of their rehabilitation become increasingly remote. For this reason, it is proposed in this thesis that the statutory regime for apportioning blame in culpable homicide cases includes a specific defence of developmental immaturity, as set out in ch 3 and repeated below:

### **Developmental immaturity**

- (1) A defendant is not criminally responsible for conduct which would otherwise constitute an offence and must be acquitted if, due to developmental immaturity:
  - (a) they did not fully understand the nature of their conduct, or that it was morally or legally wrong, or its legal or physical consequences; and/or
  - (b) they were substantially impaired in exercising rational control over their conduct and/or refraining from carrying it out.
- (2) Where a defendant is found not guilty of an offence under subs (1)(a) or (b) of this section, the court may proceed to consider whether the prosecution has met its burden of proof with respect to any lesser offences.

The enactment of this proposal means that s 22 of the Crimes Act 1961, set out above, would be surplus to requirements.

The proposed defence relies on the causal role “developmental immaturity” plays in the responsibility of young defendants. However, the focus of the defence ought to be on the *fact* of understanding rather than on the *capacity* for it.<sup>1229</sup> For the defence to succeed, the defendant must raise a credible narrative regarding either of the tests set out in (a) or (b). The prosecution must rebut the defence beyond reasonable doubt.

Finally, the proposal does not specify an upper age limit and avoids the use of definitional terms such as “child” or “young person”. This is so as to make the defence available to adults who have suffered developmental delays. What is important here is that it is the developmental delay which gives rise to the absence of understanding or foresight (or whatever mens rea element is relied upon) rather than the age of the defendant.

While young defendants may, *prima facie*, be eligible for the general defence of diminished responsibility, above, I suggest there is a strong argument for a separate defence. This is because the defence of diminished responsibility requires an abnormality of mind which, although is given an expansive definition, does not adequately capture developmental

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<sup>1229</sup> The same approach applies to intoxication (at least in New Zealand and England and Wales) as it bears upon the question of intent: see *R v Kamipeli* [1975] 2 NZLR 610 (CA) and *R v Sheehan* [1975] 2 All ER 960, [1975] 1 WLR 739 (CA).

immaturity. While the defence should apply, as mentioned above, to defendants of any age, immaturity is, in most cases, a *normal* phase of development. This defence could sit alongside the current s 21 of the Crimes Act which provides the conclusive presumption that a child under the age of 10 is incapable of committing a crime. A defence of developmental immaturity would work as a type of rebuttable presumption in relation to defendants aged over the age of ten.

## SUMMARY

### *Summary of proposals*

#### *Degrees of culpable homicide*

##### **Section 1 – first-degree murder**

- (1) Culpable homicide is murder in the first degree in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:
  - (a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the [offences](#) mentioned in subsection (2) of this section, or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury;
  - (b) if he or she administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof;
  - (c) if he or she by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath.
- (2) The [offences](#) referred to in subsection (1) are those specified in the following provisions of this Act, namely:
  - (a) [section 73](#) (treason) or [section 78](#) (communicating secrets):
  - (b) [section 79](#) (sabotage):
  - (c) [section 92](#) (piracy):
  - (d) [section 93](#) (piratical acts):
  - (e) [section 119 to 122](#) (escape or rescue from prison or lawful custody or detention):
  - (f) [section 128](#) (sexual violation):
  - (g) [section 167](#) (murder):
  - (h) [section 208](#) (abduction):
  - (i) [section 209](#) (kidnapping):
  - (j) [section 231](#) (burglary):
  - (k) [section 234](#) (robbery):
  - (l) [section 267](#) (arson).
- (3) Culpable homicide is murder in the first degree where the killing is committed partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and:
  - (a) the hostility is because of the common characteristic; and
  - (b) the [offender](#) believed that the [victim](#) has that characteristic.
- (4) Culpable homicide is murder in the first degree where the killing is committed partly or wholly because of a desire to exact revenge on a third party.

- (5) Culpable homicide is murder in the first degree where the killing is preceded by a history of abuse or violence or the exercise of coercive control toward the victim.

### **Section 2 – second-degree murder**

- (1) Culpable homicide is murder in the second degree in each of the following cases:
- (a) If the offender means to cause the death of the person killed:
  - (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
  - (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed:
  - (d) If the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting any one.
- (2) Culpable homicide is murder in the second degree where the offender, under circumstances manifesting reckless indifference to human life, causes the death of a child, and the person has previously engaged in a pattern or practice of assault or torture of the said child.
- (3) Culpable homicide is also second-degree murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:
- (a) where the offender, with intent to cause grievous bodily harm to any one, injures any person and death ensues from such injury; or
  - (b) where the offender, with intent to injure any one, or with reckless disregard for the safety of others, injures any person and death ensues from such injury; or
  - (c) where the offender, with intent to injure any one, assaults any person and death ensues from such assault.

### **Section 3 – manslaughter**

- (1) Culpable homicide that is not murder in the first or second degree is manslaughter.
- (2) Culpable homicide is manslaughter on the grounds of partially diminished responsibility where:
- (a) The killing arose out of the defendant's genuine desire to alleviate the deceased's physical suffering due to a terminal illness where there is a credible narrative of the deceased's desire to end their life; or
  - (b) The killing arose out of the defendant's honest and reasonable belief that the killing was necessary to end the suffering of the deceased; or
  - (c) The killing is in pursuit of a suicide pact entered into by the defendant and the deceased. For the purposes of this section the term suicide pact means a common agreement between 2 or more persons having for its object the death of all of them, whether or not each is to take his or her own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him or her in pursuit of the pact unless it is done while he or she has the settled intention of dying in pursuance of the pact; or
  - (d) The defendant causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation. Where the defendant causes the death of any child of hers within the first 24 hours of the child's life there is a presumption that the balance of her mind was disturbed within the meaning of this section.

- (e) The person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind, including mental disorder. Abnormality of the mind may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma, violence, or coercive control. Abnormality of the mind need not be a recognised medical condition.
- (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
  - (a) constitute abnormality of mind for the purposes of subsection (1)(e), or
  - (b) prevent such abnormality from being established for those purposes.
- (4) It is for the person charged with murder to establish, on the balance of probabilities, that any of the conditions set out in subsection (1)(a)-(e) are satisfied.
- (5) In this section, "conduct" includes acts and omissions.
- (6) Where a defendant is convicted of manslaughter on the basis of any of the conditions set out in subsection (2)(a)-(e) above, the court may substitute a conviction for any lesser offence, if satisfied that a manslaughter conviction is manifestly unjust taking into consideration all of the circumstances of the case.

## *Lesser offences*

### **Lesser offences due to diminished responsibility – see s 3(6) above**

#### **Section 4 – using force to escape coercive control**

- (1) This section applies where:
  - (a) the defendant was in a relationship characterised by the exercise of coercive control from another person; and
  - (b) as a result of the coercive control, the defendant considered they had no option other than to seriously injure or kill that other person – that is, the defendant used force because she honestly believed she had no other way of escaping that relationship or protecting herself or another person; and
  - (c) the defendant used force against that other person.
- (2) Where subsection (1) applies, the defendant will be guilty of an offence of using force to escape coercive control and not culpable homicide.

## *Defences*

### **Insanity and automatism**

- (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
- (2) No [person](#) shall be convicted of an [offence](#) by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—
  - (a) Of understanding the nature and quality of the act or omission; or
  - (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.
- (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.



- (4) The fact that by virtue of this section any [person](#) has not been or is not liable to be convicted of an [offence](#) shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.
- (5) For the purposes of subs (2) of this section, disease of the mind includes not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation.

### **Self-defence and defence of another**

- (1) Every one is [justified](#) in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.
- (2) Where the force referred to in subsection (1) is in response to coercion, that subsection may apply even where the person is responding to a threat that is not imminent.
- (3) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
  - (a) the nature of the force or threat;
  - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
  - (c) the person's role in the incident;
  - (d) whether any party to the incident used or threatened to use a weapon;
  - (e) the size, age, gender and physical capabilities of the parties to the incident;
  - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
  - (f.1) any history of interaction or communication between the parties to the incident;
  - (g) the nature and proportionality of the person's response to the use or threat of force; and
  - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

### **Defence of wholly diminished responsibility**

- (1) Where a person's ability to determine or control conduct for which the person would otherwise be convicted of culpable homicide was, at the time of the conduct, substantially impaired by reason of abnormality of mind, including mental disorder, to the extent that the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence, the court may discharge the person without conviction.
- (2) A discharge under this section is deemed to be an acquittal.
- (3) Abnormality of the mind may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma, violence, or coercive control. Abnormality of the mind need not be a recognised medical condition.
- (4) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself—
  - (a) constitute abnormality of mind for the purposes of subsection (1)(a), or
  - (b) prevent such abnormality from being established for those purposes.
- (5) In this section, “conduct” includes acts and omissions.
- (6) For the avoidance of doubt, this section does not apply to the following:
  - (a) killings provoked, partially or wholly, by sexual infidelity, alleged or otherwise, on the part of the victim or any other person; or
  - (b) killings provoked by a sexual advance made by the deceased, whether of the same or different gender to the defendant, that does not amount to criminal conduct on the part of the deceased.
  - (c) killings that, apart from this section, would be first-degree murder.

### **Coercion as a defence to failure to protect**

A person charged with failure to protect a child or vulnerable adult from the violence of another is protected from criminal responsibility if they were acting under coercion. Coercion is determined by considering whether, under the totality of the circumstances (including past abuse), the threat (implicit or explicit), or the use of force, was such that the actor was coerced to the extent they were unable to resist or to take positive action and a reasonable person similarly situated could not resist or take positive action.

### **Developmental immaturity**

- (1) A defendant is not criminally responsible for conduct which would otherwise constitute an offence and must be acquitted if, due to developmental immaturity:
  - (a) they did not fully understand the nature of their conduct, or that it was morally or legally wrong, or its legal or physical consequences; and/or
  - (b) they were substantially impaired in exercising rational control over their conduct and/or refraining from carrying it out.
- (2) Where a defendant is found not guilty of an offence under subs (1)(a) or (b) of this section, the court may proceed to consider whether the prosecution has met its burden of proof with respect to any lesser offences.

## CONCLUSION

Tadros argues that in order to discover whether a defendant is responsible for a wrong, we need to know *why* they did it and whether the motive was truly their own.<sup>1230</sup> The above proposals are the results of an analysis of the varied motivations which sit behind cases of culpable homicide and represent an attempt to elicit from these motivations different degrees of moral blame. As noted in ch 1, when Brian Neeson first introduced a Bill to create a degrees of murder approach in New Zealand, it coincided with the Government's review of sentencing and parole, from which the Sentencing Act 2002 eventuated. That process was signalled as dealing with some of the problems in the homicide regime at the time.

As I have adverted to elsewhere in this thesis, I do not believe that longer or harsher sentences are the answer to the problems with the current homicide regime. At the time of writing a great deal of attention is being given to the issue of our already over-crowded prisons.<sup>1231</sup> While a review of the sentencing regime is not within the scope of this thesis, if the proposals outlined here were to be implemented there would need to be some thought

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<sup>1230</sup> Victor Tadros *Criminal Responsibility* (Oxford University Press, Oxford, 2005) at 31-32.

<sup>1231</sup> Stacey Kirk "Govt's criminal justice summit launched with promise of long-term reform" (20 August 2018) <[www.stuff.co.nz/national/politics/106403161/govts-criminal-justice-summit-launched-with-promise-of-longterm-reform](http://www.stuff.co.nz/national/politics/106403161/govts-criminal-justice-summit-launched-with-promise-of-longterm-reform)>.

given to its impact on sentencing. It will be necessary to pay careful attention to sentencing for second-degree murder given that it encompasses cases which, at present, are usually classified as manslaughter. In particular, the rules surrounding the imposition of MPIs will need to be reevaluated.

Twenty-two years have elapsed since the New Zealand (Degrees of Murder Bill 1996 (157-1) was introduced, sixteen since the Sentencing Act 2002 was enacted. In that time, the defence of provocation has been repealed, and the three-strikes sentencing regime introduced. New Zealand has seen too many horrific child abuse homicides, has an appalling record on family violence and has failed to fairly treat defendants who kill in response to that violence. While New Zealand is often looked to as a world leader in restorative justice, particularly in relation to young defendants, this does not translate well into policies for young people who kill. It is also of great concern that those more likely to be victims of child homicide often share the same demographics of the young offender community – in other words, children and young people who are marginalised due to poverty, unstable family environments and lack of other resources such as adequate education and health. Yet, apart from the repeal of provocation, the amendment to s 150A of the Crimes Act 1961 and creation of new duties, there has been no change to the substantive culpable homicide provisions since the Crimes Act 1961 came into force. Legislative reform is overdue.

As identified in ch 1, factors such as the quality of a defendant's legal representation, issues around jury selection, and juror bias on the basis of race, class, gender (for example) all play a role in outcomes. Other factors to be considered are the adequacy of judicial summing up and directions to juries. Consider, for example, a case with facts similar to those in *R v Wihongi*: where the defendant has numerous "cognitive deficits",<sup>1232</sup> including those which flowed from a painkiller overdose at age 13; was sexually assaulted at 14, gang-raped at 19, and was the victim of a home invasion by gang members. This is all in addition to the history of abuse from the deceased, who had also taken money owned by the defendant and, on the night of the killing, demanded sex from the defendant. On these facts, there is a strong argument for diminished responsibility – either on the basis of the manslaughter iteration or the defence – on the grounds of substantial impairment due to the psychological effects of severe trauma, violence, or coercive control. However, the

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<sup>1232</sup> *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775, (2011) 25 CRNZ 483 at [94].

defendant has used violence against the deceased on other occasions. In the absence of a strong direction to the jury, they could use the fact of prior violence by the defendant of evidence that points against diminished responsibility and, or alternatively, they could believe that that prior violence means she is more morally blameworthy in relation to the murder charge, regardless of the probative value of that prior violence.

The fact that Wihongi is Māori is also relevant – overrepresentation of Māori in the criminal justice system is a serious problem and occurs at every stage of the criminal justice process from investigation to arrest to prosecution, conviction and sentencing. This is compounded by the three-strikes legislation which is misconceived and should be repealed. There are a number of other enhancements that must be made in a range of areas such as the law of evidence, prosecutorial guidelines, legal professional practice and so on.

Ultimately the most significant problem is that the law as it currently stands is a very blunt tool for determining moral blame in culpable homicide cases. It is not fair to leave it to courts to try and apportion blame without the proper tools to do so, but most importantly it is not fair to those who are most affected by these decisions – both the defendants and victims' families.

Undoubtedly there will be concerns about the proposals contained in this thesis: some will be perceived as too soft, others too harsh. As noted above, there are alternative ways of reforming the law of homicide. Any such reform should take account of the realities of human behaviour, both in terms of defendants and those who make decisions about their culpability.

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