OVERLAPPING CRIMINAL OFFENCES AND GENDERED VIOLENCE: 
WHAT IS OVERLAP AND WHEN IS IT PART OF THE PROBLEM OF 
OVERCRIMINALISATION?

by

Zoë Margaret Prebble

BA, Victoria University, Wellington, 2002
BA (Hons), Victoria University, Wellington, 2003
LLB(Hons), Victoria University, Wellington, 2006
LLM, University of Michigan, 2011

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF 
THE REQUIREMENTS FOR THE DEGREE OF 

DOCTOR OF PHILOSOPHY 
in
THE FACULTY OF GRADUATE AND POSTDOCTORAL STUDIES 
(Law)

THE UNIVERSITY OF BRITISH COLUMBIA 
(Vancouver)

May 2018

© Zoë Margaret Prebble, 2018
The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the dissertation entitled:

Overlapping Criminal Offences and Gendered Violence: What is Overlap and When is it Part of the Problem of Overcriminalisation?

submitted by Zoë Margaret Prebble in partial fulfillment of the requirements for
the degree of PhD
in Law

Examining Committee:

Emma Cunliffe, Law
Co-supervisor

Benjamin Goold, Law
Co-supervisor

Roger Shiner, Philosophy
Supervisory Committee Member

Christine Boyle, Law
University Examiner

Scott Anderson, Philosophy
University Examiner

Michelle Madden Dempsey, Law, Villanova
External Examiner
Abstract
This dissertation examines when overlapping criminal offences contribute to the problem of overcriminalisation, using two case studies of gendered harms that are specifically criminalised by offences that overlap with other more general offences.

Overcriminalisation literature notes that the “too much-ness” of the criminal law extends in two directions. Criminal law is both: too broad, criminalising conduct that it should not, and too deep, frequently criminalising the conduct that it does cover by many overlapping offences. However, the existing literature focuses most of its energies on issues of overbreadth, with overdepth mentioned frequently, but in a more cursory manner. This thesis addresses this gap in the literature. In assessing what portion of overlapping offences is part of overcriminalisation, it treats two questions separately: what does it mean in descriptive terms to say that two or more offences overlap with one another? and when in normative terms is descriptive overlap between two offences part of the problem of overcriminalisation? A key original contribution of my research is a taxonomical analysis of types of descriptive overlap. I also propose and apply to two case studies a collection of normative criteria which help to distinguish benign or justified overlap from problematic overlap.

The thesis uses two gendered harm case studies to investigate these conceptual and philosophical dimensions of overlap in the criminal law: New Zealand’s proposed offence of non-fatal strangulation in an intimate partner violence context, which will descriptively overlap with general assault offences; and offences of sexual violence known in various jurisdictions as rape or sexual assault, which can be seen as overlapping with general assault offences. Gendered harm is a pressing problem in the Anglo-American jurisdictions that are the focus of this thesis. It is a problem the law historically has addressed badly. This makes gendered harm an illuminating lens through which to consider questions of overlap: the importance of effectively criminalising gendered harms such as strangulation in intimate partner violence settings makes it no less pressing that overlapping offences be scrutinised to assess whether they contribute to overcriminalisation.
Lay Summary

This dissertation examines when overlapping criminal offences contribute to the problem of overcriminalisation: the problem that there is too much criminal law. Overcriminalisation literature notes that the criminal law is both too broad, and too deep. However, this literature focuses most on proper breath and scope of the criminal law, rather than its depth, and how many overlapping offences cover the same conduct. I address that gap, first asking, in purely descriptive terms what it means to say that two or more criminal offences “overlap” with one another; and then asking when and why descriptive overlap is problematic, and part of overcriminalisation. Two gendered violence case studies illustrate and develop these questions: New Zealand’s proposed offence of non-fatal strangulation; and offences of sexual violence known in various jurisdictions as rape or sexual assault. Both examples descriptively overlap with general assault offences, but also powerfully conceptualise and name gendered harms.
Preface

This thesis is an original intellectual product of the author, Zoë Margaret Prebble.
Table of Contents

Abstract ........................................................................................................................................... iii
Lay Summary ..................................................................................................................................... iv
Preface ............................................................................................................................................... v
Table of Contents .......................................................................................................................... vi
List of Tables .................................................................................................................................. xii
List of Figures ............................................................................................................................... xiii
Acknowledgements ..................................................................................................................... xiv
Chapter 1: Introduction .................................................................................................................. 1
  1.1 Two Central Objectives ........................................................................................................... 1
  1.2 A Roadmap ............................................................................................................................ 6
Chapter 2: What is Overcriminalisation? ....................................................................................... 9
  2.1 Introduction ............................................................................................................................ 9
  2.2 What is Overcriminalisation? ............................................................................................... 9
  2.3 Overbreadth: When the Criminal Law Casts Too Wide a Net ........................................... 10
  2.4 Morality offences .................................................................................................................. 12
  2.5 Expansion into Traditionally Non-Criminal Areas of Legal Liability: Tort ................... 13
  2.6 Criminalisation Expansion: Regulatory Offences ............................................................... 18
  2.7 Criminalisation Expansion: Preparatory Offences ............................................................. 22
  2.8 Criminalisation Expansion: Regulatory Provisions that Compound to Constitute
      Criminal Offences ................................................................................................................ 23
  2.9 Summary of Overbreadth ...................................................................................................... 27
  2.10 Overdepth: When the Law Criminalises Many Times Over ............................................ 28
  2.11 Literature on Overdepth ...................................................................................................... 29
  2.12 Fraud/White Collar crime ................................................................................................... 35
  2.13 Overfederalisation .............................................................................................................. 36
  2.14 Conclusion ........................................................................................................................... 38
Chapter 3: Why is Overcriminalisation Problematic? .................................................................. 41
  3.1 Introduction ............................................................................................................................ 41
  3.2 Causes of Overcriminalisation: The “Punitive Turn” ......................................................... 41
3.3 Why is Overcriminalisation Problematic? ................................................................. 51
3.4 Overcriminalisation and Overpunishment ............................................................... 52
3.5 Sentence Relativities .............................................................................................. 53
3.6 Rule of Law .............................................................................................................. 54
3.7 Rule of Law and Overcriminalisation: Uncertainty .................................................. 56
3.8 Prosecutorial Discretion and the Separation of Powers ............................................ 58
3.9 Prosecutorial Discretion: Quasi-legislative Power .................................................. 58
3.10 Rule of Law and Equality ....................................................................................... 64
3.11 Conclusion ............................................................................................................. 66

Chapter 4: Descriptive Overlap in the Criminal Law .................................................. 67
4.1 Introduction ............................................................................................................. 67
4.2 Descriptive Account of Overlap ............................................................................. 68
4.3 Law as a Specialised Language or Linguistic Environment .................................... 75
4.4 Statutory “Syntax” and the “Basic units” of Criminal Behaviour ............................. 81
4.5 The Three Cs, Parsing, and Overlap ...................................................................... 87
4.6 Conclusion ............................................................................................................. 97

Chapter 5: Overlapping Criminal Offences that are Part of Overcriminalisation 99
5.1 Introduction ........................................................................................................... 99
5.2 Unproblematic Overlap: Tiered Hierarchies and Lesser Included Offences .......... 99
5.3 Unproblematic Overlap: Filling Within-Scope Gaps in the Criminal Law .............. 107
5.4 Unproblematic Overlap: Descriptive Overlap that is Justified for Pragmatic or Evidential Reasons .......................................................................................... 113
5.5 Unproblematic Overlap: Descriptive Overlap that is Justified for Fair Labelling Reasons .................................................................................................................. 115
5.6 Problematic Overlap: Crimes du Jour .................................................................. 117
5.7 Problematic Overlap: Very general overlapping offences .................................... 130
5.8 Conclusion ............................................................................................................. 131

Chapter 6: Gender as a Lens for Overlap ................................................................. 133
6.1 Introduction ........................................................................................................... 133
6.2 What is Gendered Harm? .................................................................................... 133
6.3 The Power of Naming Gendered Harms ................................................................. 136
6.4 Criminal Law Reform, Government Intervention and “Wraparound” Responses to Gendered Violence................................................................. 143
6.5 Is the Legal System an Appropriate Tool for Addressing Gendered Harms? .... 144
6.6 The Liberal State and Feminist Reform................................................... 146
6.7 Gendered Harm and Unintended Consequences of State Intervention........... 152
6.8 Gendered Harm and Overlap: A Roadmap........................................... 158

Chapter 7: Non-Fatal Strangulation: Inherent Dangers and Risks.................... 165
  7.1 Introduction.......................................................................................... 165
  7.2 History of Criminalising Intimate Partner and Family Violence............... 168
  7.3 Proposal for a Non-Fatal Strangulation Offence in New Zealand............. 171
  7.4 The case for a Specific Offence of Non-Fatal Strangulation................... 174
  7.5 First Theme: Dangers and Risks of Strangulation................................ 174
  7.6 Dangerousness and the Causing of Harm........................................... 175
  7.7 Using Evidence or Background Knowledge to Assess Causal Relationships ... 177
  7.8 Dangerousness of Strangulation: Fatal Strangulation........................... 179
  7.9 Dangerousness of Strangulation: Non-Fatal Strangulation Injuries.......... 183
  7.10 Dangerousness of Strangulation: Cumulative Traumatic Brain Injury (CTE).... 187
  7.11 Strangulation and Lethality Risk: A “Red Flag”.................................... 190
  7.12 The Risk Society and Crime Control................................................ 192
  7.13 When Does the Criminalisation of Risk Contribute to Overbreadth?........ 198
  7.14 Strangulation, Risk Prevention, and Overcriminalisation...................... 205
  7.15 Non-fatal Strangulation as a Completed Criminal Act.......................... 205
  7.16 Strangulation Sentencing and Risk.................................................... 208
  7.17 Summary.......................................................................................... 214

Chapter 8: Non-Fatal Strangulation: Practical and Evidential Difficulties Prosecuting
Strangulation Assaults............................................................................. 216
  8.1 Introduction.......................................................................................... 216
  8.2 Subtheme 1: Victims and Officials Underestimate the Seriousness of Strangulation... 218
  8.3 Labels and Conceptions of Strangulation: Implications for Reporting Rates and Police Detection................................................................. 222
  8.4 Subtheme 2: Problems of Proof and Evidence .................................... 226
8.5 How Enactment of a Specific Offence Addresses the Two Themes ........................................ 229
8.6 A Complication: Uncorroborated Complainant Testimony and Questions of Credibility ................................................................. 231
8.7 Addressing the Complication: Improved and Specialised Documentation Techniques:
Complainant as a Source of Evidence .................................................................................. 236
8.8 Improved and Specialised Documentation Techniques: Advanced Photographic and Imaging Techniques ........................................................................................................ 240
8.9 Summary ............................................................................................................................. 242

Chapter 9: Non-Fatal Strangulation: Is it Descriptive Overlap and will it Contribute to Overcriminalisation? ....................................................................................................................... 244
9.1 Introduction ......................................................................................................................... 244
9.2 Non-Fatal Strangulation and Descriptive Overlap ................................................................ 246
9.3 Descriptions of Units of Behavior that are Ontologically True ............................................. 250
9.4 Descriptions of Units of Behavior that are Pragmatically and Evidentially Provable .......... 253
9.5 Descriptive Overlap between Non-Fatal Strangulation, Common Assault and Male
Assaults Female ...................................................................................................................... 254
9.6 Descriptive Overlap between Non-Fatal Strangulation and Assault Offences with
Heightened Intent and Consequence Elements ........................................................................ 257
9.7 Law Commission Trepidation about Overlapping Offences ............................................. 259
9.8 When is Descriptive Overlap Part of the Problem of Overcriminalisation? ......................... 261
9.9 Inapplicable Unproblematic Overlap Categories: Lesser-Included Offences ..................... 262
9.10 Inapplicable Unproblematic Overlap Categories: Offences Filling Within-Scope Gaps .. .......................................................................................... 263
9.11 Inapplicable Problematic Overlap Categories: Crimes du Jour ........................................ 264
9.12 Inapplicable Problematic Overlap Categories: Very General Overlapping Offences ..................................................................................................................... 266
9.13 Unproblematic Overlap: Depth that is Justified by Pragmatic or Evidential Reasons .............................................................................................. 267
9.14 Unproblematic Overlap: Depth that is Justified by Fair Labelling Interests ....................... 270
9.15 Conclusions ....................................................................................................................... 271

Chapter 10: Descriptive Overlap between Sexual Assault and Assault Generally................. 273
10.1 Introduction ........................................................................................................................................ 273
10.2 Descriptive Overlap between Assault and Sexual Assault .............................................................. 280
10.3 Prevalence of Descriptive Overlap Across Jurisdictions: No Single “Correct” Way to Arrange a Criminal Code .............................................................................................................................................................. 281
10.4 Sexual Assault and the Overcriminalisation Literature ................................................................ 284
10.5 Inapplicable Categories of Problematic Overlap ............................................................................ 287
10.6 Inapplicable Categories of Unproblematic Overlap ....................................................................... 290
10.7 Unproblematic Overlap: Depth that is Justified on Fair Labelling Grounds ................................... 293
10.8 Summary ........................................................................................................................................... 296

Chapter 11: Historical Understandings of Sexual Violence ................................................................. 297
11.1 Introduction ........................................................................................................................................ 297
11.2 Theories of Sexual Assault and Rape: The Historiography of Rape Theory ................................... 299
11.3 Conservative Theories of Sexual Assault and Rape: Rape as a Property Crime ............................ 302
11.4 Modern Commodity Theories of Rape ............................................................................................. 306
11.5 Other Modern Echoes of Property Theory: Marital Rape ............................................................... 312
11.6 Other Modern Echoes of Property Theory: Hierarchies of Victims .............................................. 317
11.7 Summary ........................................................................................................................................... 319

Chapter 12: Modern Understandings of Sexual Violence: Overlap, Overcriminalisation and Dangers of Circularity ................................................................................................................................................................. 322
12.1 Introduction ........................................................................................................................................ 322
12.2 Liberal Theories: Rape as Battery and an Infringement of Autonomy ............................................. 323
12.3 Bodily and Sexual Autonomy and Self-Determination .................................................................. 325
12.4 Bodily Integrity and Sexual Integrity ............................................................................................... 328
12.5 Liberalism as Individualistic, Decontextualised and Disembodied ............................................... 329
12.6 Bodily Integrity as both Territorial and Disembodied .................................................................... 333
12.7 Feminist Re-imaginings of Bodily Autonomy, Bodily Integrity and Sexual Integrity ....................... 336
12.8 Considering Concerns about Subjectivity ....................................................................................... 343
12.9 Sexual Autonomy, Sexual Integrity and Subjectivity ................................................................. 352
12.10 Principle of Fair Labelling ............................................................................................................. 355
12.11 Contours of the Principle of Fair Labelling .................................................................................... 357
List of Tables

Table 4.1: Parsing a Criminal Offence ................................................................. 84
Table 4.2: Common Assault (Crimes Act 1961, s 196)........................................ 90
Table 4.3: Assault on a Child (Crimes Act 1961, s 194(a))................................. 91
Table 4.4: Male assaults Female (Crimes Act 1961, s 194(b)).......................... 91
Table 4.5: Aggravated Assault: Assault on a Constable (Crimes Act 1961, 192(2)) 91
Table 4.6: Legal Descriptions Available for Behaviour in the Four Videos .......... 94
Table 5.1: Nested Structure of NZ Assault Offences ....................................... 100
Table 7.1: Non-fatal Strangulation (Family and Whānau Violence Legislation Bill 2017, cl 93) .............................................................. 210
Table 8.1: Signs and Symptoms of Strangulation............................................. 237
Table 12.1: Common Assault (Crimes Act 1961, s 196)...................................... 366
Table 12.2: Sexual Violation: Rape (Crimes Act 1961, s 128(2), and s 2) ............. 366
List of Figures

Figure 4.1: Examples of Lego Block Combinations Equivalent to a Single 2x6 Block .................................................................................................................................................. 69
Figure 4.2: Lego Block that has been Subdivided to the Point of Incompletness .......... 70
Figure 4.3: Diagram of 5x4 Sheet of $1 Stamps ................................................................................................................. 70
Figure 5.1: Gaps in Criminalisation and Categories of Justified Depth in the Criminal Law ...................................................................................................................................................... 111
Acknowledgements

I am lucky to have a lot of people to thank for their support in this project. I’m very grateful to my supervisory committee, Emma Cunliffe, Ben Goold and Roger Shiner. Not many doctoral candidates have three such co-operative, engaged, responsive and intellectually generous supervisors, and I have had so many occasions to reflect on how fortunate I’ve been to have each of you on board. Emma, thank you for being incredibly generous with your insights, time and your warm spirit. You’ve been a patient and quietly inspiring supervisor, mentor, employer, and friend, and I’d have been hard pressed to have done this without you. I’m grateful to Ben, for your thoughtful supervision, mentorship, support and always useful guidance and feedback. Roger, on more occasions than I can count, your perspective has helped me to wrangle the curlier philosophical questions in ways that has really helped me so much. I’ve been so grateful to have you on my team.

Thank you to the graduate programme at Allard Hall. In particular, I’ve appreciated the warmth, interest and support I’ve received from Lijiana Biuković, Doug Harris and Joanne Chung. My thanks also to the Social Sciences and Humanities Research Council, the Killam Trusts and the Allard Hall School of Law for the financial support I’ve received.

To my family, I’m hugely grateful. Thank you so much to my parents, Bonnie Dewart and Tom Prebble, for all the small and big ways in which you’ve supported me, especially during this final eighteen months. It is no overstatement to say I couldn’t have done this without you. To my sisters Sophie Prebble and Tessa Prebble, and their partners Dan Lineham and Michael Gray, thank you for being my skype lifelines, and then my spare room lifelines, and so many other lifelines besides. I am looking forward to paying back a lot of favours. I’m also very grateful to my Canadian family, John, Susan, Frances, Georgia and Eve Dewart. During my time in Vancouver, it was so special having you just the next province over, and my holiday visits with you have frequently been highlights of my year. I already miss being just being just a Rockie mountain range away.

To my friends, Sarah Townsend and Susan Pinkus, thank you for being warm, intelligent and so generous in your friendship and support, and for being the ideal readers I’ve often pictured as I’ve worked on this project. Thanks especially, Sarah for asking me exactly the right probing questions at exactly the right times. To the friends whose stints in Vancouver have
overlapped with mine, Jen Harvey, Kat Middleton, Mladen Kojic, Hannah van Voorthuysen, Meg and Paul Embleton-Muir, Aimée Henny Brown, Helene and Kevin Love, and Anna Lund, thank you for your friendship. Thank you also to Erin Baines and Mikis Manolis, Ariel Vernon, Taylor Owen and Saskia Schuttler. Nicole Scott and Ben Rathbone, our camping trips and adventures in New Orleans and Chicago have been a bright spot. Elspeth Kaiser-Derrick, you deserve special mention for your heroic kindness and help from Vancouver while I have been in New Zealand. It is a true friend that will clean out the study carrel of a pack rat, and I am grateful every time I think of it.

Thank you Mel Sue, Matt Paterson, Becky Prebble, Hamish McIntosh, Pam Bell, Tania Te Whenua, Sarah and James Reynolds and Geetha Verhaeghe for giving me breaks to look forward to while I’ve been writing in spare rooms in Palmerston North and Maungaraki, and a post-dissertation life to really look forward to now.

Finally, to my much beloved cohort of small and hilarious friends in Vancouver, Wellington and Palmerston North – Ari, Zois, Myrtle, Wally, Lucie, Charlie, Matty, Oliver, Arlo and Hector, not to mention Scraps, Juni, Bridie, Tuku, Walter, Mordecai, Lu, Bosco, Leonard, Lenny and Mac, thank you for always putting things in perspective. We didn’t talk much about my thesis, but quietly, I’ve always rather liked that about you.
Chapter 1: Introduction

1.1 Two Central Objectives

I have two central objectives in this dissertation. The first objective is to address the question of when overlap in the criminal law is part of the problem of overcriminalisation, that is, the problem that there is too much criminal law. Broadly speaking, what I mean by overlap in the criminal law are situations in which some unit of criminalised conduct is picked out not by a single criminal offence, but rather by a number of separate offences that all describe the unit of conduct. Overcriminalisation literature mentions issues of the criminal law’s “overdepth” due to overlapping criminal offences, noting that much of the conduct that is criminalised is not criminalised once, but many times by a variety of overlapping criminal offences. In this dissertation I take care to treat separately descriptive questions about what is overlap and normative questions about when overlap is part of overcriminalisation.\(^1\) When the overcriminalisation literature refers to overlapping offences as overdepth, it fuses together these descriptive and normative questions, seeming to imply that overlap in the descriptive sense is in the normative sense necessarily problematic and part of overcriminalisation.

Beyond its cursory mentions of overdepth that contributes to overcriminalisation, the existing literature does not explicate in detail what kinds of depth in the criminal law are problematic and part of the problem of overcriminalisation.\(^2\) Overcriminalisation literature has instead focused in much greater detail on questions of “overbreadth,” and arguments that the criminal law’s reach has extended too far, criminalising conduct that is not within the proper scope of the criminal law. For clarity, in this dissertation I treat “depth” and “overlap” as synonyms: both express a descriptive, but not normative, idea of criminal offences that describe the same unit of behaviour. However, descriptive overlap or depth is not necessarily also overdepth, and part of the problem of overcriminalisation. The relationship between the terms overdepth and overcriminalisation is as follows: if an offence that descriptively overlaps with another offence is found in normative terms to be overdepth, that is the same as saying it is part of the problem of overcriminalisation.

---

\(^1\) See below, at notes 3 and 4 and associated text.

\(^2\) See chapter 2, sections 2.10 – 2.11.
My first objective addresses this gap in the literature, exploring in greater detail questions of when overlapping criminal offences give rise to the problems and dangers associated with overcriminalisation, and when on the other hand, overlapping offences either do not raise these problems at all, or raise potentially problematic risks associated with overcriminalisation, but those risks are nonetheless justifiable on balance due to the other benefits associated with the overlapping offences. In addressing this first objective, it is crucial that I avoid the circularity of constructing overlap as problematic simply by definition. In order to avoid that potential pitfall, I address separately the descriptive question of when criminal offences can be described as overlapping with one another, and the normative question of when descriptive overlap is part of the problem of overcriminalisation.

My second objective is to situate my investigations of overlapping criminal offences and overcriminalisation in the particular context of the criminalisation of gendered violence. As is discussed in greater detail in chapter 6, a particular type of violence can be described as gendered when it predominantly affects women because of systemic societal inequalities between men and women, and is principally perpetrated by men. I use the terms “woman” and “women” to include transgender women, and those who self-identify as women. I note that other transgender people and gender non-conforming people also experience a heightened risk of gendered violence. I also emphasise that “woman” is not an undifferentiated category: gender intersects with other dimensions of identity such as race, Indigeneity, class and economic status, sexual orientation, gender identity to produce different vulnerabilities to harms that may fairly be understood as gendered harms. I examine the questions of whether and when overlapping criminal offences that specifically criminalise gendered harm while overlapping with other generally applicable offences are part of the problem of overcriminalisation. I conduct my examination with reference to two gendered violence case studies: the case for a specific offence of non-fatal strangulation and the specific criminalisation of sexual assault separately from general assault offences. I use the pair of case studies to consider how sexual violence and
intimate partner violence, forms of violence that disproportionately affect women, are or should be criminalised.

In one sense, the relationship between these two objectives is not a necessary one. While gendered violence is a rich source of examples of overlapping criminal offences, other areas of the criminal law also offer potential alternative case studies of overlapping offences – for instance, white collar crime, regulatory offences, theft, and preparatory and risk prevention offences, such as the possession of burglar’s tools. This means that a different version of this dissertation could have addressed my first objective using an entirely different set of case studies not related to gendered violence.

However, while gendered violence case studies are not the only possible lens through which one could examine questions of overlap and overcriminalisation, for several reasons gendered violence is a particularly good lens. First, just as it is important that this dissertation should avoid defining overlap as something that is by definition problematic and part of overcriminalisation, equally my case studies need to avoid an analogous kind of circularity by being immediately identifiable as instances of overlap that are clearly part of the problem of overcriminalisation. That is, if in order to test when overlapping criminal offences are part of the problem of overcriminalisation I selected only case studies of overlapping offences that were on their face clearly problematic, and that clearly gave rise to problems associated with overcriminalisation, then I would not get far in addressing my first objective. Testing and knocking down a straw person case study of overlap would not address the gap in the literature concerning which kinds of descriptive overlap in the criminal law contribute to the wider overcriminalisation problem. Accordingly, an important criterion in selecting my case studies was that they should be overlapping offences for which prima facie robust and principled supporting arguments could be made, rather than case studies that would quickly and clearly turn out to be part of overcriminalisation.

Secondly, while arguments about overcriminalisation are most often made in the context of partisan political debate, overlapping offences that contribute to overcriminalisation are a problem regardless of one’s position on the political spectrum. Because overcriminalisation literature has expended more energy, space and time on detailed analysis of overbreadth in the criminal law than it has on overdepth, the few examples of overdepth and overlap that the
literature expressly mentions tend to be “crimes du jour,” enacted hastily in response to a moral panic over a cluster of high profile crime incidents and perceived crisis arguably so that legislators may demonstrate that they are “doing something” about a perceived problem.⁹ Crimes du jour can give rise to overlap and depth, and arguably to overdepth and overcriminalisation. These examples of crime du jour that the overcriminalisation literature briefly discusses indeed frequently do seem to represent redundancy, giving rise to problems associated with overcriminalisation without any countervailing positive characteristics that might arguably outweigh those overcriminalisation concerns. The implication is that in part because of the rushed and emotive process by which such offences are introduced, overlapping crimes du jour are poorly designed, redundant, and problematically inconsistent both in terms of offence elements and maximum penalties with the other offences with which they overlap.

Political and public concern in response to high profile crimes and perceived need for new offences can relate to crime control interests more frequently associated with conservative ideologies, such as calls to design a specific offence prohibiting drag racing, throwing objects off overpasses, or specific modes of violent offending, such as home invasion, one-punch or “sucker punch” assaults, and “carjacking” offences. However, the issue of whether overlapping specific offences contribute to problems of overcriminalisation also arises over calls for specific offences more typically associated with more socially progressive ideologies, for instance, specific hate- or bias-motivated offences, cyber bullying offences designed to protect vulnerable young people and others from online abuse, and victim-specific offences concerning assaults against socially marginalised or vulnerable groups such as women, members of minority groups, and children.

As such, the question of whether and when overlapping criminal offences are part of the problem of overcriminalisation is equally pertinent to readers of most political inclinations. This meant that the field of possible case studies from which I could select was wide open. I could select examples of specific offences that overlap with other more general offences that did not immediately collapse into clear examples of overcriminalisation by virtue of being “crimes du jour” redundantly responding to moral panics. This led me to my second objective: a focus on the criminalisation of gendered violence.

⁹ See the discussion and examples of “crimes du jour” and “moral panics” in Chapter 5, at section 5.6.
Certainly, questions about how to best criminalise violence that predominantly affects women are political questions. The ways in which the law understands and criminalises harms suffered disproportionately by women has been an important area of feminist legal research, and a key site of political struggle for feminist activists and law reformers. For instance, in many jurisdictions the past 50 years have seen feminist movements achieve changes to public attitudes about violence against women, which has manifested in criminal law reforms, and the development of associated political, legal and civil institutions. To draw specifically from New Zealand examples, the New Zealand women’s movement in the 1970s identified violence in the home as an important issue, establishing New Zealand’s first women’s refuge in Christchurch in 1973, and the first permanent rape crisis centre in Auckland in 1978. Family violence had historically been largely tolerated by society and police, and regarded as private and to be kept unseen.

But social views began to shift so that it was increasingly considered acceptable for police to intervene in violence occurring within intimate and family relationships. The first piece of New Zealand legislation specifically targeting domestic violence was the Domestic Protection Act 1982, which introduced non-violence orders and non-molestation orders, and gave police powers to arrest without laying formal charges. Feminist law reform efforts resulted in the criminalisation of spousal rape in 1985; and changes to laws of evidence concerning sexual assault complainants, such as restricting lines of questioning regarding a complainant’s prior sexual history. Writing in 2005, Janet Fanslow remarked that the issue of family violence in New

---

10 See Chapter 6, at sections 6.3 and 6.4.
15 The Crimes Amendment Act (No 3) 1985 repealed section 28(3) of the Crimes Act 1961, thereby specifically abolishing spousal immunity to rape charges. For a discussion of the removal of spousal rape exemptions in New Zealand and other jurisdictions from the mid-1970s, see the discussion in Chapter 9 at section 9.10.
Zealand was receiving an “unprecedented level of attention,” and was the focus of a number of government initiatives and statements marking it as a high government priority.\(^\text{16}\)

Interestingly however, few commentators have suggested that offences targeting gendered violence are “crimes du jour,” overly populist, or represent unreflective kneejerk reactions to moral panic. That is, though questions about how to criminalise gendered violence certainly have a political dimension, they are not politicised in such a way that they *obviously* constitute part of overcriminalisation in a way that makes them a less interesting case study for my purposes.

A final dimension to my formulation of this dissertation’s second objective is personal: gendered violence is an issue about which I feel strongly. As I noted above, overlapping offences that contribute to problems of overcriminalisation are a problem that should concern readers regardless of their personal ideologies. However, since *I* am authoring this dissertation, the deepest way for *me* to pursue my first objective of testing and analysing when overlapping criminal offences contribute to the problem of overcriminalisation is not by testing case studies that I am inclined to easily find to contribute to overcriminalisation but rather, to test case studies involving overlap that strike me as being more justifiable. As I explore in my case study chapters, violence that affects women at disproportionately high rates is a serious problem in New Zealand and Canada and in most other jurisdictions. It is also a problem that has historically been dealt with poorly by the criminal law, and other forms of governmental and official power.

### 1.2 A Roadmap

A simple roadmap of this dissertation is as follows. This roadmap is deliberately brief, focusing on introducing the reader to the dissertation’s overall structure, rather than rehearsing key arguments and analysis, or exploring themes running between chapters. Chapters 2 to 6 set out

---

and develop the conceptual tools with which I address the question of when descriptive overlap constitutes normatively problematic overlap. Chapters 2 and 3 introduce the phenomenon of overcriminalisation and the literature regarding that phenomenon. Chapter 2 explains two dimensions of overcriminalisation, or the idea that there is too much criminal law: first, that the law is too broad, covering conduct it should not; and secondly, that the law is too deep, so that conduct that is criminalised is covered by many overlapping offences. Chapter 3 gives a historical background of some of the social, economic and political forces that have contributed to the problem of overcriminalisation. The chapter then sets out the problems associated with overcriminalisation and why we should be worried about it.

Chapter 4 sets out my descriptive account of overlap, taking care not to imply at a descriptive level that there is inherently anything normatively troubling about overlap. In Chapter 5, I present my normative account of when descriptive overlap raises problems associated with overcriminalisation. Chapter 6 introduces conceptual tools drawn from feminist legal theory, which I then go on to apply in the case study chapters. The chapter introduces gendered harm as a particularly useful lens through which to consider questions of overlap and overcriminalisation.

Chapters 7 to 12 address two gendered harm case studies, illustrating ways in which specific offences targeting particular gendered harms may be justifiable, rather than constituting part of the problem of overcriminalisation, even though they overlap with other, more general criminal offences. Chapters 7 to 9 address the first case study: New Zealand’s new specific non-fatal strangulation offence. The proposed offence will overlap with existing general assault offences. However, as set out in chapter 7, non-fatal strangulation assaults in the context of violent intimate partner relationships are a particularly serious form of assault: strangulation is particularly dangerous, in the sense that strangulation can easily cause injury or death; and previous strangulation assaults are known to be statistically correlated with eventual homicide on a later occasion. As explored in chapter 8, for a number of practical and evidential reasons, strangulation assaults are particularly difficult to charge under general assault provisions. Chapter 9 considers whether the proposed new offence will descriptively overlap with existing general assault offences in the terms set out in chapter 4. Having concluded that the new offence will descriptively overlap with general assault offences, the chapter then applies the concepts developed in chapters 5 and 6 exploring whether this descriptive overlap will in normative terms
contribute to the problem of overcriminalisation. The chapter concludes that because the new
offence will address pragmatic and evidential difficulties with prosecuting strangulation assaults
under general assault offences, this descriptive overlap is justified and does not form part of the
problem of overcriminalisation.

The second case study, offences of sexual violence known as rape or sexual assault, is set
out in chapters 10 to 12. There is a long history of criminalising rape or sexual assault separately
from general assault offences, even though it would be possible to capture it under those general
assault offences. The three chapters set out several theoretical understandings of the central harm
of rape or sexual assault. They consider the developing conversation between these theories, and
how together, these theories inform the general feeling that sexual assault is qualitatively
different from assault generally, such that its criminalisation separately from general assault
offences does not give rise to problems of overcriminalisation.

Both case studies describe offences that specifically criminalise a form of gendered
harm, and which at least arguably overlap with general assault offences. As is explored in the
case study chapters, in both instances, the specific offences describe core aspects of the
criminalised behaviour, and the harms implicated by that behaviour, that are not reflected by
general assault offences. Together, the case study chapters paint a picture of whether and under
what circumstances descriptive overlap in the criminal law is part of the problem of
overcriminalisation.

Chapter 13, the conclusion, bookends the structural roadmap laid out in this introductory
chapter. Chapter 13 presents a thematic survey of the preceding twelve chapters, highlighting
and drawing together the key motifs and ideas running between the case studies and earlier
chapters
Chapter 2: What is Overcriminalisation?

2.1 Introduction

The first objective pursued within this dissertation is to determine when criminal offences that overlap with one another, multiply criminalising the same conduct, constitute part of the problem of overcriminalisation. In order to answer this question a necessary initial step is to explain what the term “overcriminalisation” means, and to investigate the reasons why it is problematic. That is the focus of this chapter and the following chapter.

This chapter is a review of the literature regarding overcriminalisation. In particular, the chapter lays out two dimensions of overcriminalisation: overbreadth, and overdepth. The former has been the primary focus of the overcriminalisation literature, while overdepth when it is mentioned is generally gestured to in briefer and general terms. Of the overcriminalisation literature that turns substantively to issues of overdepth, a large proportion focuses on the predominantly American issue of “overfederalisation.” Overfederalisation is outside of the scope of this dissertation, but parts of the overfederalisation literature are useful for analysing overdepth generally, outside of a federal context. In chapter 3, I set out some of the causes of overcriminalisation, and review the reasons why overcriminalisation is problematic.

2.2 What is Overcriminalisation?

Overcriminalisation is the phenomenon, noted by many theorists, that there is altogether too much criminal law.¹ There is a “wide consensus that overcriminalisation is a serious problem.”² William Stuntz has made the taxonomical observation that this “too much-ness” extends in two

---


dimensions: criminal law’s coverage is at once too broad, and too deep.\textsuperscript{3} This dissertation focuses on the second of these dimensions: that criminal law is too deep, such that the conduct it criminalises, it criminalises many times over. Chapter 5 analyses in more detail the ways in which overlapping criminal offences do and do not contribute to the problem of overcriminalisation. It is useful here to begin by setting out both dimensions of overcriminalisation.

2.3 Overbreadth: When the Criminal Law Casts Too Wide a Net

When it is observed that the criminal law is too broad, what is meant is that criminal law covers too wide a range of types of conduct, extending to conduct that should not be criminalised at all. In the late 1970s, sociologist and criminologist Stanley Cohen drew attention to the dangers of an overexpansive criminal law and criminal justice system.\textsuperscript{4} He noted that even measures introduced with the aim of curbing criminal law’s scope can have unintended consequences. For example, community-based modes of social control, such as diversion, parole and probation, despite having been introduced with a view to lowering rates of imprisonment by “keeping people out of dungeons,” can have paradoxical consequences.\textsuperscript{5} Cohen and a number of other criminologists observed that despite worthy intentions, in practice the introduction of less onerous alternative measures of social control paradoxically frequently does not affect rates of incarceration, and contributes to further expansion, rather than contraction, of the criminal law’s scope.\textsuperscript{6}


\textsuperscript{5} Ibid, at 347–48.

Criminologist David Greenberg argues that it is misleading to speak of community-based interventions as *alternatives* to prison-based sentences:  

the contrast between the brutality of the prison and the alleged humanitarianism of community corrections is beside the point because the community institution is not used to *replace* the prison; instead, the offender is exposed to both the prison and the community “alternative.”

Instead of operating as alternatives to prison sentences, less onerous sanctions tend in practice to operate only at the “shallow end” rather than the “deep end” of the pool of those potentially subject to government control via the criminal justice system. Lesser sanctions tend not to be used to less-severely punish “deep end” offenders who would otherwise have been imprisoned (except as supplement, rather than as an alternative, to prison sentences); rather, such “alternative” sanctions are used for “shallow end” offenders who would have been unlikely to receive incarcerative sentences in the first place.

This means that “deep end” offenders are subject to as much (if not more) punishment as they would have been without the availability of “alternative” lesser modes of social control, and “shallow end” offenders are subject to more social control than they would otherwise have been. That is, the introduction of less onerous sanctions can lead to higher overall rates of social control. The availability of lesser sanctions tends to lead to increases in both the amount of intervention directed at individual offenders, and in the total number of people who fall within the criminal justice system to begin with. Cohen calls this tendency the “widening [of] the net”

---


7 David F Greenberg, “Problems in Community Corrections” (1975) 10:1 Issue Criminol 1 at 8 (emphasis in original); quoted by Cohen, “The Punitive City”, *supra* note 4 at 350.


9 Cohen, “The Punitive City”, *supra* note 4 at 347.

10 *Ibid*, at 348.

and “thinning [of] the mesh” social control via the criminal law.\textsuperscript{12} Questions of overbreadth are questions of scope, or of the appropriate limits of the criminal law. These overextensions of scope fall into several categories.

2.4 Morality offences

Perhaps the clearest category of overbreadth is that of morality or vice offences, including criminal laws enforcing sexual morality (which over the years have included laws against adultery, bigamy, cohabitation, fornication, homosexual sex, pornography, and prostitution), laws prohibiting illegal drug use and gambling, and laws against conduct such as public drunkenness,\textsuperscript{13} and the use of profane language. Over the course of several generations, community mores around conduct covered by morality offences has evolved. Some matters, such as illegal drug use, largely – though not uncontroversially – remain within the scope of the criminal law.\textsuperscript{14} However, other matters, notably matters of sexual morality, and the degree to which consensual sex between adults is widely regarded as a matter for the criminal law, has evolved, and many of these kinds of offences no longer exist. There is often a time lag before outmoded offences are actually repealed, and some disused offences may never actually be repealed,\textsuperscript{15} remaining technically in force, though not in active use.\textsuperscript{16}

However, a number of such morality offences have been repealed following intense public debate. For illustration, I focus here on several New Zealand examples:\textsuperscript{17} for instance, the


\textsuperscript{15} For further discussion of this “one-way ratchet” effect, see chapter 3, section 3.2.


\textsuperscript{17} For reasons of space, I have focused on New Zealand examples here, but similar examples could be found in any jurisdiction in which there has been public debate about the potential decriminalisation of
debate preceding the enactment of the Homosexual Law Reform Act 1986, which decriminalised consensual sex between two men of 16 years or above;\(^{18}\) the debate leading up to the enactment of the Prostitution Reform Act 2003, which decriminalised prostitution;\(^{19}\) or the debate currently playing out in New Zealand, including before the Health Select Committee about whether forms of medically-assisted dying in the event of a terminal illness or an irreversible condition which makes life unbearable should be permitted (at present, medically assisted dying constitutes homicide under the Crimes Act 1961, and no defence is available for physician assisted dying).\(^{20}\)

I do not intend to imply that the merits of criminalisation are equivalent in all of the above examples. Rather, I simply emphasise that public debates about, for instance, decriminalising homosexual sex, or decriminalising prostitution, are debates about the proper limits and scope of the criminal law: first, whether the conduct in question is sufficiently harmful to require criminalisation,\(^{21}\) and second, whether the harmful conduct should properly be addressed by criminalisation, or is instead better understood not as a criminal justice problem, but as matters for the health, education, social welfare, employment regulation, or other sector. It is beyond the scope of this dissertation for me to substantively weigh in on these debates. What is important for understanding problems of overbreadth in the criminal law is that there may be compelling arguments on both sides of such debates, and that the conceptual territory in which these debates are staked out concerns the proper scope and limits of the criminal law.

### 2.5 Expansion into Traditionally Non-Criminal Areas of Legal Liability: Tort

Another direction in which the criminal law’s breadth of coverage can extend too far is into subject areas traditionally conceptualised as falling exclusively within the purview of another

---


\(^{21}\) For further discussion of the harm principle and liberalism, see discussion in chapter 6 at section 6.6.
branch of law, such as principles of tort law, or regulatory provisions. There is a long-standing distinction or boundary between civil and criminal liability for wrongdoing. Pursuant to this distinction, state-administered deprivations of liberty are primarily reserved for breaches of criminal law, rather than for civil wrongs. While tort and criminal law share a general concern with wrongdoing, and with providing a means of correction for that wrongdoing, they have distinct essential aims.

The essential aim of tort law is to financially compensate a person who has suffered an injury or loss. The parties to a tort claim are the plaintiff – the person who has suffered harm – and the defendant – the person or legal entity that wrongfully caused that harm. By contrast, the criminal law is not about the direct relationship between a wrongdoer and harmed victim. Its focus instead is the wrongdoer, or criminally accused person, and the state, which prohibits and punishes wrongful conduct on behalf of the people of the jurisdiction. The central aims of the criminal law are not to compensate victims, but to allocate blame and punishment to wrongdoers who have breached the jurisdiction’s criminal law.

The distinct aims of criminal and tort law are reflected in the different fault elements required by each field of legal responsibility: because tort is concerned centrally with compensating loss rather than punishing, blaming, and stigmatising wrongs, liability for tortious wrongs can be established with a lower fault element than is usually required to establish criminal guilt. The culpability standard generally required for criminal liability, particularly if conviction will lead to a deprivation of liberty or carry significant stigma, is subjective intention or recklessness. In contrast, civil liability in tort requires negligence, understood as a departure

---


24 Ashworth, “Is the Criminal Law a Lost Cause?”, supra note 1 at 233–34.

from the standard of care expected of a reasonable person in the defendant’s position. This is an objective rather than subjective test.

While the imposition of objective versus subjective fault standards is traditionally a key distinction between tort and criminal liability, it is important to understand that it is not a universal rule. It would be wrong to say that tort fault standards are objective and criminal fault standards are only ever subjective: many criminal offences, such as manslaughter, rely on proof of a fault element which is not purely subjective. Notably however the criminal negligence standard is in most jurisdictions distinct from, and more stringent than, the civil negligence standard. The tort of negligence requires a departure from the standard of care expected of a reasonable person in the defendant’s circumstances. Contrastingly, in jurisdictions like Canada and New Zealand criminal negligence requires not just a departure, but a marked, major, or marked and substantial departure from the standard of care expected of a reasonable person. That is, although there is a longstanding precedent for the existence of criminal negligence offences, such offences are still subject to a more stringent fault element than would be required to establish civil negligence liability.

Despite such distinctions between criminal and civil liability for wrongdoing, many jurisdictions have expanded their criminal law to include offences with lower fault elements. The distinctions between tort and criminal liability therefore may be eroding. Writing in the United States, William Stuntz has discussed negligent assault criminal offences in several states that have fault elements equivalent to that of an ordinary negligence tort. Stuntz notes that Montana even has an offence of negligent endangerment, which requires no injury or materialisation of

---

26 There are some strict liability torts, such as liability for damage caused by the escape of inherently dangerous things one has brought onto one’s property (Rylands v Fletcher [1868] UKHL 1) or vicarious liability for torts committed by employees. Of course, strict liability torts have an even lower culpability standard than torts of negligence.


29 Crimes Act 1961, s 150A(2) (New Zealand)


32 Stuntz, “Pathological Politics”, supra note 3 at 516.
risk, only the creation of risk. As Stuntz points out, negligent endangerment is not even a tort, even though typically, it is expected that the fault element of the criminal law should be higher, not lower, than that of tort law. Writing in an English context, Andrew Ashworth has catalogued a range of categories of criminal offences that incorporate lower (or even no) fault standards. He identifies: strict liability criminal offences, penalising acts or omissions, subject to exceptions where the defendant bears the burden of proving the exception or excuse applies; and strict liability offences, criminalising acts or omissions, which include no specific provision for any defences. Ashworth draws attention to a “dissonance” between the traditionally accepted wisdom that mens rea is a prerequisite for criminal liability and the reality that the criminal law frequently imposes liability for objective fault.

Offences of the kind noted by Stuntz and Ashworth that criminalise conduct with lower fault requirements are examples of the criminal law straying beyond its historically conceived boundaries. In one sense, the permeability of the distinction between criminal law and tort does not mean that the essential aims of the criminal law should be understood as having expanded: even when criminal law includes strict liability offences defined according to a civil law negligence fault standard, rather than a heightened fault criminal negligence standard, those offences still do not provide for compensation to the harmed person as a tort would. Instead, as criminal offences, they remain focused on punishing and allocating blame to the wrongdoer. However, as we will see in the next section, commentators and courts have spent considerable efforts distinguishing “true crimes,” from “regulatory offences,” suggesting that the central goals of the latter are less about punishment and blame, and more about regulating public safety, health, convenience, and general welfare.

My primary purpose in noting the distinctions between criminal and civil fault standards is descriptive or taxonomical rather than normative. My aim is to map the scope of the criminal law and its interplay with other forms of legal liability. Descriptively speaking, if traditionally non-criminal fault standards are coming to be incorporated within the criminal law, that

---

33 Ibid.
34 Also see, Husak, Overcriminalization, supra note 1 at 54.
35 Ashworth, “Is the Criminal Law a Lost Cause?”, supra note 1 at 227.
38 See discussion in section 2.6 below.
represents a growth in the size of the criminal law. While my focus in this chapter is a
descriptive account of the boundaries and scope of the criminal law, that discussion in turn
suggests normative questions about the proper limits of the criminal law. That is, the observation
that the criminal law increasingly includes objective fault standards raises normative questions as
to whether criminal liability should extend to objective as well as subjective fault.

A series of Canadian cases in which the Supreme Court addressed the minimum
constitutional and common law fault elements required for “true crimes” illustrates the way in
which normative questions about the proper limits of the criminal law can play out in practice.\(^39\)
In early cases in this series of cases, the Supreme Court of Canada noted a common law
presumption against convicting a person of a “true crime”\(^40\) without proof of subjective intent or
recklessness\(^41\) – that is, a presumption against criminal liability for negligence.\(^42\) Having
identified this presumption, the question became whether and when the presumption could be
rebutted. The Supreme Court found that for murder – the offence carrying the highest degree of
stigma and punishment in the Canadian system – the presumption can never be rebutted:\(^43\) the
minimum fault standard for murder is subjective foresight of the likelihood of death, and murder
can never be committed through negligence.\(^44\)

However, in subsequent cases, the Court held that subjective fault was not necessarily
required for offences other than murder. That is, the presumption in favour of subjective mens
rea for criminal offences was rebuttable for offences other than murder. For instance, the Court
found that because the charge of “unlawfully causing bodily harm” does not carry the high level
of stigma or punishment that murder does, that offence was not constitutionally required to have
a subjective fault element.\(^45\) Similarly, the court found that manslaughter liability did not require
a subjective fault element: objective foreseeability of risk of non-trivial bodily harm stemming
from a dangerous act, coupled with a major departure from the standard of care expected of a

1303 (Dickson J).

\(^40\) Note that the court’s definition of “true crimes” introduces a degree of circularity in this context: the
term refers to serious, or paradigmatic criminal offences that require subjective intention or recklessness,

\(^41\) Ibid, at 1303, building on *Beaver v R* [1957] SCR 531.


\(^43\) *R v Martineau* [1990] 2 SCR 633 (Lamer CJ), at 646.

\(^44\) Ibid; building on *R v Vaillancourt*, [1987] 2 SCR. 636.

reasonable person in the defendant’s circumstances, is constitutionally sufficient to ground liability.\textsuperscript{46} According to the Supreme Court of Canada, while there is a general presumption against objective fault standards in criminal law, this presumption is rebuttable in many circumstances, and its operation is highly responsive to context.

Returning to my descriptive focus, the Canadian example illustrates that although the imposition of objective as opposed to subjective fault standards is traditionally a central distinction between tort and criminal liability, it is not a universal rule: criminal fault standards are in some cases partially objective, rather than wholly subjective.\textsuperscript{47} Civil and criminal liability remain distinct legal categories but there has been some erosion of the distinctions between the two categories of legal liability for wrongdoing.

2.6 Criminalisation Expansion: Regulatory Offences

Another source of the increasing scope of the criminal law is the expansion of regulatory offences.\textsuperscript{48} In Canada, the Supreme Court noted in 1971 that Canadian law includes “a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public.”\textsuperscript{49} Christine Haynes of the Department of Justice of Canada writes that “[t]he number of regulatory offences in an industrialized country such as Canada is overwhelming.”\textsuperscript{50} In England, Lindsay Farmer writes of the difficulty in defining the term “criminal law,” calling it a problem that “could not be resolved by means of the traditional categorisation of crimes as ‘public wrongs’” as opposed to private

\textsuperscript{46} \textit{R v Creighton} [1993] 3 SCR 3 (McLachlin J).
\textsuperscript{48} Note that this section’s discussion of regulatory offences as a source of increasing breadth in the criminal law dovetails with the previous section’s discussion of objective fault standards in the criminal law. Canadian courts have noted that regulatory offences frequently employ objective fault standards. See, \textit{R v Sault Ste. Marie}, supra note 39; and \textit{R v Raham} 2010 ONCA 206.
\textsuperscript{49} \textit{R v Pierce Fisheries} [1971] SCR 5, at 13.
\textsuperscript{50} Christine Haynes, of the Department of Justice, Canada, \textit{Regulatory Offences} (Saskatoon: Saskatchewan Legal Education Society Inc Seminar, Criminal Law Update, 2005) at 4; also see Peter Spiro, \textit{Narrowing the Gap between Regulatory and Criminal Offences in Canada} (2013).
wrongs, due to the modern reality that the criminal law contains a great volume of regulatory offences.\(^5\)

In the United States, Samuel Buell argues that overbreadth produced by the use of regulatory offences is, even if not positively desirable, at least “a necessary evil”\(^52\) in order to facilitate the state’s “regulatory project to control social harms.”\(^53\) William Stuntz gives examples of state laws that criminalise breaches in regulations regarding the testing and sale of sparklers, public health and safety regulations concerning the disposal of dead animals – presumably, road-kill – on streets and roads, and regularity offences such as the sale of alcohol to any “common drunkard”, and cheating at cards,\(^54\) characterising such regulatory offences as “trivial and exotic” rather than harmful.\(^55\) Stuart P Green categorises regulatory offences as examples of crimes that are mala prohibitum – wrongs only in virtue of having been criminalised – as opposed to mala in se – wrongs that are wrong in themselves, for instance rape or murder.\(^56\)

In Canada, Janet Mosher and Joe Hermer have written of the ways in which traditionally non-criminalised matters of public policy such as immigration, education and social welfare have increasingly come to be viewed as problems of safety, security and crime, and acted upon accordingly.\(^57\) Mosher and Hermer focus particularly on the criminalisation of welfare fraud, arguing that despite the similar labels, much of what is described as welfare fraud “bears scant resemblance to actual criminal fraud.”\(^58\) Instead, conduct described as “welfare fraud” is frequently the result of welfare recipients’ unintentional mistakes or misunderstandings as they struggle to navigate extremely complex bureaucratic systems and rules in order to claim their


\(^{53}\) Ibid, at 1564.

\(^{54}\) But see, R v Riesberry [2015] 3 SCR 1167, in which a horse trainer attempted to rig two horse races by drugging two horses was charged with cheating at play and attempted cheating under section 209 of the Canadian Criminal Code, and fraud and attempted fraud under section 380(1). Stuntz, “Pathological Politics”, supra note 3 at 515–17; Beale, “Many Faces of Overcriminalization”, supra note 1 at 761.


\(^{57}\) Ibid, at 18 (emphasis added).
welfare entitlements. Mosher and Hermer note that welfare recipients can run afoul of welfare rules even by engaging in behaviour that may “seem innocuous or even socially valued [such as] having dinner at a friend’s or forming an intimate relationship.” Although relatively few “welfare fraud” cases are prosecuted as fraud in criminal courts, Mosher and Hermer argue that treating all welfare recipients with suspicion and subjecting them to high levels of surveillance, and associating welfare recipients as a class with explicitly criminal terms such as “fraud,” “liars,” “cheats,” “theft,” and “crackdowns” and “zero tolerance,” means that criminalisation of welfare fraud is not limited to criminal justice processes. Instead, this construction of welfare fraud as a serious and escalating problem requiring ever-harsher prevention measures positions beneficiaries as “actual or potential criminals.”

Another Canadian example is the criminalisation of unlicensed hunting and fishing. Lisa Chartrand and Cora Weber-Pillwax have discussed the troubling ways in which these regulatory offences impact Indigenous individuals and groups who can be criminalised for engaging in traditional hunting and gathering practices in their traditional territories. When legislation imposes fines or allows for incarceration in respect of conduct such as hunting without a licence, or failing to report to fish and game officers 24 hours prior to setting a fishing net, descriptively speaking, these are regulatory offences. Chartrand and Weber-Pillwax argue that these regulatory hunting and fishing offences criminalise Indigenous people for practising their traditional culture.

This state practice is normatively troubling for a number of reasons: traditional hunting and fishing practices remain an important source of sustenance for many Indigenous communities; and the practices are also important for the psychological and spiritual well-being of Indigenous individuals and communities. Furthermore, Chartrand and Weber-Pillwax state that “[m]ost Indigenous people have been, and continue to be, excluded from … processes of

---

59 Ibid.
60 Ibid.
61 Ibid, at 18–19.
64 Ibid, at 92.
65 Ibid, at 93.
law-making in Canada.” Viewed in a wider colonial context, and understood as “a contemporary expression of the state’s earlier criminalization of Indigenous spiritual practices … such as the sun dances, the ghost dances, and the potlatches,” Chartrand and Weber-Pillwax call the criminalisation of traditional hunting and fishing “a deep and complex level of violence against human consciousness and life” resulting in “the repression, denial, and destruction of people’s rights to express and live out their own spiritualities.”

Commentators discussing regulatory offences frequently raise the question of instrument choice. Criminalisation is one mode of social control, but it is far from being the only tool available to the state. The Law Commission of Canada has emphasised that the choice to criminalise unwanted behaviour, as opposed to using other available intervention strategies, is just that: a choice. That choice should be taken consciously and thoughtfully, rather than by default. In this way, the state may avoid and curb the tendency towards “inappropriate criminalization of various behaviours,” where “inappropriate criminalization” is breadth in the criminal law that is part of the problem of overcriminalisation.

Another way of expressing this overbreadth problem was suggested by Andrew Ashworth when he questioned at a descriptive level the “prospects for distinguishing criminal offences from … other [legal] provisions by reference to their content.” That is, if the criminal law has in fact expanded to accommodate conduct more paradigmatically understood as falling under tort law or non-criminal regulation, then, as the title of his article queries, perhaps the

---

66 Ibid, at 90.
67 Ibid, at 89.
71 Ibid, at 7–8.
73 Ashworth, “Is the Criminal Law a Lost Cause?”, supra note 1 at 225.
conceptual clarity and constitutional and political appropriateness of the criminal law are indeed a “lost cause.”

2.7 Criminalisation Expansion: Preparatory Offences

Preparatory offences are another species of risk-minimisation offences that the overcriminalisation literature cites as contributing to an outward creep of the criminal law’s scope. Writers have described preparatory offences by a number of terms, for instance, “pre-inchoate offences,” and “prophylactic crimes.” These are offences that criminalise early preparatory steps or preconditions to a particular completed offence, sometimes many steps removed from the harm being protected against. They include, for instance, possession of burglars’ tools, and possession of various kinds of drug paraphernalia like spoons and bowls. Commentators have remarked on the tendency to extend principles of inchoate liability to ever-wider and more remote forms of activity.

Peter Ramsay has written of “pre-inchoate offences,” which he defines as “purely preventative” and comprising “conduct that may constitute the initial stage of the complete offence or of a dangerous act, but does not constitute a dangerous act in its

---

74 Ibid.
own right.” Such offences include “offences of possession, criminal preparation, failure to report, and breach of a preventative order.” Such preparatory offences contrast with inchoate offences, such as attempt, solicitation, and conspiracy, because the latter criminalise conduct that is itself intrinsically dangerous, and thus much closer to the realised harm of the completed offence.

2.8 Criminalisation Expansion: Regulatory Provisions that Compound to Constitute Criminal Offences

Another source of the outward creep of criminal law’s scope, and the eroding distinctions between regulatory offences and criminal liability, are hybrid civil and criminal law processes and instruments. These are civil law instruments, but when breached they give rise to criminal sanctions. Anti-Social Behaviour Orders (ASBOs) in the United Kingdom are an example of these hybrid instruments. ASBOs are regarded as a regulatory rather than punitive measure, and can be issued in response to civil or criminal proceedings. However, once issued, breach of

---

81 Ramsey, “Democratic Limits to Preventive Criminal Law”, supra note 74 at 215.
82 Ibid.
83 Ibid, at 215; Husak, Overcriminalization, supra note 1 at 39.
an ASBO is a criminal offence punishable by up to 5 years’ imprisonment.\textsuperscript{90} This means, issuing a non-criminal regulatory measure can lead to \textit{criminal} liability – a kind of criminalisation via bootstrapping.\textsuperscript{91}

Andrew Ashworth and Lucia Zedner note that two-step criminalisation\textsuperscript{92} via hybrid civil and criminal law instruments can mean that people are exposed to potentially severe penalties without also receiving the proper criminal procedure protections.\textsuperscript{93} ASBOs place preventive restrictions on individuals who are deemed to pose a high risk of certain kinds of offending. For instance, an individual deemed to be at high risk of spraying graffiti in train stations could be subject to an ASBO banning her from the whole of a local rail network, rather than just banning her from the harmful act of vandalism itself. If that individual later breaches the order by travelling on a train, she could be subject to criminal sanctions.

Ashworth and Zedner call this “a kind of overbreadth that results in the application of the criminal sanction to conduct that is not in itself harmful and that is less serious than the anti-social behavior that is the real target for prevention."\textsuperscript{94} Individuals who breach ASBOs can either find that their non-criminal, but ASBO-breaching, acts are rendered criminal, or find that their criminal and ASBO-breaching acts may be subject to a higher maximum penalties as breaches of an order than would have been available under the offence itself. Ashworth and Zedner give the examples of begging and soliciting for prostitution: neither of these are imprisonable offences in England, no matter how many times committed. However, if a condition of an ASBO is that the defendant must not beg or solicit in public, then breach of the order can result in imprisonment.\textsuperscript{95} In a similar vein, Antony Duff argues that:\textsuperscript{96}

\textsuperscript{90} \textit{Crime and Disorder Act 1998} sec 1(10)(b).
\textsuperscript{91} Lucia Zedner, “Preventive Justice or Pre-Punishment? The Case of Control Orders” (2007) 60:1 Curr Leg Probs 174 at 189.
\textsuperscript{92} Ashworth and Zedner, “Prevention and Criminalization”, \textit{supra} note 74 at 563.
\textsuperscript{95} Ashworth and Zedner, “Defending the Criminal Law”, \textit{supra} note 83 at 30.
The provisions for ASBOs … constitute a subversion of criminal law, in that they use a non-criminal procedure and supposedly non-penal restrictions to deal with conduct that, if it does constitute a public wrong, should instead be dealt with through the criminal law; and a perversion of criminal law, in that they impose criminal conviction and punishment on those who break the supposedly non-criminal orders that are imposed.

An analogous slippage can occur in jurisdictions that criminalise the non-payment of fines. Some jurisdictions criminalise the non-payment of fines, even if those fines are for regulatory matters that are not themselves subject to imprisonment. The problem is particularly chronic in the United States. As a New York Times opinion article noted: “You don’t go to jail for walking your dog without a leash, making an illegal left turn or burning leaves without a permit, but in many states you will go to jail if you can’t pay the resulting [court] fees and fines.”97 Other examples of minor regulatory matters that can lead to imprisonment in this way include broken tail-lights, minor drug offences, sitting on a sidewalk or sleeping in a park,98 as wearing saggy pants,99 “quality of life” violations,100 and property upkeep violations, such as chipped paint and untidy trash cans.101

Commentators have written critically of this form of two-step criminalisation, many saying it creates what amount to modern day Dickensian debtors’ prisons,102 and citing it as a means of criminalising poverty.103 Indigent people who have minor initial interactions with the criminal justice system can find themselves “sucked further in for no good reason.”104 This can lead to a negative cycle in which poor people are unable to pay their fines and court fees, and as

103 Dolan and Carr, Poor Get Prison, supra note 96.
a result are imprisoned on a recurring basis. Being imprisoned for non-payment of fines and fees interrupts people’s employment and housing continuity and opportunities. After emerging from even a relatively short spell of imprisonment, frequently it is not possible to resume previous employment and housing arrangements. As such, people are likely to return to the community from periods of imprisonment with fewer employment opportunities, increasingly precarious access to housing, and deeper in debt. These factors combined contribute to increasingly worse prospects of breaking the cycle of recurring imprisonment for debt.105

While some of the most striking examples of this phenomenon are taken from the United States, jurisdictions with similar provisions have also seen debate. In England, it is possible to go to prison for not paying a television licence fee, general court fines, school attendance fines, parking fines, or fines for travel on buses, trains or trams without a valid ticket.106 In New Zealand, a term of imprisonment of up to 2 years107 can be imposed for non-payment of a court-imposed fine.108 Notably, when the New Zealand Parliament debated in 2010 and 2011 whether prison and home detention sentences should be able to be substituted for unpaid fines,109 Labour and Green Party members noted that default on fines is frequently a result of an economic inability to pay,110 as well as “more fundamentally … an inability to deal with the regulatory system.”111 They argued that imprisonment for the non-payment of fines thus falls disproportionately on already economically and socially disadvantaged groups.112 The members also reasoned that imprisoning those who cannot pay their fines would be ineffective in ensuring

107 Crimes Act 1961, s 19(5), and Summary Proceedings Act 1957, s 90.
110 New Zealand Parliamentary Debates, vol 663 (19 May 2010) at 10993 (Jacinda Ardern (Labour Party)), and 10996 (Kennedy Graham (Green Party)) (Courts and Criminal Matters Bill 147-1, first reading).
111 New Zealand Parliamentary Debates, vol 663 (19 May 2010) at 10996 (Kennedy Graham (Green Party)) (Courts and Criminal Matters Bill, first reading).
112 New Zealand Parliamentary Debates, vol 668(16 November 2010) at 15354 (Keith Locke (Green Party)) (Courts and Criminal Matters Bill, second reading).
the payment of fines,\textsuperscript{113} and counterproductive,\textsuperscript{114} simply adding to “an already overstretched prison population.”\textsuperscript{115} Notwithstanding these criticisms, the ability to substitute imprisonment for unpaid fines was retained in New Zealand.\textsuperscript{116} Contrastingly, Ireland passed new legislation in 2014, which came into effect in 2016, to reduce the number of people imprisoned for failure to pay fines, making clear that imprisonment is a last resort, and to require courts to consider the financial circumstances of offenders.\textsuperscript{117}

2.9 Summary of Overbreadth

Questions about overcriminalisation by way of the criminal law’s overbreadth are questions about the proper scope and limits of the criminal law. Such questions draw on two distinct normative concerns. One set of concerns regards the moral limits of the criminal law and draws on the notion of a presumption in favour of liberty, such that conduct should only be criminalised and liberty limited if the conduct is harmful to others.\textsuperscript{118} The other set of concerns are political critiques that point out the disproportionately harsh effects of overcriminalisation on marginalised persons. An argument that, for instance, consensual homosexual sex between adults should not be criminalised because it causes no one any harm, and criminalising it grossly infringes the autonomy and liberty of LGBTQ people falls into the first category: regardless of how underprivileged or wealthy a particular person may be, the state has no business criminalising sexual activity between consenting adults. The example of a person who is imprisoned because they cannot pay a fine falls into the second category of normative concerns: even if at face value the initial fines were justified, and even if at face value it is justifiable to expect those who have been fined to pay those fines, nonetheless, the effect of imprisonment for

\begin{footnotesize}
\begin{enumerate}
\item[113] New Zealand Parliamentary Debates, vol 673 (5 July 2011) at 19773 (Lynne Pillay (Labour Party)) (Courts and Criminal Matters Bill, In Committee of the Whole House).
\item[114] New Zealand Parliamentary Debates, vol 668(16 November 2010) at 15354 (Keith Locke (Green Party)) (Courts and Criminal Matters Bill, second reading).
\item[115] New Zealand Parliamentary Debates, vol 663 (19 May 2010) at 10996 (Kennedy Graham (Green Party)) (Courts and Criminal Matters Bill, first reading).
\item[116] Crimes Amendment Act (No 2) 2011, s 4.
\item[118] Joel Feinberg, Harm to Others (Oxford University Press, 1987) at 9; also see discussion of the harm principle and liberalism in chapter 6, at section 6.6.
\end{enumerate}
\end{footnotesize}
failure to pay fines negatively impacts marginalised persons in a way that is not the case for those who can afford to pay.

Both sets of normative concerns about the overbreadth dimension of overcriminalisation are important. However, overbreadth is not the focus of this dissertation. In fact, much of the overcriminalisation literature focuses primarily on the overbreadth dimension of overcriminalisation, while referring in more cursory terms to the overdepth dimension. It is this second dimension that I investigate more deeply in this dissertation. In the next section, I introduce the overcriminalisation literature’s treatment of the concept of overdepth, and consider why that literature has tended to focus in more detail on questions of overbreadth than overdepth.

2.10 Overdepth: When the Law Criminalises Many Times Over

The overcriminalisation literature emphasises that criminal law’s coverage is not only broad, it is also deep, in that much of the conduct that is criminalised is criminalised many times over. However, the literature has not analysed both dimensions of the criminal law’s over-coverage with equal focus and rigour. When describing the ways in which there is too much criminal law, most writers spend the greatest amount of time cataloguing the types of offences that account for the criminal law’s unwieldy scope and spread. The literature is rich in taxonomical accounts of the criminal law’s overbreadth, as sections 2.3 to 2.8 have described. However, the literature is generally more cursory in its descriptive accounts of overdepth.

The focus on overbreadth is understandable – overbreadth is about the proper limits of the criminal law. When the criminal law is too broad, that means it criminalises conduct that should not be criminalised. People who engage in the (inappropriately) criminalised conduct can be charged and convicted of having done the criminalised conduct. The criminal law has reached into areas of conduct which, and criminalised people whom, it should not have.

The difficulty with overdepth is subtler. If an offence that is within the proper scope of the criminal law is criminalised many times over, there is no question about whether it should have been

119 Stuntz, “Pathological Politics”, supra note 3 at 518; Husak, Overcriminalization, supra note 1 at 36.
criminalised per se. Rather, the question is whether it should have been criminalised by so many separate offences. And if an offence that is outside the proper scope of the criminal law – that is, is an example of the criminal law’s overbreadth – and is also criminalised many times over, the most striking problem seems to be that the conduct is being criminalised at all; the fact that it is criminalised many times over seems a secondary matter; adding insult to injury, but not constituting the main injury.

Yet, the literature is right to note both dimensions of overcriminalisation. Understanding overcriminalisation as a problem, and comprehending all the facets of that problem, will be incomplete without a more detailed understanding of overdepth. This section outlines the relatively brief and tangential ways in which the existing overcriminalisation literature has referred to overdepth in the criminal law. The analysis in this chapter is descriptive rather than normative: I do not distinguish depth from overdepth, or overlap that is useful and legitimate from overlap that represents part of overcriminalisation. My goal is just to identify in a non-question begging way the descriptive phenomenon of overlap between criminal offences that is the focus of this dissertation. In Chapter 5, I delve into these normative questions about which kinds of overdepth are problematic and represent overcriminalisation. There, I begin to propose a taxonomy of the ways in which criminal offences can overlap one another. It is a taxonomy I continue to explore and refine with reference to the case studies in chapters 7 to 12.

2.11 Literature on Overdepth

Many overcriminalisation commentators note that the criminal law’s coverage is deep as well as broad.122 William Stuntz points out that much of the conduct that is criminalised is “criminalized many times over,” and “repeatedly,” so that “federal and state codes alike are filled with

---

overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.\(^{123}\) Stuntz acknowledges that overlap when offences are lesser-included versions of each other is “healthy” and implicitly acknowledges that lesser-included offences need not be part of the problem of overcriminalisation.\(^{124}\) Stuntz’ concerns regarding depth in the criminal law, and the concerns of a range of other commentators, are that a person whose actions effectively constitute a single unit of criminalised behaviour “can be treated as through they committed many different crimes.”\(^{125}\) This leads to inconsistency,\(^{126}\) uncertainty,\(^{127}\) unfairness\(^{128}\) and muddied symbolism.\(^{129}\) For this reason, commentators regard the build-up of overlap within a criminal code as a “degradation” of that code causing “positive damage to the effective operation of the code.”\(^{130}\) Various commentators agree that overlapping criminal offences unfairly stack the deck in favour of prosecutors against accused persons,\(^{131}\) so that prosecutors may overwhelm an accused person with a stack of multiple overlapping charges in order to unfairly leverage guilty pleas.\(^{132}\)

Douglas Husak lists “overlapping crimes” as a category of types of offence that contribute to the expanding scope of criminal law: “We overcriminalize partly by re-criminalizing—by criminalizing the same conduct over and over again.”\(^{133}\) He makes the point I


\(^{124}\) Stuntz, “Pathological Politics”, supra note 3 at 519. Also see discussion of lesser-included offences in chapter 4 at section 4.2.

\(^{125}\) Ibid, at 519–23; also see Paul H Robinson, Michael T Cahill, and Usman Mohammad, “The Five Worst (and Five Best) American Criminal Codes” (2000) 95 Nw U L Rev 1 at 111.

\(^{126}\) Also see Beale, “Many Faces of Overcriminalization”, supra note 1 at 770.


\(^{129}\) Stuntz, “Pathological Politics”, supra note 3 at 519–23.


\(^{131}\) Levin, “So-Called Crimes”, supra note 120 at 9; Clarkson, “General Endangerment Offences”, supra note 126 at 137.


\(^{133}\) Husak, Overcriminalization, supra note 1 at 36 (emphasis in original). Husak’s other two categories are “crimes of risk prevention and ancillary offences”; also see Michael Plaxton, The CBA Report on Bill C-13: Looking Beyond “Cyberbullying” (2014) at 6.
noted in section 2.10: that the harmfulness of overdepth is subtler than that of overbreadth, because overdepth does not expand the criminal law’s reach into subject areas outside of its proper scope. However, like Stuntz he is clear that a proliferation of overlapping offences is objectionable because their presence leads to inconsistent and increased penalties, and the concentration of discretion in the hands of prosecutors. Though Husak does not frame his argument in this way, arguably overlap can be understood as a kind of unjustified reach of the criminal law into the liberty of citizens. Overdepth leads to concentrated prosecutorial discretion. If that discretion is improperly exercised, it can result in the indicting, convicting, and imprisonment of those who should not have been, or at least, should not have been indicted, convicted and imprisoned of the combination of offences with which they were improperly charged.

Erik Luna, writing from a libertarian perspective, speaks of the “troubling phenomenon” of a continuous stream of new offences that “recriminalize or overcriminalize conduct that is already prohibited.” In part, his concern with overcriminalisation is simply that it offends the libertarian interest in minimal state interference with individual liberty. Luna refers to the criminal law as a “mess” rife with “statutory redundancy” due to “duplicative” offences, and calls the criminal law “bloated” and “unhealthy.” Referring to a “massive web” of regulatory laws “often backed by … criminal sanction,” he contends that an overbroad and overdeep criminal law empowers prosecutors to wield a “sledgehammer of draconian punishment.” In part, this colourful and emotive language emphasises Luna’s inclination to hew to the principle of minimal state interference with individuals’ liberty. But Luna also provides more specific reasons for distrusting overdepth in particular.

---

139 Ibid, at 6.
140 Ibid, at 3.
141 Ibid, at 6.
Like Stuntz and others discussed above,\textsuperscript{142} Luna explains that his primary concern with overdepth is that it concentrates power and discretion in the hands of prosecutors who since they “are not neutral and detached but instead interested parties actively seeking arrests and convictions,” may unfairly use their power and discretion to “charge stack”\textsuperscript{143} and unfairly leverage guilty pleas.\textsuperscript{144} Luna writes that “the reach and force of the criminal law and its penalties can be awe inspiring and disconcerting”; recalling the point above that overdepth does not expand the criminal law’s scope or reach,\textsuperscript{145} it is fair to read Luna as saying that overdepth contributes to a daunting and unfair increase in the criminal law’s force.

It is not only academics that have taken note of depth in the criminal law. In the United States, when a House Subcommittee conducted a review of overcriminalisation, several presenters to the subcommittee highlighted overlapping offences as a significant and problematic aspect of overcriminalisation.\textsuperscript{146} Law reform commissions have also turned their minds to questions of depth in the criminal law. The English Law Commission’s 1969 review of malicious damage and arson offences began from the presumption that overlapping criminal offences are prima facie undesirable, and need to be positively justified.\textsuperscript{147} Yet the Commission conceded that realistically no law reform project can completely eliminate all overlap or achieve a completely logical system.\textsuperscript{148} At the time, many overlapping malicious damage offences existed, specifically covering damage to certain kinds of property (for instance, buildings, ships, goods in the process of manufacture, machinery, corn, trees and vegetables, fences, mines, ponds, bridges, trains, shipwrecks, works of art); and means of causing damage (for instance, by arson, explosives or otherwise, during a riot, as a tenant of a building).\textsuperscript{149}

\begin{itemize}
\item[\textsuperscript{142}] See notes 125 – 132 above and associated text.
\item[\textsuperscript{143}] Husak, Overcriminalization, supra note 1 at 22.
\item[\textsuperscript{144}] Luna, “Overextending the Criminal Law”, supra note 134 at 5–7; also Clarkson, “General Endangerment Offences”, supra note 126 at 137.
\item[\textsuperscript{145}] See above at section 2.10, at note 134 and accompanying text.
\item[\textsuperscript{148}] Ibid, at 23.
\item[\textsuperscript{149}] Ibid, at para 12.
\end{itemize}
The Commission viewed the high degree of overlap as likely in need of culling for several reasons. First, it noted that many of the overlapping offences had accreted over time as “accidents of history” rather than by design.\textsuperscript{150} That is, there was certainly no presumption that overlapping offences had necessarily been enacted for a good reason. Secondly, the Commission argued that the set of “piecemeal” overlapping offences contained important inconsistencies between, for instance, the mental states required for otherwise similar forms of arson,\textsuperscript{151} and “multiplicity” and inconsistency of penalties as well as restrictions on jurisdiction.\textsuperscript{152} Thirdly, it describes the existing system of classification as “overdue for simplification” and “unnecessary[ily] complicated,” particularly when compared with the much simpler approaches that had been adopted in other jurisdictions.\textsuperscript{153}

The Commission’s report recommended a major simplification of the subject areas of malicious damage to property and arson, calling for a reduction in the number of basic offences to two, one of which would be an aggravated offence, subject to a higher maximum penalty.\textsuperscript{154} Drawing on the approach that had already been taken in relation to theft, the Commission said:\textsuperscript{155}

> the essence of offences of criminal damage [is] the destruction of or damage to the property of another. Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged [do] not affect the basic nature of the offence.

The Commission considered it unnecessary to retain specific offences in terms of the type of offender, type of property damaged, or method of damage.\textsuperscript{156} It did not recommend the retention of a separate arson offence, arguing that the central harm of damaging property using fire was not essentially different to the central harm of damaging property in other ways.\textsuperscript{157} More than thirty years later, in 2002 the Commission expressed a similar suspicion of overlap when it said the “multitude of overlapping but distinct” fraud offences that existed was irrational and inefficient.\textsuperscript{158} It argued that “[o]ver-particularization or ‘untidiness’ is undesirable in itself, [and]

\textsuperscript{150} Ibid, at para 11.
\textsuperscript{151} Ibid, at para 13.
\textsuperscript{152} Ibid, at para 15.
\textsuperscript{153} Ibid, at para 16.
\textsuperscript{155} Ibid.
\textsuperscript{156} Ibid, at para 28–33.
\textsuperscript{157} Ibid.
\textsuperscript{158} Law Commission, Fraud (R 276, London: HMSO, 2002) at 15.
also has undesirable consequences."\textsuperscript{159} These undesirable consequences include that inconsistent overlapping offences “allow technical arguments to prosper,”\textsuperscript{160} and that defendants “may face the wrong charge, or too many charges.”\textsuperscript{161}

The New Zealand Law Commission in 2009 also expressed concerns in context of several victim-specific offences, including assault on a child and male assaults female, which overlapped with common assault.\textsuperscript{162} The two victim-specific offences had a maximum penalty of two years’ imprisonment, whereas common assault had a one-year maximum. The Commission recommended the repeal of both assault on a child and male assaults female and that the maximum penalty for common assault to be raised to two years’ imprisonment to accommodate the most serious cases of common assault against those classes of victims.\textsuperscript{163} Although it acknowledged fair labelling arguments for marking out male assaults female and assault on a child separately from common assault, it regarded those arguments as outweighed by several problems stemming from the offences’ overlap with common assault. The Commission’s key concerns related to the charging discretion available when overlapping offences apply to the same conduct, and the potential for unpredictability and inconsistency as a result of that discretion.\textsuperscript{164} The Commission also considered it arbitrary and inconsistent to single out certain aggravating factors, such as a juvenile or female victim, for specific criminalisation but not others.\textsuperscript{165} For instance, there is no specific offence of assaulting an elderly person or assaulting a person with a disability. The Commission’s third objection to specific overlapping offences was a slippery slope argument: that “if we create victim-specific offences in some areas, we will probably find it hard to resist doing so in others. The result will be a patchwork of offences without any logical or coherent structure.”\textsuperscript{166}

And in 2016, in its recommendation of a specific non-fatal strangulation offence, the Commission again referred to the controversy that can accompany overlapping offences, and

\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid, at 17.
\textsuperscript{163} Ibid, at 22–23 and 30.
\textsuperscript{164} Ibid, at 30.
\textsuperscript{165} Ibid, at 31.
\textsuperscript{166} Ibid.
concerns that specific overlapping offences “can confer too much discretion on prosecutors deciding which charge to bring; may result in inconsistent charging practice; and may muddle the public message about exactly what behaviour is prohibited.”

However, as will be discussed in greater detail in chapters 7 to 9, in the case of the strangulation offence, the Commission considered that the positive arguments for a specific offence outweighed those dangers.

2.12 Fraud/White Collar crime

Many commentators have noted that fraud and white-collar crime are particular areas in which overlapping offences abound. According to one United States commentator writing in 1998, there were 325 separate federal statutes containing criminal penalties for fraud. The subject matter of these offences varies from the most general, such as mail fraud and false statement, to the extremely fact specific and specialised, for instance, filing a false statement in an affidavit required to accompany a translation of a foreign news article during World War I. The maximum penalties available under each of these fraud offences varies about as widely as is possible: offences at the lowest end have penalties from a fine of $300 or $1000, or six months’ imprisonment, but other offences higher up the scale have maxima of 10 years, 20 years or even life imprisonment. It is likely that among 325 separate fraud offences, there

171 18 USC s 1725 (1988) (knowingly and willfully mailing any mailable matter without postage with intent to avoid payment).
172 26 USC s 7261 (1988) (false representation that excise tax is excluded from price or article).
173 42 USC s 7413(a)(2) (1988) (false statement or report knowingly made under Air Pollution Control provisions).
174 18 USC s 1029(c)(1) (1988) (fraud in connection with credit cards; obtaining $1000, possession of fifteen or more cards with intent to defraud).
175 18 USC s 1341 (1988) (use of mail in scheme to defraud where financial institution affected).
will be a good deal of overlap. Commentators point in particular to certain very general and flexible fraud statutes, like those governing mail and wire fraud, as overlapping with many other more specific fraud offences.

Part of this may relate to fraud’s conceptual breadth as a category. Broadly speaking, fraud is obtaining by deception or dishonesty. But while it can be committed via outright lying, it often also extends to subtler forms of deception, misleading and dishonesty. The object of fraud can also vary widely, from obtaining money, property or other objects of economic value, to other unjust advantages or injuries to the rights or interests of others. Furthermore, fraud, like other forms of white collar offending, is often committed by offenders keen to avail themselves of statutory loopholes. One way to accommodate this conceptual flexibility, and to eliminate as many loopholes as possible, is to use a wide range of overlapping offences, some general, and others extremely specific.

2.13 Overfederalisation

A form of overlap that does feature more prominently in the United States literature is “overfederalisation” – the practice of re-criminalising at federal level acts already criminalised at state level. However, for reasons I will explain here, overfederalisation is a form of overlap that is outside the scope of this dissertation.

177 18 USC s 2272 (1988) (willful and corrupt destruction of vessel by owner-insurance fraud); Standen, “An Economic Perspective”, supra note 146 at 290.
180 Green, Lying, Cheating, and Stealing, supra note 177 at 148–49.
181 Ibid, at 156.
183 Kamensky, “American Peanuts v Ukrainian Cigarettes”, supra note 176 at 189.
The constitutional allocation of powers in the United States leaves the general police power in the states, which should leave the federal government with a much smaller policing role. However, throughout the twentieth century, and especially since the 1970s, federal law’s scope has broadened and deepened, with a movement to concurrent state and federal criminalisation jurisdiction for many offences. A famous example of this federal overlap with state offences is the “mostly superfluous” offence of “carjacking”, which recriminalised at a federal level conduct that was already adequately covered at the state level by offences like robbery, and kidnapping.

Overfederalisation is problematic because a person who has committed an act that is criminalised at both the state and federal level could potentially face prosecutions at both levels for the same act. This is unfair to defendants for at least two reasons. First, overlapping state and federal laws allow for a “quasi-loophole” around the constitutional protection against double jeopardy: a defendant already acquitted of an offence in state court could later be prosecuted for the equivalent offence in federal court, and vice versa. Secondly, because the same act can be prosecuted at either state or federal level, similarly situated defendants may be treated very differently according to the luck of which jurisdiction they are charged within. Usually, federal offences are subject to more severe penalties than their state-level equivalents, and defendants have fewer procedural rights under Federal law than in many states.

However, while overfederalisation is a form of overlap or overdepth that is a considerable problem in the United States, it is in some ways peculiar to that jurisdiction. For one thing, overfederalisation is not something that can occur in a unitary, rather than federal, state like New

---

186 United States Constitution, Tenth Amendment (providing that states are entitled to the rights not expressly delegated to the federal government; the power to define crimes is not one of Congress’ specifically enumerated powers).
190 Luna, “The Overcriminalization Phenomenon”, supra note 118 at 708.
191 Ibid, at 951.
193 Beale, “Many Faces of Overcriminalization”, supra note 1 at 764 and 768.
Zealand or England and Wales. Unitary states have one set of criminal laws that apply throughout the entire unified criminal jurisdiction. And while Canada is a federal rather than unitary state, its criminal law is under the exclusive legislative jurisdiction of the Canadian federal government. In his influential criminal law textbook, Kent Roach writes: “Under section 91(27) of the Constitution Act, 1867, only the federal parliament can enact laws concerning criminal law and procedure.”

For these reasons, the problem of overfederalisation is particular to the United States. As such, overlapping state and federal criminalisation is outside of the scope of this dissertation. Parts of the overfederalisation literature are still useful for this dissertation because it deals with a number of themes – for instance, the political causes of overfederalisation – that are directly relevant to my separate study of overdepth in unitary criminal codes.

2.14 Conclusion

The overcriminalisation literature is clear that overcriminalisation has two dimensions: breadth and depth. However, in its accounts of the “too much-ness” of the criminal law, most overcriminalisation writers spend the greatest amount of time constructing a taxonomy of the kinds of offences that account for the overbreadth of the criminal law. The literature’s treatment of overdepth is generally briefer and considerably less detailed. As I noted in section 2.10, on its face the overcriminalisation literature’s focus on overbreadth is understandable. When the criminal law is overbroad, that means it criminalises conduct that it has no business criminalising, and labels and punishes as criminals people who have engaged in that conduct. The problems raised by overdepth are subtler: as Husak notes, “[i]f the conduct proscribed [by a new overlapping offence] was already criminal, then in one obvious sense, [the offence does] not contributute to overcriminalization; the reach of the criminal law not been extended.” In Husak’s terms, a new criminal offence that contributes to overbreadth in the criminal law is one that extends the coverage of the criminal law to new units of behaviour that were not previously labelled as criminal; a new criminal offence that contributes to overdepth (but not overbreadth) is

---

194 Kent Roach, Criminal Law, 6th ed (Toronto, ON: Irwin Law, 2015) at 25. Roach then goes on to discuss the limited power of provinces to enact laws that create offences punishable by imprisonment with a dominant power that lies within provincial jurisdiction. Interested readers may wish to refer to Roach’s more detailed discussion at 25-28.

195 Husak, Overcriminalization, supra note 132 at 37.
one that creates a new legal description of a unit of already criminalised behaviour. According to Husak’s framing, if behaviour that is within the proper bounds of the criminal law is criminalised by several overlapping offences, the objection is not that the behaviour is criminalised, but rather that it has been criminalised too many times over. That is, for Husak, the dangers associated with overdepth take on a secondary character when compared with those associated with overbreadth. If an offence is outside the of the criminal law’s rightful scope, the principal overcriminalisation objection is that it was criminalised at all. The fact that it has been criminalised several times seems to be a secondary matter, intensifying the problems associated with overcriminalisation, but not constituting the greatest problem.

However, as noted in section 2.11 above, it is important not to downplay the negative effects of overdepth simply because they are not identical to those of overbreadth. Fundamentally, the problems associated with overdepth, like the problems associated with overbreadth, are that people are being punished by the criminal law when they should not be punished, or are being punished more than they should be punished. In the case of overbreadth, this means criminalising people for engaging in conduct, for instance, consensual homosexual sex between adults, which is not rightly within the proper scope of the criminal law. In the case of overdepth, this may mean that conduct that is within the law’s proper scope is criminalised by many descriptively overlapping offences, so that prosecutors have discretion to strategically select more easily proved charges, or a combination of charges with dauntingly high combined penalties, in order to induce guilty pleas. Such “charge stacking” practices are problematic because they can manipulate accused people into pleading guilty, waiving their right to a fair trial, even when they are factually innocent of the offences with which they are charged. For further discussion of concerns associated with charge stacking, see chapter 3.196

In order to address a complex problem like overcriminalisation, it is important to understand the problem as deeply as possible. Our understanding of overcriminalisation as a phenomenon and as a problem will be incomplete if the literature analyses in great detail some aspects of overcriminalisation, but while addressing other aspects to a substantially less thorough degree. Our understanding of overcriminalisation is incomplete without a deeper understanding of overdepth. A key original contribution to the overcriminalisation literature that I make in this

196 Chapter 3, at section 3.9.
dissertation is in addressing in more detailed terms the question of exactly what counts as overdepth in the criminal law, or overlap that is part of the problem of overcriminalisation.

My review of the overcriminalisation literature’s treatment of depth, overlap and overdepth is a foundational step in this contribution, which later parts of this dissertation build upon.\textsuperscript{197} In chapter 4, I develop a descriptive account of what it means to say that two or more criminal offences overlap with one another. There, I begin to propose a taxonomy of the ways in which criminal offences can overlap one another. I continue to explore and refine this taxonomy of descriptive overlap with reference to my two case studies.\textsuperscript{198} In chapter 5, I assess in normative terms when descriptive overlap in the criminal law is problematic in the sense that it is overdepth, or part of the problem of overcriminalisation. That is, the normative analysis in chapter 5 of which forms of descriptive overlap constitute overcriminalisation, and which are benign and not part of the problem of overcriminalisation builds on chapter 4’s taxonomy of descriptive overlap to offer a taxonomy of overdepth, or overlap that is part of the problem of overcriminalisation.

\textsuperscript{197} Sections 2.10 to 2.13.
\textsuperscript{198} Chapters 7 to 12.
Chapter 3: Why is Overcriminalisation Problematic?

3.1 Introduction

The previous chapter set out the distinction between overbreadth and overdepth in the criminal law and gave a sense of the literature about this distinction. The first sections of this chapter provide historical context for that distinction, setting out various causes and possible causes of overcriminalisation. The latter sections of this chapter then investigate the reasons why overcriminalisation is problematic.

This chapter’s discussion of the normative problems with overcriminalisation forms an important foundation for chapter 5, which analyses which aspects of criminal law’s depth are problematic and are properly viewed as constituting part of overcriminalisation, and which parts are neutral, acceptable, or desirable depth. In order to move to that normative assessment in chapter 5, it is important to have the right tools. Section 3.2 of this chapter gives an overview of factors that have contributed to the problem of overcriminalisation, and draws particularly on David Garland’s history of social, economic and cultural changes over the past fifty years that have affected the shape of criminal justice policy, and contributed to overcriminalisation. The section provides important context in order to distinguish problematic from unproblematic overlap in the criminal law. In sections 3.3 to 3.10 I lay out the reasons why the overcriminalisation literature regards overcriminalisation to be problematic. These sections also assess which problematic aspects of overcriminalisation correspond with the criminal law’s breadth, but not depth, and which problems relate to overdepth particularly.

3.2 Causes of Overcriminalisation: The “Punitive Turn”

In order to understand the problem of overcriminalisation in all its dimensions it is helpful to have an idea of the factors that have contributed to the criminal law’s prodigious growth. Commentators have argued that political incentives generate a “one-way ratchet” system in the criminal law sphere,¹ according to which levels of criminalisation only ever increase, and never

In the sphere of public opinion, partisan argument and decision-making, there are considerable incentives for, and pressures on, legislators to demonstrate their toughness on crime by enacting new offences. The countervailing incentives to reduce the number of offences are much weaker.4

Criminologists have debated the empirical causes of overcriminalisation.5 Husak notes that no consensus has emerged as to the precise causes of overcriminalisation, but gestures towards a “hodgepodge of loosely related factors.”6 Some useful perspectives to consider are those of scholars who have critiqued the “punitive turn” in the penal policies of a number of Western jurisdictions.7 For reasons of space, my treatment of this history and the “punitive turn”


3 William Stuntz has argued that these political incentives, which he calls “surface politics” are intensified by “deeper politics” according to which at the systemic level factors such as the power relationships between the three branches of government also contribute to this one-way ratchet effect: Stuntz, “Pathological Politics”, supra note 1 at 510 and 523-29. For reasons of space, and because Stuntz’ discussion focuses specifically on United States institutions of government, I note here but do not explore in the body of the thesis Stuntz’ distinction between “surface” and “deeper” politics.

4 See also Beale, “Many Faces of Overcriminalization”, supra note 1.


6 Ibid.

from the penal welfarism of the first two thirds of the twentieth century to the culture of control that began to emerge in the final three decades is a high-level overview rather than a deeper history. Consequently, the section is necessarily somewhat reductive. It aims to give the gestalt of certain social, economic and cultural changes that took place in America and England in the twentieth century, which are thought by many critical criminologists to have contributed to today’s phenomenon of overcriminalisation. But it does not purport to describe every contour and nuance of this history. Indeed, even leading works in this area have themselves been critiqued on the basis that they at times describe a sweep of history that is arguably too smooth.8 Those interested may find the discussion and footnotes a useful starting point for further reading.

A particularly influential perspective in this area is that of legal scholar and critical criminologist David Garland. Garland describes his project in his book The Culture of Control as tracing a genealogical “history of the present,” explaining contemporary British and American practices of crime control, punishment and criminal justice with reference to the historical forces that led to great change during the last three decades of the twentieth century.9 Garland describes the late 1960s/early 1970s as a kind of fulcrum.10 For the first two thirds of the century the prevailing theory implemented by criminal justice and punishment practice was what Garland terms “penal-welfarism.” Penal welfarism was interested in the causes of crime, and treatment through the criminal justice system and through welfare reform as solutions to crime. Garland

---


9 Garland, The Culture of Control, supra note 8 at 2.

describes as the “basic axiom” of penal welfarism: “that penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments.”

Implementation of penal welfarism was linked to sentencing laws allowing for individualisation of treatment based on expert assessments of offenders. This had positive impacts, such as that “standard imprisonment” was regarded as a matter of last resort, with a preference for more targeted approaches such as community measures, and specialist custodial regimes such as youth reformatories. But the impacts were not only positive. The system allowed for indeterminate sentencing, with individualised early release. The high degree of individualisation of treatment of convicted offenders or juveniles in need of care was achieved through the grant of discretionary power to professionals. Increasingly penal experts, such as probation officers, social workers, psychologists and educationalists, rather than judicial authorities made central decisions regarding sentencing, classifying offenders, allocating inmates to particular institutions and regimes, assessing eligibility for release and setting supervisory conditions upon release. This could lead to radically different sentencing outcomes for individual offenders based on factors unrelated to their culpability or desert. Offenders considered to be “dangerous, recidivistic or incorrigible” could be denied early release and be detained for long periods of time; others “with respectable backgrounds or strong connections to work and family could be let off more leniently.”

Individualised treatment is not objectionable per se. However, in practice, unconscious biases and stereotypes on the part of professionals and experts and wider systemic and implicit biases could also influence assessments of which individuals could be released early, and which were too high-risk. Systemic disadvantages due to race, class, education, poverty could thus compound, so that already disadvantaged offenders received harsher penalties than offenders who had more advantages. Unlike judges who give reasons and whose decisions can be appealed, these decision makers generally were licensed to issue their decisions without explanation, and were not subject to judicial review, on the basis that the system saw them in a “benign, apolitical light.”

---

11 Garland, *The Culture of Control*, supra note 8 at 34.
13 *Ibid*, at 35.
14 *Ibid*, at 36.
As an approach to criminalisation, penal welfarism had both strengths and weaknesses. But by the late 1960s, Garland argues that there was a well-established bipartisan professional consensus among government policy makers, social work professionals and liberal elites that the criminal justice system should further correctionalist, rehabilitative and welfarist ends. And yet, the early 1970s saw the beginning of a shift away from the rehabilitative ideal to what Garland calls the “crime complex,” and a culture of control.

Garland’s “history of the present” sets out to explain this shift, which was marked by a number of interrelated changes in the fields of crime control and criminal justice, including: the decline of the rehabilitative ideal and penal welfarism; the re-emergence of punitive, retributive, and expressive sentencing; changes in the emotional tone of crime policy, from a focus on “decency and humanity”, and on bringing offenders back into the fold of society through treatment and rehabilitation, to “anger, fear, resentment,” and demands for protection and retribution; the elevation of the victim to the central symbolic figure in criminal justice; and the privileging of public protection.

Further changes were that the criminal justice sector has become increasingly politicised with an emerging new “penal populism” characterising public discourse about crime policy. Crime control policy decision-making has shifted from experts to the political process, and the public are an increasingly important source of policy support, with interest groups and politicians

---

15 Ibid, at 27–28; but see Zedner, “Dangers of Dystopias in Penal Theory”, supra note 8 at 344–46, questioning whether even in its heyday of the 1960s penal welfarism was as universally accepted as Garland states.
16 Garland, The Culture of Control, supra note 8 at 164.
17 Ibid, at 6–20
18 Ibid, at 8
19 Ibid, at 8–9
21 Garland, The Culture of Control, supra note 8 at 11–12; Also see Simon, Governing through Crime, supra note 20 at 75–76.
22 Garland, The Culture of Control, supra note 8 at 12.
using slogans such as “zero tolerance,”24 “tough on crime” and “3 strikes” to generate public approval.25 Since the 1970s, the prison has been reconceived, so that imprisonment is no longer regarded as essentially problematic, counterproductive and a measure of last resort, but as necessary for the maintenance of social order, and to provide safety and retribution.26 Criminological theories have shifted from viewing criminality as due to deprivation, or mal-adjustment on the part of offenders, to the view that it is due to insufficient social controls, situational controls and self-control.27

Additionally, the period saw a change from the state being the sole provider of community safety and crime prevention to an expanding infrastructure of crime prevention and community safety: for instance, neighbourhood watch.28 Garland and others write of the new perpetual sense of crisis.29 The period also saw widespread cuts in social welfare more generally, with the poor increasingly seen as unworthy of support and the cause of crime problems.30

Garland attributes these shifts in crime control approach to two “dynamics of change” in late modernity:31 economic, social, and cultural changes; and political changes, particularly the rise of neo-liberal politics. Jock Young argues that of the two sets of changes, the economic, social and cultural factors were the “major dynamo,” contributing to increasing crime rates and leading to a growing sense of anxiety and unease, and a desire for order, control and safety; in response, neo-liberalism “determin[ed] the policy responses to the repercussions.”32

To understand these changes, it is useful to outline the social, economic and political context in which penal welfarism emerged as the dominant criminal justice ethos in the period

25 John Pratt, Penal Populism (Taylor & Francis, 2007) at 22.
26 Garland, The Culture of Control, supra note 8 at 14.
27 Ibid, at 15–16; but see Loader and Sparks, “For an Historical Sociology of Crime Policy in England and Wales since 1968”, supra note 10 at 23.
28 Garland, The Culture of Control, supra note 8 at 16–17.
beginning in the 1890s and spanning the post Second World War years and ending in the late 1960s. The first half of the twentieth century was marked by low crime rates, the development and growth of the welfare state. Garland describes the welfare state as a broad “solidarity project.” In the context of criminal justice, the solidarity project was willing to find a balance between individual offender rights and larger societal risks.

Garland refers to the period from 1950 to 1973 as “The Golden Years” during which Britain and America’s economies and those of most of the developed industrial world “experienced a remarkable process of growth and raising living standards.” Low unemployment rates, the growth of trade unions, rising wage levels and progressive taxation saw a growing affluent middle class and a reduction in the gap between rich and poor.

From the 1960s, for the first time in several generations, crime rates began to rapidly rise. Garland discusses a range of social, economic and political changes that contributed to rising crime rates and the shift away from penal welfarism and towards a culture of control. As older mechanisms of social control began to break down, this created greater pressure for criminal sanctions. Garland points to the restructuring of the labour market and changes in the family and household, increased mobility and affordability of cars, increased suburbanisation and physical separation of work and home, the emergence of youth culture, individualism, access to electronic media such as radios and television. For instance, Garland notes that “situational controls” on crime were decreased due to social changes: increasing numbers of women joining the work force outside the home, and suburbanisation, meant that greater numbers of houses, well-stocked with consumer goods, were empty during the day while families were at work and

---

33 Garland, The Culture of Control, supra note 8 at 208-09 (Appendix).
34 Ibid, at 45–46.
36 Simon, Governing through Crime, supra note 20.
37 Garland, The Culture of Control, supra note 8 at 79; also see Young, The Exclusive Society, supra note 30 at 1–3 & 7; Hobsbawm, The Age of Extremes, supra note 31.
39 Garland, The Culture of Control, supra note 8 at 78–89; also see Young, “Searching for a New Criminology of Everyday Life: A Review of ‘The Culture of Control’”, supra note 8 at 228–29.
school.\textsuperscript{40} As cars became more prevalent, they too created a new category of crime and countless new occasions for opportunistic offending:\textsuperscript{41}

the spread of the automobile brought into existence a new and highly attractive target for crime, available on every city street at all times of the day and night, often completely unattended. Thefts of and from motor vehicles quickly became one of the largest categories of property crime.

The 1960s, as a result of the post-war baby boom, saw a large cohort of teenaged males and an emerging youth culture. This is an age group prone to criminal behaviour, and Garland writes that social and economic changes provided more opportunity for this cohort to offend: teenagers were mobile, because of access to cars; more affluent; and less subject to adult supervision. Factors like suburbanisation saw social space becoming “more stretched out, more anonymous and less well supervised, at the very time that it was becoming more heavily laden with criminal temptations and opportunities.”\textsuperscript{42}

Together, these factors contributed to rising crime rates. Recession in the 1980s and 1990s led to high unemployment rates\textsuperscript{43} Those increasing crime rates, and mass-media coverage of crime and victimisation, combined with weakening of community ties due to factors such as suburbanisation have resulted in what Jonathan Simon calls a “culture of fear.”\textsuperscript{44} Simon describes Garland’s book as a reading of how political order in American and Britain has been reshaped by a fear of crime.\textsuperscript{45} Adam Crawford has pointed to the prominent role played by public anxieties and fears in crime control discourse, with the state responding with crime control measures such as Anti-Social Behavioural Orders with the purpose of “steering, monitoring and correcting people’s lifestyles.”\textsuperscript{46} As approaches to crime became more punitive, prison populations also rose.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{Garland40} Garland, \textit{The Culture of Control}, supra note 8 at 91.
\bibitem{Ibid41} \textit{Ibid}.
\bibitem{Ibid42} \textit{Ibid}.
\bibitem{Young43} Young, \textit{The Exclusive Society}, supra note 30 at 48.
\bibitem{Simon44} Simon, \textit{Governing through Crime}, supra note 20.
\bibitem{Ibid45} \textit{Ibid}; also Young, \textit{The Exclusive Society}, supra note 30 at 74–78.
\bibitem{Adam Crawford46} Adam Crawford, “Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice” (2009) 49:6 Br J Criminol 810 at 814; also see chap 2, at sec 2.8 for a discussion of Anti-Social Behavioural Orders as a form of hybrid instrument contributing to the expanding scope of the criminal law.
\end{thebibliography}
Young points to a connection between social exclusion and crime.\(^4\) Young argues that factors of the kind outlined above saw a shift in the last third of the century from what had been an “inclusive society” to an “exclusive society” in which marginal, deviant or difficult out-group members, were no longer viewed as groups that needed to be socialised or rehabilitated so that they could eventually return to the social fold, but instead came to be punitively scapegoated and excluded. Market individualism contributed to this pattern, and deviant “others” – including those who break the criminal law – are regarded not as lapsed in-group members to be rehabilitated, but as deviant “others” lacking in the values and virtues that are important in society. Young argues that the shift to addressing the “problem of crime” and the deviant other solely through the intensification of “crime control” or penal severity tended to be ineffective, because such measures do not address underlying problems of social exclusion contributing to criminal offending. He argues that fear, incivility and exclusion all intensify one another: already marginalised out-group members become frustrated, angry and further alienated by harsh crime control measures and become even more excluded and likely to offend; this in turn intensifies fear, suspicion and the desire for control on the part of in-group members.

As mentioned above, since the 1960s, criminal justice policy has become increasingly politicised.\(^4\) There are intense political incentives on politicians to be seen to be tough on crime. One way for politicians to show that they take crime seriously, and that they are “doing something” about a perceived “crisis” of unwanted, antisocial or already criminalised behaviour is to pass new legislation criminalising, re-criminalising, or enhancing the maximum penalties for the conduct in question. There are few incentives on political actors to oppose such

---

\(^4\) Young, *The Exclusive Society*, supra note 30.

\(^4\) Husak and other commentators focus on the politicisation of the United States criminal justice system in particular, considering it a particularly striking case. While this is true, conversations around criminal justice have also been politicised in jurisdictions such as New Zealand and Canada, even if not to the extreme degree that is true in the United States.
legislation, even if it contributes to overcriminalisation and the attendant problems that will be discussed in the next sections of this chapter.

Writing in the United States, Ellen Podgor has written of the ways in which society is “reactive” such that whenever “[a] major incident happens, and [the legislature] passes legislation in response.”\(^5\) Indeed, this kind of reactivity is a major theme throughout overcriminalisation literature – it is not only politicians who are reactive in this way, but also pressure groups, journalists and other groups who “often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern.”\(^6\)

Of course, criminalisation (or re-criminalisation) is not the only way society or government can respond to a perceived problem, and writers have spoken of other available instrument choices, such as civil regulation, contracts, administrative decisions, and social norms.\(^7\) Edward Cheng distinguishes between two methods of government regulation: fiat, or the use of criminal law to regulate the behaviour in question; and structure, which are laws or measures that establish mechanisms or procedures that guide citizens towards compliance by making the undesirable behaviour more troublesome, or more likely to be detected. These structure-based alternatives include regulatory measures like incentives and disincentives through tax law, tort law, and licensing regimes.\(^8\) Like Podgor, Cheng highlights that the use of fiat is reactive and backward looking, although it is direct. Structure on the other hand is preventive and forward-looking, but more indirect.

No one type of instrument will be appropriate for all situations. Yet, often the most emotionally resonant and apparently most unequivocal way of responding to a problem or objectionable state of affairs is to declare that “there ought to be a law” – specifically, a criminal law.\(^9\) The directness of fiat, or criminalisation, as a response to perceived problems may account for some of its emotional resonance: the emotive drive to “do something” about a crisis is

\(^6\) Ashworth, “Is the Criminal Law a Lost Cause?”, supra note 2 at 225.
\(^7\) Pal, There Ought to Be a Law!, supra note 2.
\(^9\) Pal, There Ought to Be a Law!, supra note 2.
addressed more satisfyingly by a response that feels direct and immediate, rather than subtler forms of background regulation. Being “tough on crime” is a position that politicians find easiest to project by being as direct as possible, and passing new criminal laws.

Overcriminalisation writers speak of high profile crimes or moral panics which often seed new criminal legislation and offences. For instance, “crimes du jour,” or “designer offences” are offences enacted in response to a perceived crisis, but which are already criminalised by existing offences. The United States federal offence of carjacking enacted in the 1990s is an often-cited example of a high-profile crime du jour. These new offences are often drafted as if the existing general offences with which they overlap did not exist.

3.3 Why is Overcriminalisation Problematic?
Overcriminalisation is associated with a range of negative consequences, which are inconsistent with our normative sense of what criminal law ought to be or ought to do. It is useful here to set them out clearly. As discussed in the previous chapter, the overcriminalisation literature has tended to focus on overcriminalisation that is due to the breadth of the criminal law, and spend less time on the depth aspect of overcriminalisation. The term “overcriminalisation” wears its normative implications right on its sleeve: the word “over” suggests overcriminalisation is by

56 Erik Luna, Overextending the Criminal Law (2003) 1 at 15.
57 Robinson and Cahill, “Can a Model Penal Code Second Save the States from Themselves?”, supra note 55 at 170.
58 Beale, “Many Faces of Overcriminalization”, supra note 1 at 757.
59 Robinson and Cahill, “Can a Model Penal Code Second Save the States from Themselves?”, supra note 55 at 171.
definition inefficient and excessive: it means criminalising more conduct than is necessary to further the goals of criminalisation.

As we will see in chapter 5, not all depth is overdepth, or part of overcriminalisation. A certain degree of depth is built into the criminal law for structural and policy reasons. Distinguishing neutral and positive examples of depth from problematic examples, which constitute overcriminalisation is necessarily a normative process. That is, overlapping offences are problematic and part of overcriminalisation only if they cause some of the problems that are associated with overcriminalisation, and those problems are not outweighed by the salutary effects of the provision.

Thus, it is important here to first set out as comprehensive as possible a set of problems with overlap. But then to also assess which of these problems relate specifically to the depth of the criminal law, and whether some of the problems are excluded from the scope of this dissertation because they relate to criminal law’s breadth only.

3.4 Overcriminalisation and Overpunishment

A central theme for overcriminalisation writers is that the trend of an expanding criminal law is closely linked to a parallel trend of a rising number of people living under the supervision of the criminal justice system. That is, if the law criminalises a wider array of types of conduct, it also criminalises a wider range, and greater number, of people who engage in that conduct. Conduct that was previously not criminal, and people who engage in that conduct are liable to criminal labelling and penalties for engaging in conduct that was legal in the past. This is a significant problem of overcriminalisation. But it is a problem stemming from the breadth of the criminal

---

61 Bruce L Benson and Iljoong Kim, *Causes and Consequences of Over-Criminalization* (Seoul: Center for Economic Research of Korea, 2012) at 5.
62 Chapter 5, at sections 5.2 – 5.5.
64 Husak, *Overcriminalization*, *supra* note 5 at 17.
law, rather than from its depth. As such, it will not be a focus in my discussion in chapter 5 of the kinds of depth that is problematic in the criminal law and represents part of overcriminalisation.

A further important theme in the literature is that overcriminalisation undermines the expressive, or signalling, function of the criminal law – the law cannot send messages if people do not know the content of the law.65 A signal cannot work if no one can hear it. An overly broad and deep criminal system is uncertain. Its messages are likely to be very different from those one would infer from the law on the books. Even worse, the expressive function may be swamped by local variation, difficult to discern arrest patterns, low visibility guilty pleas, and lower visibility decisions to decline prosecution.

3.5 Sentence Relativities

Another key theme in overcriminalisation literature has been the close relationship between too much criminal law, and too much punishment,66 in particular, too much incarceration.67 Overcriminalisation tends to drive up available and awarded sentences.68 The same forces that impel the expanding breadth and depth of the criminal law tend to mean that new offences have increasingly higher maximum penalties, which in turn leads to sentence relativities becoming out of synch across various offences.69 That is, the political incentives to enact new offences in order to appear to “do something” about a perceived crime control problem also incentivise those new offences to have higher maximum penalties.70 In addition, the ability to charge conduct with

65 Stuntz, “Pathological Politics”, supra note 1 at 520.
67 Garland, The Culture of Control, supra note 8; Simon, Governing through Crime, supra note 20 at chap 5; Dyszlewski, Harrison-Cox, and Ortiz, “Mass Incarceration”, supra note 63.
70 Supra section 3.2, at notes 3-4 and 49-51 and associated text.
several overlapping offences can also serve to drive up the maximum available penalty for that conduct.71

In a situation in which multiple offences offer overlapping descriptions of a unit of criminalised behaviour, each associated with different maximum penalties, the question of what charges any particular offender who engages in that unit of behaviour will face will be an opaque matter of prosecutorial discretion and luck.72 There is scope for similar accused people to face disparate penalties depending on the particular offences with which they are charged. For instance, section 3.9 below discusses a Canadian example in which the behaviour of protesting in an unlawful manner (unlawful assembly) while wearing a mask can be charged under two overlapping offences, one of which has a 5-year maximum penalty, and one of which has a 10-year maximum.73 As is discussed further in that section, in that case the presence of overlapping offences with different maximum penalties means there is scope for two similarly situated offenders to be charged differently, thus facing significantly different maximum penalties in respect of the same conduct.

The skewing of sentence relativities across criminal codes, and the likelihood that similar accused people may receive disparate penalties depending on which available overlapping offence they are charged with are significant problems of overcriminalisation. Furthermore, they are problems intimately tied to the depth of the criminal law. As such, problems of sentence relativity and sentence inflation will be relevant in chapter 5.

3.6 Rule of Law

“The rule of law” is a kind of portmanteau term, connoting a number of related values to which people generally think good laws, and legal systems, should adhere.74 Writers have noted that the rule of law is a complex normative and evaluative concept – perhaps even an “essentially contested concept”75 – the precise contours of which can be difficult to chart and agree upon.76

71 Stuntz, “Pathological Politics”, supra note 1 at 509.
73 Section 3.9, at notes 119 - 121.
However, despite these controversies, most commentators could broadly agree that the term invokes certain key values, which were famously set out by AV Dicey who popularised the term.\textsuperscript{77} Dicey framed the rule of law as requiring, first, “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power,”\textsuperscript{78} and second, “equality before the law”.\textsuperscript{79}

Theorists since Dicey have supplemented his basic formulation with further details and conditions.\textsuperscript{80} One of the most important of these in the context of criminal law, expanding on the first requirement of non-arbitrariness – that is, that there should be no punishment except for a breach of law – is the requirement that the law should be capable of guiding people and their conduct.\textsuperscript{81} A secret law, or a law that is indecipherable, cannot usefully guide anyone’s conduct or choices. Laws must be reasonably accessible, relatively clear and their application relatively certain in order that people subject to them have a reasonable idea of what the law permits and what it criminalises.\textsuperscript{82}

Dicey said that his second requirement of equality under the law meant that no person is above the law, and even the most senior leaders and officials are subject to the same laws and tribunals as any other citizen.\textsuperscript{83} It also follows from Dicey’s definition that it is inconsistent with the rule of law to single out particular individuals or groups for worse treatment under the law. Overcriminalisation has a number of troubling consequences for these aspects of the rule of law.\textsuperscript{84}


\textsuperscript{78} A V Dicey, \textit{Introduction to the Study of the Law of the Constitution}, 8th ed (Indianapolis, IN: Liberty Fund Inc, 1982) at 120.

\textsuperscript{79} \textit{Ibid}, at 120–21.

\textsuperscript{80} Raz, “The Rule of Law and Its Virtue”, \textit{supra} note 76 at 213–18.

\textsuperscript{81} \textit{Ibid}, at 214.

\textsuperscript{82} Prebble and Prebble, “Does the Use of GAARs to Combat Tax Avoidance Breach Principles of the Rule of Law”, \textit{supra} note 74 at 22.

\textsuperscript{83} Dicey, \textit{Introduction to the Study of the Law of the Constitution}, \textit{supra} note 78 at 114.

\textsuperscript{84} Husak, \textit{Overcriminalization}, \textit{supra} note 5 at 17; Edward K Cheng, “Structural Laws and the Puzzle of Regulating Behaviour” (2006) 100:2 Nw UL Rev 143 at 144.
3.7 Rule of Law and Overcriminalisation: Uncertainty

The rule of law requires that the law be sufficiently clear, accessible and certain in its application that people can know and understand what laws apply to them and can take guidance from the law in planning their actions. Many of the most famous historical examples of uncertain laws that have breached the rule of law have concerned vague and broad criminal provisions, which legislate the capacity for great, even arbitrary, discretion on the part of those applying the laws. For instance, the city of Danzig in 1935, in order to align the city’s criminal law with that of Nazi Germany, criminalised acts “deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling,” the Criminal Code of the Qing Dynasty, which ruled China from 1644 to 1912, criminalised “[doing] that which ought not to be done,” and in England, the House of Lords in Shaw v Direct of Public Prosecutions decided that it had jurisdiction to punish acts that were contrary to public morals but that had not previously been held to be illegal.

These examples concern offence “definitions” so extremely broad and extraordinarily malleable that they are not meaningful definitions at all. A person reading such provisions would have no effective notice of the kind of conduct that would be considered criminal and would have little guidance in what conduct to legally engage in. All that such a person would really know is that officials administering the law have broad discretion to arbitrarily criminalise actions as they see fit. As Husak says, “[p]ersons should not be forced to guess at their peril about whether their behavior has been proscribed, and must be afforded a fair opportunity to refrain from whatever conduct will incur criminal liability.”

But these famous examples are not the only kinds of uncertainty that can undermine the rule of law value that the law should be capable of guiding people’s conduct. In order to provide this kind of guidance, the law must be certain and clear, in the sense of being understandable,

---

90 Husak, Overcriminalization, supra note 5 at 11.
and accessible, in the sense that it is not secret, and can be known in advance. Overcriminalisation undermines this kind of notice. As the criminal law expands, and becomes increasingly voluminous and complex, true notice increasingly becomes a legal fiction.\(^9\) When there is too much criminal law for any normal citizen to keep track of, those citizens cease to have meaningful notice of the laws to which they are subject.\(^{92}\) Furthermore, the portion of the law that is enforced in practice is much smaller than the amount of law that exists, so the written law is not a good indicator of the law as enforced, which is the de facto law of the land.\(^{93}\)

By “the law as enforced,” I am referring both to matters of prosecutorial discretion at the charge-laying stage that I discuss in the next section, and also resourcing and policing decisions made well before the question of charge-laying arises. For instance, consider the first case study of New Zealand’s proposed specific offence of non-fatal strangulation, which is designed to address this specific mode of assault in the intimate partner violence context.\(^{94}\) If and when the proposed offence is enacted and comes into force, it will be part of New Zealand’s criminal law. Also part of the law on the books will be other already in force assault offences with which it descriptively overlaps, ranging from common assault and male assaults female through to aggravated offences such as assault with intent to injure or even attempted murder. Whether the new offence (and the various existing offences) is part of “the law as enforced” is a separate, empirical question. Answering this question will depend on empirical facts about, for instance, whether the offence is charged in practice, but also questions about whether strangulation is investigated at the policing level, whether sufficient police resources are earmarked for prioritising intimate partner violence generally and strangulation assaults in particular. The answer to this question may well be that indeed the new offence is accompanied with a resourcing and policing focus on non-fatal strangulation, in which case, the new law on the books is also part of the law “as enforced.”

The point is that the connection between the law on the books and the law as enforced is contingent: the fact that a law is part of the law on the books does not guarantee that it will also

\(^{92}\) Podgor, “Overcriminalization”, supra note 50 at 530.
\(^{94}\) See chapters 7, 8 and 9.
be enforced in practice. This uncertainty concerning the scope and coverage of the criminal law is compounded by the permeability of the distinctions between criminal and civil liability discussed in the previous chapter.\textsuperscript{95} That is, sheer volume and complexity of the criminal law can overwhelm realistic prospects of effective notice.

3.8 Prosecutorial Discretion and the Separation of Powers

The rule of law requires that criminal punishment be imposed only through law, rather than arbitrarily. Commentators have noted that overcriminalisation tends to concentrate power and discretion in the hands of police and prosecutors.\textsuperscript{96} One commentator states that “[t]he prosecutor acts with discretion that is almost unmatched anywhere in law.”\textsuperscript{97} The presence of discretion within a legal system can be entirely consistent with the rule of law. Indeed, any legal system is likely to allow for some amount of discretion. What varies between systems is the amount of total discretion within the system, and the distribution of that discretion among the various institutional actors in the system. Where there exists a wide discretion, there is scope for arbitrariness. One check on arbitrariness on the part of government is the notion of a system of divided powers – that is, powers of government distributed evenly among three branches of government, with each branch acting as a check on the others. Police and prosecutors are part of the executive branch of government, but overcriminalisation sees prosecutorial discretion and power expand such that it encroaches on the powers of the legislative and judicial branches of government.

3.9 Prosecutorial Discretion: Quasi-legislative Power

Under conditions of overcriminalisation, there is more law on the books than could ever be enforced in practice. Where there is too much criminal law, some portion of offences go largely unenforced, though they may be enforced sporadically. Police and prosecutors have the discretion to decide what portion of laws to enforce in practice, and against whom.\textsuperscript{98} In this way, they act as the justice system’s “real lawmakers”\textsuperscript{99} and as “de facto legislators”, assuming the role of the legislative branch of government.\textsuperscript{100} It seems particularly dangerous in the hands of

\begin{itemize}
\item\textsuperscript{95} Chapter 2, section 2.5.
\item\textsuperscript{96} Husak, \textit{Overcriminalization}, \textit{supra} note 5 at 21.
\item\textsuperscript{98} Hart Jr, “The Aims of the Criminal Law”, \textit{supra} note 93 at 428.
\item\textsuperscript{99} Stuntz, “Pathological Politics”, \textit{supra} note 1 at 506.
\item\textsuperscript{100} \textit{Ibid}, at 519.
\end{itemize}
bad-acting prosecutors, for whom sporadic enforcement can be “an instrument of tyranny”.101 But even the best-intentioned prosecutor may not be able to shed an “inescapable residuum of injustice” when exercising broad, unchecked discretion to sporadically enforce particular criminal provisions.102 Doing so is likely to involve a degree of arbitrariness, and of treating like people differently, which undermines the rule of law. Joseph Raz has argued that an important principle derived from the basic idea of the rule of law is that “the discretion of crime preventing agencies should not be allowed to pervert the law.”103 Overcriminalisation commentators have argued that overdepth in the criminal law gives rise to a level of prosecutorial discretion that is problematic.

Much of the overcriminalisation literature discussing prosecutorial discretion focuses on the United States. It is important to be conscious of the differences between the structural and constitutional arrangements in the United States and the jurisdictions that are the focus of this dissertation. Crown prosecutors in Canada, Britain and New Zealand are understood as performing dual roles, both as public servants and officers of the court with ethical duties to the court.104 The Crown’s role is to present to a trier of fact evidence that it considers credible and relevant to the alleged offence,105 and to promote the cause of justice rather than to pursue a conviction with animus.106 This acts as an important restraint in these jurisdictions in a way that is not directly analogous to the United States, in which there it accepted that sheriffs and district attorneys are elected officials, and to that extent are directly answerable to the public will.107

In Canada for instance, although prosecutorial discretion is broad, covering “all decisions regarding the nature and extent of prosecution and the Attorney General’s participation in it” and “entitled to considerable deference” from the courts,108 it is never entirely unchecked.109

---

102 Ibid.
105 R v Chamandy (1934) 61 CCC 224, at 227.
106 MacFarlane, “Crim L Q”, supra note 104.
Prosecutors are guided by Crown policy manuals, most of which require that prosecutions must have “a reasonable prospect of conviction” and there must be a “public interest” in the preceding.\footnote{Miazga v Kvello Estate [2009] 3 SCR 339, at para 64; R v Harrigan and Graham (1975) 33 CRNS 60 (Ont CA), at 69 (per Henry J). Note that British Columbia has a higher standard, requiring “substantial likelihood of a conviction” and a public interest in the prosecution: British Columbia Prosecution Service, Charge Assessment Guidelines, Crown Policy Manual (2018) at 2.} Exercises of prosecutorial discretion \textit{are} reviewable by the courts if there is proof of abuse of process:\footnote{Also see Alice Woolley, “Defining Prosecutorial Discretion (With an Invitation to the Court to Re-Define Abuse of Process)” (20 June 2014), online ABlawg.ca <https://ablawg.ca/2014/06/20/defining-prosecutorial-discretion-with-an-invitation-to-the-court-to-re-define-abuse-of-process/>.} Crown conduct can be reviewed when it constituted “a marked and unacceptable departure from the reasonable standards expected of the prosecution.”\footnote{R v Nixon [2011] 2 SCR 566, at paras 20, and 63-64.} The courts have a residual discretion to remedy an abuse of the court’s processes but only in the “clearest of cases” involving Crown conduct that “shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.”\footnote{R v 974649 Ontario Inc [2001] 3 SCR 575; R v LL 2015 ABCA 222, at para 10.} These are clearly high standards. The Supreme Court has made it clear that prosecutorial discretion is essential to keep the system from becoming “unworkably complex and rigid,”\footnote{R v Beare [1988] 2 SCR 387, at 410-11, per LaForest J.} and that the courts should be reluctant to interfere with prosecutorial discretion except when the high “proof of abuse of process” threshold is met.\footnote{R v Power [1994] 1 SCR 601; and R v Cook [1997] 1 SCR 1113.} That is, although prosecutorial discretion in Canada is never entirely unchecked, it is certainly broad.\footnote{Wayne Gorman, “Prosecutorial Discretion in a Charter-Dominated Trial Process Articles and Addresses” (2000–2001) 44 Crim LQ 15 at 31–32; Kent Roach, “The Attorney General and the Charter Revisited” (2000) 50:1 U Toronto LJ 1; Matthew A Hennigar, “Conceptualizing Attorney General Conduct in Charter Litigation: From Independence to Central Agency” (2008) 51:2 Canadian Public Administration 193; Kent Roach, “Four Models of the Criminal Process Criminology” (1998–1999) 89 J Crim L & Criminology 671 at 688.} 

The concerns raised by United States overcriminalisation theorists regarding prosecutorial discretion centre on the enormous leverage to secure guilty pleas that is accorded to prosecutors by an “abundance of overlapping offences.”\footnote{Husak, Overcriminalization, supra note 5 at 23.} When the same act is criminalised by several separate but overlapping offences, it is likely that some offences will contain fewer elements and be more easily made out; others will contain more, or more complex elements. Similarly, the maximum penalties associated with the overlapping offences will also vary. This
means that prosecutors can strategically select charges that are more easily made out, or charges the seriousness of which may be extremely daunting to an accused, or that for other reasons are more likely than other available charges to lead to guilty pleas. This practice, combined with the practice of “charge stacking” (charging a range of overlapping offences at once, in order to raise the maximum possible penalty), allow prosecutors to often manipulate accused people into waiving their right to a full trial through plea bargaining, and shepherding them towards guilty pleas.118

Again, it is important not to extrapolate unthoughtfully from discussions of plea-bargaining in the United States to conclusions about plea bargaining practices in other jurisdictions. However, there is some Canadian literature on plea negotiation and prosecutorial practice, which is useful here. Jean-Pierre Hachey critiques prosecutors’ use of section 351(2) of the Canadian Criminal Code, the offence of wearing a mask with intent to commit an indictable offence, against protestors who wear masks.119 The offence’s elements are satisfied when the offender, with his face masked either commits an indictable offence or has the intention to do so. The offence is itself an indictable offence, subject to a 10-year maximum penalty. Hachey writes that the offence “allows the police to threaten disproportionate punishment for the commission of, or intent to commit, hybrid offences such as mischief”120 or nuisance.”121

Section 351(2) and Hachey’s critique are particularly illustrative here. First, the offence overlaps with existing offences more clearly intended to address mask-wearing protestors. In fact, the public order offences with which protestors might reasonably expect to be charged if their assembly is unlawful such as unlawful assembly and rioting, already have aggravated variants to accommodate masked unlawful assembly or rioting. Unlawful assembly is a summary

---

120 Ibid. Canadian Criminal Code, RSC 1985, c C-46, s 430. Mischief is subject to a range of maximum penalties on indictment, depending on the value of the property damaged, but the lowest grades of mischief offence are subject to only a 2-year maximum penalty: s 430(4)(1).
121 Canadian Criminal Code, RSC 1985, c C-46, s 180(1): common nuisance is an indictable offence with a 2-year maximum penalty.
offence, subject to a maximum of 6-months’ imprisonment, but when committed wearing a mask, is an indictable offence subject to a 5-year maximum penalty.\textsuperscript{122} Participating in a riot is an indictable offence subject to a 2-year maximum, but when committed wearing a mask, rises to a 10-year maximum penalty.\textsuperscript{123} This means that section 351(2), if applied to masked protestors, overlaps with unlawful assembly wearing a mask and with rioting wearing a mask; particularly in respect of the former, section 351(2) accords the police significant additional leverage: a 10-year maximum penalty is available where there earlier was only a 5-year maximum or a summary charge and another indictable offence such as mischief or nuisance.

Notably, section 351(2) is not grouped with other “Offences against Public Order” like unlawful assembly\textsuperscript{124} and rioting,\textsuperscript{125} but instead under “Offences against Property.” Section 351(2) is coupled with section 351(1), which is possession of housebreaking instruments, which when committed as an indictable offence is also subject to a 10-year maximum penalty. Furthermore, s 66(2) provides that unlawful assembly while wearing a mask or concealing one’s identity is an offence, punishable on indictment by up to 5-years’ imprisonment. That is, s 66(2) and s 351(s) overlap, provided that at the same time as an offender unlawfully assembles while wearing a mask, she at least intends another indictable offence such as mischief. Indeed, Hachey notes that according to the case law,\textsuperscript{126} section 351(2) is most frequently charged alongside either break and enter\textsuperscript{127} or robbery\textsuperscript{128} and associated charges arising out of the facts, such as pointing a firearm,\textsuperscript{129} uttering threats,\textsuperscript{130} assault\textsuperscript{131} or unlawful confinement.\textsuperscript{132} That is, the offence seems

\textsuperscript{122} Canadian Criminal Code, RSC 1985, c C-46, s 63, and s 66(2) (summary conviction and a maximum of 6-months’ imprisonment for unlawful assembly; for unlawful assembly while wearing a mask, summary conviction and 6-months maximum, or 5 years as an indictable offence).
\textsuperscript{123} Canadian Criminal Code, RSC 1985, c C-46, s 64, and s 65 (2 years maximum for rioting; 10 years maximum for rioting wearing a mask).
\textsuperscript{124} Canadian Criminal Code, RSC 1985, c C-46, s 63, and s 66(2) (summary conviction and a maximum of 6-months’ imprisonment for unlawful assembly; 5 years maximum for unlawful assembly while wearing a mask).
\textsuperscript{125} Canadian Criminal Code, RSC 1985, c C-46, s 64, and s 65 (2 years maximum for rioting; 10 years maximum for rioting wearing a mask).
\textsuperscript{126} Hachey, “Stifling Dissent through Creative Use of the Criminal Law”, supra note 119 at 121.
\textsuperscript{127} Canadian Criminal Code, RSC 1985, c C-46, s 348 (10-year maximum penalty); s 349 (10 years);
\textsuperscript{128} Canadian Criminal Code, RSC 1985, c C-46, s 344 (from 5-years maximum for a first offence, up to life imprisonment, given certain aggravating factors);
\textsuperscript{129} Canadian Criminal Code, RSC 1985, c C-46, s 87 (5-year maximum).
\textsuperscript{130} Canadian Criminal Code, RSC 1985, c C-46, s 264.1 (5-year maximum).
\textsuperscript{131} Canadian Criminal Code, RSC 1985, c C-46, s 266 (5-year maximum).
\textsuperscript{132} Canadian Criminal Code, RSC 1985, c C-46, s 279 (10-year maximum).
primarily designed to capture the covering of one’s face in order to facilitate robberies and breaking and entering.

The second reason Hachey’s example is useful in this chapter is it is a Canadian example of arguable “charge stacking.” Hachey cites three reported cases of masked protestors who have been charged under section 351(2). He also speculates that there are likely other similar cases in which masked protestors were charged under section 351(2), which were either unreported cases, such as cases decided in provincial court, in which judges commonly do not give written reasons for decisions, or cases that end in a guilty plea rather than a trial. He suggests that offence is a flexible tool to use against masked protestors, particularly repeat or “problem” protestors.

Furthermore, the cases Hachey cites suggest that this is not a form of charge stacking that the courts are likely to see as improper use of prosecutorial discretion. The judge’s comments in Barnett v Quebec constitute “matter-of-fact acceptance of the use of s 351(2) against misbehaving protestors as well as against masked armed robbers” and “give the impression that the use of s 351(2) against protestors is standard practice.” That is, Hachey’s analysis suggests that section 351(2) has been used at least sometimes, and possibly more frequently, as a means of charge stacking in order to facilitate plea negotiations and “encourage” guilty pleas.

Under overcriminalisation, a wide range of conduct is criminalised, and much of what is criminalised is covered by many overlapping offences. Consider an offender who engages in a certain unit of criminalised behaviour, and that behaviour is criminalised by a large number of overlapping offences, subject to a variety of maximum penalties and offence elements. The law on the books is broader than the law that a prosecutor will decide to enforce in practice. To this extent, before the offender is charged, he experiences uncertainty as to what portion of the law will apply to him in practice.

133 Including R v S (SS) (1999) 136 CCC (3d) 477 (Ont SCJ); Barnett v Quebec (Cour Municipale de Montreal) 2003 CanLII 30417 (Que SC); R v Bertrand 2007 QCCQ 6509 (Que Ct).
135 Ibid, at 124.
136 Ibid, at 126 & 132.
137 Barnett v Quebec (Cour Municipale de Montreal) 2003 CanLII 30417 (Que SC).
This second dimension to prosecutorial discretion, which can allow prosecutors to exercise quasi-adjudicative powers stems in part from the breadth of the criminal law, but more significantly, stems from depth. By stacking charges, it can be possible to confront an accused person with a collection of charges subject to an inflated and dauntingly high available maximum penalty, manipulating or coercing that person into a guilty plea. As such, this problem associated with overcriminalisation will be of particular note in chapter 5 when I assess the kinds of depth and overlap in the criminal law that may be part of overcriminalisation.

3.10 Rule of Law and Equality

The rule of law ideal that legal systems should be free from arbitrariness and unconstrained discretion is closely related to the parallel notion that all people should be equal under the law. One problem with arbitrariness and overbroad discretion is that similarly situated people may arbitrarily be treated differently. “Different” is not a neutral word in the context of how one is treated by the criminal law: there are relatively better and worse ways to find oneself treated by the law. The above sections have discussed some of the negative consequences associated with overcriminalisation: unevenly sentence grading across offences; uncertainty of what laws are likely to apply to one’s conduct in practice; broad, unconstrained prosecutorial and police discretion regarding charging decisions, resulting in similarly situated accused people being treated differently on arbitrary grounds.

Negative consequences of this kind are a problem in and of themselves. Importantly, and worse than that, these negative consequences do not fall evenly on all members of society. Instead, lower class and racial minority communities generally bear the brunt of the selective enforcement of criminal offences that is facilitated by overcriminalisation.

If the criminal law on the books criminalises a large proportion of the population, but there are only sufficient resources to enforce the law against a small subset of that group, then the choices about whom to charge and not to charge, and with what combinations of available

---

139 Husak, Overcriminalization, supra note 5 at 54.
charges, are matters for the discretion of police and prosecutors. Commentators have pointed out that as an empirical matter, the groups who tend to do less well by the exercise of discretion tend to be already vulnerable and less socially privileged.\footnote{Stuntz, “Pathological Politics”, supra note 1 at 575.} Stuntz has noted that enforcement of vice crimes tends to focus on fairly small subset of the population, even though a considerably larger part of the overall population engages in the criminalised activities.\footnote{Ibid, at 573; William J Stuntz, “Race, Class, and Drugs” (1998) Colum L Rev 1795.} Usually that subset that bears the brunt of enforcement attentions are minority ethnic groups and low socioeconomic groups: “class-based, and hence to some degree race-based, enforcement [is] common”.\footnote{Stuntz, “Pathological Politics”, supra note 1 at 575.} This means that groups likely to already be doing comparatively poorly in society and groups lacking in political power and influence are the same groups that are unequally and more severely punished by the criminal law than other more privileged groups. For instance Janet Mosher and Joe Hermer note the difference in the position of alleged or potential welfare fraudsters under the Ontario Works Act, and the position of alleged or potential income tax evaders and employment standards violators.\footnote{Janet Mosher and Joe Hermer, “Welfare Fraud: The Constitution of Social Assistance as a Crime”, in Marie-Andrée Bertrand, Janet Mosher, and Joan Brockman, eds, Constructing Crime: Contemporary Processes of Criminalization (Vancouver: UBC Press, 2011) 17 at 101–120; Shiner, What Is a Crime?, supra note 2 at 56.} Although those who have committed welfare fraud frequently do so out of need, and misappropriate relatively low total sums of money particularly compared to the amounts that can be involved with wealthy tax evaders,\footnote{Tax avoidance, which is not criminal, often involves still higher amounts of money and more privileged tax avoiders who have the resources to invest in devising complex schemes to avail themselves of potential loopholes: Zoë Prebble and John Prebble, “Tax Avoidance and Morality”, in Nigar Hashimzade and Yuliya Epifantseva, eds, The Routledge Companion to Tax Avoidance Research (Routledge, 2017) 369.} they are subject to intrusive surveillance and monitoring, and generally receive higher sentences than tax evaders.\footnote{Mosher and Hermer, “Welfare Fraud: The Constitution of Social Assistance as a Crime”, supra note 145 at 101–120; Shiner, What Is a Crime?, supra note 2 at 56.}

Those enforcement decisions are more likely to target already vulnerable people and communities, a serious threat to the rule of law value of equality under the law. These issues relate to overdepth as well as overbreadth, and so will be relevant to chapter 4.
3.11 Conclusion

This chapter set discussed arguments by David Garland and others about the historical factors that have contributed to criminal law’s overbreadth and overdepth. This historical context provided important context for the discussions that followed of the reasons why overcriminalisation is problematic. Overcriminalisation is not a neutral state of affairs. Nor is it merely a problem of untidy statute books, of concern to a small number of lawyers or scholars who take a particular interest in statute book tidiness. Overcriminalisation is closely tied to over-punishment – that is, punishing too many people, for too many types of conduct, and punishing them more than they deserve. These are questions of fairness and questions of justice. As Husak surmises, the problems associated with overcriminalisation combine to monumentally erode the rule of law.\(^{148}\) Questions about overcriminalisation are not just questions for the textbook, the classroom or the law reformer or statutory drafter; they are questions of justice, and questions for everyone.

\(^{148}\) Husak, *Overcriminalization*, *supra* note 5 at 28.
Chapter 4: Descriptive Overlap in the Criminal Law

4.1 Introduction

This dissertation looks at overlapping criminal offences and asks which types of overlapping offences are problematic in the sense of being properly viewed as part of the phenomenon of overcriminalisation. As discussed in chapter 2, while questions of depth and overdepth in the criminal law do appear in the overcriminalisation literature, generally that literature focuses in greater detail on questions of overbreadth, arguing that the scope of the criminal law is too broad and the state criminalises types of conduct that it should not. The literature is cursory in its treatment of overdepth as an aspect of overcriminalisation. When the overcriminalisation literature addresses overlapping offences, or depth in the criminal law, it tends to state that “recriminalising” conduct is a troubling contributor to overcriminalisation.¹ The superficial and largely pejorative treatment of depth or overlap in the criminal law by the overcriminalisation literature can be read in at least two ways: on the one hand, as implying that all forms of overlap or depth in the criminal law are problematic and constitute overcriminalisation; or on the other hand, as not necessarily implicating all forms of depth or overlap as problematic, but being unhelpfully opaque and uncritical as to which instances of depth or overlap give rise to the kind of problems that are associated with overcriminalisation. My dissertation addresses this gap in the literature.

Identifying a type of overlap as problematic and part of overcriminalisation – or as unproblematic or justified, and so not part of overcriminalisation – is clearly a normative process. Before one can evaluate various types of overlap, it is important to have a clear descriptive account of what the terms “overlapping offences,” and “depth” in the criminal law, mean. Crucially, in order to avoid circularity, this descriptive account must be just that: descriptive. The descriptive account of what is overlap or depth must be separate from any subsequent normative evaluation of which kinds of overlap or depth in the criminal law are problematic in the sense of being part of overcriminalisation. The descriptive and normative questions must remain discrete, to avoid defining overlap as something that is by definition problematic. This is a more difficult matter than it might sound. After all, the very decision to

¹ See Chapter 2, section 2.11.
define and interrogate the notions of overlap and depth could be interpreted as implying that, normatively speaking, there is something at least questionable about those notions.

This chapter considers in descriptive terms what overlap means, taking care not to define overlap as something that, by definition, is problematic. When I use the terms “depth” and “overlap,” I mean them in the descriptive senses that I explore in this chapter. The use of these terms does not on its own suggest anything normative about whether that depth or overlap is part of overcriminalisation. In chapter 5, I assess examples of depth or overlap in the criminal law and ask the normative question of whether these examples are part of overcriminalisation. That is, whether the examples seem vulnerable to the problems associated with overlap discussed in chapter 3.

4.2 Descriptive Account of Overlap

In providing this descriptive account of overlap between criminal offences, and depth in the criminal law, I have begun this descriptive project as conceptually far back as possible by trying to understand overlap in pre-legal and pre-philosophical terms. A useful way to begin thinking about the concept of overlap is outside of a legal context, by analysing the ways we think about using language to label behaviour, events, and things in everyday life. We are very familiar in ordinary language with the phenomenon where one piece of behaviour (or one discrete cluster of behaviours) is capable of being described in various different ways. A feature of language is that (most) words have synonyms; a phrase can be re-formulated by substituting one synonym for another, preserving the same essential meaning. A similar principle obtains at the sentence level: a sentence can be syntactically re-organised, creating a new sentence structure but expressing the same or nearly the same meaning. For instance, the same, or nearly the same, meaning can be expressed in either active or passive voice, or in present or past tense. A further feature of language with which we are familiar is that the same event can be described from different points of view or perspectives, or with altered emphasis. Combining some of these ideas for instance, “the cat sat on the mat” can describe the same set of facts as “the rug was sat upon by the moggy,” or even “I’m a cat, and I like sitting on mats like this one I’m on right now.”

However, the observation that the same behaviour can be described by different forms of words is not enough on its own to get off the ground a fully developed concept of “overlap.” Overlap is not just about synonyms, either at the word or sentence level. Overlap, even in a
purely descriptive sense, seems to involve the idea of there being some available “basic description” for some “basic unit” of behaviour. By “basic unit,” I mean a unit that captures a chunk of behaviour that is best understood as a single “piece” of behaviour, which neither omits further pieces of behaviour that are properly considered as part of that piece of behaviour, nor includes further pieces that are better treated separately.

By way of illustration, consider here a child’s collection of lego building blocks. A collection of lego pieces can be interlocked and arranged in millions of different combinations and configurations. Individual lego blocks come in a range of sizes, shapes and colours. The basic building units in lego are the individual lego pieces. These basic units can be combined in various ways to stand in for other combinations of lego blocks. For instance, if a person is building an object from lego blocks, and needs a 2x6 lego block, the most obvious option is to use a single block with those dimensions. But if the lego user cannot find a block with those dimensions, or perhaps wishes to combine a variety of colours, they can combine other blocks to make up a group of blocks adding up to those same dimensions, as illustrated in Figure 4.1, below.

**Figure 4.1: Examples of Lego Block Combinations Equivalent to a Single 2x6 Block**

While lego blocks can be combined in various ways to make larger structures, it always remains the case that the basic building blocks are the *individual* lego pieces. That is, these building blocks cannot be further divided without becoming incomplete. It is physically possible for a person to use a very sharp serrated knife to cut a plastic lego piece in two – see for instance Figure 4.2 below. But if someone did that, we would be inclined to regard the resulting pieces as
two incomplete fragments, rather than two new blocks of lego. Imagine an older sister allowing her younger brother to play with her lego pieces, only to later find he had sawed them into halves or quarters. It seems likely the sister would feel upset with her brother, and regard him as having damaged her lego collection. “Basic units” of lego are not all the same size, colour, or shape. What they do share in common is that they are the discrete, individuated building blocks produced by the lego factory according to certain conventions about what constitutes lego-ness.

Figure 4.2: Lego Block that has been Subdivided to the Point of Incompleteness

A second basic unit analogy can drawn using the example of a perforated sheet of one dollar domestic postage stamps. Imagine the sheet of stamps is arranged in a grid with five stamps across, and four stamps down, as illustrated in Figure 4.3 below.

Figure 4.3: Diagram of 5 x 4 Sheet of $1 Stamps
One way to divide such a sheet of stamps would be to tear the sheet into eighty small pieces, so that each of the twenty stamps is torn into four pieces. But do so would mean subdividing the sheet into smaller pieces than makes sense – the stamp fragments would be useless for posting any letters. Alternatively, the sheet of stamps could be left totally intact as one large sheet of twenty joined stamps. But if one wants to send a letter to one’s cousin, a task requiring only a single unit of domestic postage, this approach too will pose problems. The full sheet of stamps will not fit on the front surface of an envelope, and even if it did, using twenty times the postage required to send the letter is wasteful. The “basic unit” of such a sheet of postage stamps is a single, but complete, stamp. So, it makes the best sense to divide the sheet of stamps up at the perforated edges between each stamp, and deal with each stamp on its own terms.

A basic unit of behaviour, for the purposes of understanding overlap, invokes an analogous notion to that set out in these lego block and postage stamp examples. While it is possible to throw lego blocks through a wood chipper, or postage stamps through a paper shredder, if one were to do this, the resulting plastic fragments and paper confetti would in practical terms no longer be usable as lego or as postage. Both lego and postage stamps are human artefacts with certain socially defined functions. Because of what a postage stamp is, and how it functions in our lives, the “basic unit” of a sheet of stamps is the single stamp. Similarly, lego blocks have a socially determined set of functions, and according to those functions, the basic unit of lego is the individual block. When it comes to behaviour, the basic unit is analogously that chunk of behaviour that it makes the best sense to treat as a complete and distinct piece of behaviour. That is, that piece of behaviour for which subdividing further would result in incomplete fragments of behaviour, and ceasing subdividing before reaching that unit would leave several pieces of behaviour clumped together. A unit of behaviour of this size or scale makes sense on its own and cannot, or should not, be further subdivided. As with the lego and postage stamp examples, the basic unit that “makes sense” when describing behaviour is a socially determined matter, rather than something metaphysical.

---

2 Facts about how postage stamps function in our lives include facts such as: the typical size of an envelope; that stamps are sold in rolls to businesses; and that philatelists are interested in intact stamps rather than stamp fragments.
Of course, these analogies may strike the reader as oversimplifications in a key respect: while postage stamps are even, clearly demarcated separate units, human behaviour seems to have no such clear and visible “perforated line” dividing it into units. Nor do units of behaviour have the hard plastic edges of a lego block. However, even in the lego and postage stamp examples, perforations at, or hardness of, the edges of the basic units are significant in a context-dependent way. The “edges” of a basic unit of lego or postage stamp paper are socially determined and thus context dependent, just as the “edges” of a basic unit of behaviour are context dependent. The edges of a brand new lego block, straight from the factory, are not any harder than the edges of the lego block messily cut in two, shown above in Figure 4.2. It is not the having of edges that makes the individual lego block a basic unit. It is the contextual matter that, given our social understanding of what lego is, and how we use it, when presented with chopped up fragments of lego blocks, or fine plastic shavings from putting lego through a high powered coffee grinder, we no longer feel we are dealing with units of lego at all.

Similarly, it is true that a sheet of stamps has perforations between the individual stamps. But it is still a contextual matter that these perforations have a meaningful relationship to the basic unit of the sheet. In the context of wanting to send a letter, socially determined facts about the postage system are relevant. We are so accustomed to the socially determined meanings of postage stamps and lego blocks, and so habituated to using them in a standard context, that the basic unit that applies in a standard context strikes us as obvious. But even the perforations between stamps as a determinant of the basic unit of the sheet of stamps cease to be relevant in other contexts. Imagine I am lost in the wilderness and need to start a campfire for survival. By a stroke of luck, I have with me the sheet of 20 stamps I described above, and a box of matches. Here, a different set of contextual factors applies to the question of basic units and the sheet of stamps. If the only dry material I can use as a fire starter is my sheet of stamps, I will not be concerned with dividing them neatly along their perforations, nor will I be thinking of or treating them as stamps. I will be concerned only with crumpling the sheet of paper, and combining it with kindling, in the best way possible to successfully start a fire.

Let us revisit the earlier example of the basic unit of behaviour involved in, or basic description of, a cat sitting on the mat. Suppose we can agree that the basic unit of factual information being presented by “the cat sat on the mat” is about, simultaneously, a cat, the cat’s action of sitting, and the cat’s relationship to a mat. One could further subdivide that factual
relationship statement into several separate statements: for instance, “the cat was sitting on something,” “there is a mat on the floor,” and “there is a creature on that rug”. But describing the facts or behaviour in this way uses more words to say less, with less precision. Descriptively, it a worse account of the facts – it is like ripping a postage stamp into uneven thirds in the context of trying to send a letter, or cutting a lego block in half with a hack saw in the context of trying use lego in the standard way.

I note here the importance of context. I began the example in the above paragraph by asking the reader to assume we could agree that the basic unit of factual information to be conveyed was about the cat, the cat’s act of sitting, and the cat’s relationship to the mat. That is no minor assumption – it is effectively an assumption about context. By asking the reader to assume those are the pertinent factual aspects of the chunk of behaviour or state of affairs I need to describe, I am asking the reader to assume that the context is such that these are indeed the pertinent details. Perhaps the context is that I have been asked to go into a room and describe the positions of any animals in the room, and the only animal in the room is indeed the cat, sitting on a rug. In such a context, it would be a very poor response to my questioner for me to come out of the room and report that the window ledge needs dusting, or that the wallpaper is green. In this context, the unit of behaviour that is represented well by my description “the cat sat on the mat.”

Imagine now the same facts – the same cat, and rug, in the same position in the same room (with the same dusty window ledges and green wallpaper and so on). This time, the context is that I have been asked to describe whether the cat has fleas. In this context, “the cat sat on the mat” is a much worse unit of description. While I may not be able to answer for sure whether the cat has fleas, what my questioner is implicitly interested in are likely to be matters such as whether the cat was scratching, or seemed uncomfortable, rather than specifically where she is sitting. Imagine now a third context in which I am to describe the cat. Here, a concerned cat owner is worried that his cat may have died, and asks me to check on it. Having seen the cat is alive and well, sitting on the mat, I could respond “the cat sits on the mat” – it would be true, and by implication, suggests the cat is still alive. But in this context, the relevant descriptive unit is more plausibly “your cat is alive and seems fine” or something similar. That is, even with what I began by presenting as a unit of behaviour that seems so straight forward we can relatively easily find a way to very clearly capture its factual essence, this straight forwardness is premised on
assumptions about context. I will return to questions of factual descriptions and units of behaviour in the case of legal description and definition in section 4.3 below.

I return here to my initial assumption that I am describing the cat and mat in a context in which the basic unit of information is the cat, its seated position, and its relationship to the mat. I grant here, the notion of a basic or irreducible factual unit is complex. Writing in other contexts, some philosophers have spoken about “basic facts,” or “brute facts.” These are “basic” in the sense that they are not reducible to other facts. A brute fact is true, but has no explanation, or cannot be explained. As such, brute facts are foundational in the sense of being the building blocks from which all knowledge is built. But others dispute that there is any such thing as a “basic” or “brute” fact. At any rate, my discussion can proceed without settling that issue at such a metaphysical level. Whatever the “basic unit” of behaviour empirically might be, in a given context, the concept of overlap seems to involve the idea that there is an available “basic description” of that basic unit, as well as other possible descriptions of the behaviour, such that we can identify that this precise unit of behaviour is the unit to which more than one description applies. That is, that someone can identify that “the cat sat on the mat” refers to the same unit of behaviour or facts as “the feline sat on the small carpet”.

Or consider a new non-legal example. Imagine I pick up a number of substances and pour them into a bowl. I pick up an object of a certain shape – a wooden spoon – and move it round and round in the bowl. Imagine further that I am being video taped, so that we have an essentially objective record of what I am doing. One observer might say, “she is stirring the mixture”; another might say, “she’s blending the ingredients,” another could say “she’s making a chocolate cake.” It is clear that in some sense, the descriptions “stir,” “blend,” and “making a

---


chocolate cake” overlap, in the sense that the same behaviour on my part – we have it on video, and here it is – can be properly described in these three different ways.

It is important here to be clear about what is meant by “properly”. Here, “properly” means if one were explaining the meaning of the words “stir,” “blend,” and “make a cake” to a person who was learning English and did not yet know the meaning of those terms, one could with grammatical and idiomatic correctness point to the video footage of me moving ingredients around in a bowl with my wooden spoon and say “that is an example of stirring,” “that is an example of blending,” and “that is an example of making a cake.” At a descriptive level, that is what overlap amounts to. If we can point to a particular behaviour and accurately say “that is an example of A” and also say “that is an example of B”, then A and B overlap.

I note that, again, context is relevant to these questions. I have assumed here a context in which we are interested in the actions of a person, and matters such as cake making. But one could imagine contexts in which those are not the most relevant aspects of my behaviour, or of what is going on in the video. If the video has been prepared as part of a video skills course, a basic unit of description could be, for instance, the lighting is not successful in this video, or the camera work is jerky.

The examples I have considered so far have deliberately been not from the criminal law sphere. Consider now another video of behaviour, but this time one in which the criminal law is more likely to take an interest. We see one person, A, treating another person, B, in a particular way. Different observers might all properly say, “A is inserting a knife into B,” or “A is forcibly inserting a knife into B,” or perhaps “A is stabbing B.” To say that different observers could properly and accurately describe A’s conduct in all three of the above ways is to say that those ordinary language descriptions overlap.

4.3 Law as a Specialised Language or Linguistic Environment

So far, I have talked about overlapping ways of describing in ordinary language the same behaviour or facts. As a descriptive matter, overlap is built into the way that language works. In this section, I turn to the ways these features of language play out in the specific linguistic environment of the law, and legal definition. The law is a system of rules regulating social facts

---

7 Assuming that “stabbing” can be, and is here, a purely descriptive concept.
and behaviour. Law – that is, positive law sources such as legislation and judicial decisions\textsuperscript{8} – does this using language. Law is a specialised linguistic environment, with its own particular conventions, terms of art, and technical modes of expression.

At its most notorious and least accessible and understandable for non-lawyers, law’s particular modes of expression can take the form of obscure and confusing “legalese” or legal jargon. There have been moves away from “legalese” towards “plain language” in legal drafting, with the aim of making legal language more accessible to non-lawyers.\textsuperscript{9} However, even with these moves, law remains a specialised domain. Law contains many complex concepts, such that conveying them through language will also be complex, simply due to the complexity of the subject matter.\textsuperscript{10} Even for a legal system that aspires to, and achieves, plain language drafting, conceptual complexities and nuances will necessarily remain.\textsuperscript{11}

A possible way of understanding the relationship between written legal sources such as legislation and common law precedents, and the real world situations and facts to which the law applies is to assume that legal concepts, modes of discourse, and technical language are ultimately a kind of legal-transliteration of ordinary language factual descriptions of states of affairs “out in the world”. According to this kind of understanding, ideally behaviour and facts can be picked out by factual description and then unproblematically have the language of the law applied to them.\textsuperscript{12} Another way of putting this is to say that the specialised language of law is

\textsuperscript{8} Note, analysis of meaning and the nature of language is more central to positivist theories of law than it is to natural law theories. See, Timothy Endicott, “Law and Language”, in Edward N Zalta, ed, The Stanford Encyclopedia of Philosophy (Stanford University, 2016) at sec 1.


supposed to be applicable to real world facts, and ordinary factual descriptions are supposed to be translatable to legal descriptions.\textsuperscript{13}

In practice, the conversion between factual description and legal description is not simple or as uni-directional as the model I have just described would suggest. Noting the complex interplay between facts and law, HL Ho writes:\textsuperscript{14}

The court does not look at each separately and then attempt to apply the law to the facts. Not only is the relevancy of facts, and hence the scope of factual inquiry, determined by the law, the relevant law is determined by the facts.

SFC Milsom builds on the notion of law and fact being interconnected, writing that neither “can be seen as the fixed background to the examination of the other.”\textsuperscript{15} In a similar vein, Kim Lane Scheppele writes that:\textsuperscript{16}

Descriptions of facts are legal all the way down, just as legal rules always have as a crucial element a statement of the facts to which they are to apply. Law and fact are mutually constituting – not simply hard to tell apart.

It is useful here to return to the example in the previous section of the cat sitting on the mat. Recall that I began my analysis in this chapter by presenting the example as an almost cartoonishly simple “fact” or set of observable features of the world\textsuperscript{17} – a state of affairs so simple that one might imagine it as a page in a child’s early-reading book.\textsuperscript{18} But then I complicated that picture, by noting that even the description of a seemingly very simple state of affairs is in fact extremely context dependent.\textsuperscript{19} That is, context determines and shapes how a given “fact” can be accurately expressed in ordinary language. Ho, Milsom and Scheppele’s

\begin{itemize}
  \item HL Ho, \textit{A Philosophy of Evidence Law: Justice in the Search for Truth} (Oxford University Press, 2008) at 7.
  \item SFC Milsom, “Law and Fact in Legal Development” (1967) 17:1 U Toronto LJ 1 at 1.
  \item Ho, \textit{A Philosophy of Evidence Law}, supra note 14 at 7.
  \item Indeed, using a simple Google search I found two early-readers featuring the phrase in their titles: Nurit Karlin, \textit{The Fat Cat Sat on the Mat}, (I Can Read Level 1). (Harper Collins, 1998); Alice Cameron, \textit{The Cat Sat on the Mat} (Boston: Houghton Mifflin/Walter Lorraine Books, 1994).
  \item For instance, in the context of a person asking “were there any animals in that room, and if so, could you describe to me their positions?” then “the cat sat on the mat” is an apt factual description. But if the context is “could you tell me whether the window ledges in the room need dusting?” then “the cat sat on the mat” is extremely inapt.
\end{itemize}
statements reinforce that context is just as important in relation to legal descriptions of fact as it is to ordinary language descriptions. Further, the relationship between ordinary language factual descriptions and legal descriptions is not one of translation, so much as each constituting, and providing context for, the other. Law is itself a context, which shapes how we look at and understand facts that are observable or provable “out in the world.” Indeed, historian of political and legal thought Barbara Shapiro reports that the concept of “fact” originated not in the natural sciences but in law.20

The way in which fact and law are “mutually constituting” can be illustrated by considering the process by which evidence is deemed admissible in a jury trial. Two initial questions help determine whether a piece of potential evidence is admissible. The first question is, what are the material facts or facts in issue – that is, what facts must be proved to settle the question of law.21 This is a matter of substantive law, and is decided by the judge.22 The second question is whether a potential piece of evidence is relevant – that is, does this piece of evidence tend to support or tend to negate one of the facts in issue.23 It is often noted that relevance is a question of logic and general experience.24 It is a matter for the judge.25 Graham Roberts emphasises that relevance is entirely context-dependent and relational: “There is no such thing as relevance in a vacuum. If evidence is to be relevant it must be relevant to something.”26

23 Ibid; Ho, A Philosophy of Evidence Law, supra note 14 at 11; Roberts, “Methodology in Evidence”, supra note 21 at 71.
25 If a piece of evidence is relevant, it will be admissible provided that no exclusionary rules or principles require its exclusion on the basis that it either belongs to a class of inadmissible character, it would be contrary to the policy of the law to admit the piece of evidence in the circumstances of the case or its probative value is outweighed by its prejudicial risk. Admissibility is governed by the law of evidence and is a question for the judge. The final question of what weight should be given to an admissible item of evidence is governed by logic and general experience and is a matter for the jury or finder of fact: Twining, Rethinking Evidence, supra note 22 at 189.
Various writers have further noted that in addition to factual and legal description being mutually constituting, the doctrinal distinction between questions of fact and law is itself “notoriously fragile,”27 artificial,28 and a question of degree rather than kind.29 The distinction is a matter of convention or pragmatism rather than essential or ontological.30 Ronald Allen and Michael Pardo argue that although law is a matter of human convention rather than a “natural kind” such as a tiger, since law exists as a social artefact within a given jurisdiction, law’s content is factual just as the rules of chess are factual. They conclude that on that basis that “questions of law are questions of fact.”31 Members of the judiciary have similarly called the distinction between fact and law “elusive,”32 “slippery”33 and “vexing”.34

Because of the complex, interlinked relationship between ordinary language and legal descriptions of facts or events “out in the world,” it is overly simplified to try to understand legal descriptions of factual scenarios as straight forward “translations” of ordinary language descriptions of the same factual scenarios. One complication of the process of translating a factual description of a unit of behaviour to a legal description is, once again, a question of context. As I have described in my lego and postage stamp examples, and the cat-on-the-mat and cake baking examples, what constitutes a basic unit of behaviour is a contextual matter. Translation of a factual description of a unit of behaviour “out in the world” into a criminal legal description is not a unidirectional process. Rather, the very fact of translating factual descriptions into legal language influences which facts, and which units of behaviour, are considered relevant at all.

Recall the final example I considered in the previous section of a person A inserting a knife into another person B. If we see video footage of A inserting a knife into B, or if we hear a witness’s testimony as to those facts, we need then to translate those factual statements into legal propositions, such as “the defendant committed assault”. The ideal is for that transition or translation from factual to legal language to be as direct and seamless as possible. The more complicated, and technical or specialised the language of the law is, the less seamless the transition appears to be. Being a lawyer is a specialisation. Part of the process by which lawyers gain their specialised expertise involves acquiring the skill of reading, analysing, and interpreting statutes, and applying them to sets of facts. One of the reasons that clients retain lawyers is so they can act as expert guides, helping clients to navigate this transition from factual description and language to descriptions and language in the specialised linguistic environment of the law.\textsuperscript{35}

Some of lawyers’ analytical reading skills pertain to statutory interpretation, a much-studied area of jurisprudence.\textsuperscript{36} Statutory interpretation is the process by which the courts interpret and apply legislation, and in particular, the techniques they use to resolve any ambiguity or vagueness in the words of statutes.\textsuperscript{37} Such ambiguities are resolved by applying traditional canons of statutory interpretation,\textsuperscript{38} and by referring to legislative history, and drawing inferences about parliamentary intention and purpose.\textsuperscript{39} Skills of statutory interpretation are among the first specialised techniques that beginning law students are taught as they are familiarised with the law as a special linguistic environment.

However, there is another set of statute reading skills that new law students must learn even before they begin learning the “statutory interpretation” skills needed to resolve statutory ambiguities. This logically prior process is a more mechanical, almost syntactical, process of “parsing” or “breaking down” the statutory language of a given provision into its component

\textsuperscript{35} Schauer, “Is Law a Technical Language”, supra note 11.

\textsuperscript{36} For example, some leading Canadian texts on statutory interpretation include: Pierre-André Côté, The Interpretation of Legislation in Canada, 3rd ed. (Scarborough, Ont: Carswell, 2000); D J Gifford, How to Understand Statutes and By-Laws (Scarborough, Ont: Carswell, 1996); Randy N Graham, Statutory Interpretation: Theory and Practice (Toronto: E Montgomery Publications, 2001); Louis Philippe Pigeon, drafting and Interpreting Legislation (Toronto: Carswell, 1988); Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes (Markham, Ont: Butterworths, 2002); Ruth Sullivan, Statutory Interpretation, 2d ed (Toronto: Irwin Law, 2007).


\textsuperscript{38} Such as “the literal meaning rule,” “the mischief rule,” and “the golden rule”. See ibid.

\textsuperscript{39} Ibid.
pieces. Understanding what these discrete conceptual and syntactical linguistic components are can help us to see the “basic” units of behaviour that are represented or captured by the specialised language of the law. This understanding helps to delineate what kinds of legal descriptions of facts constitute overlap, as a descriptive matter, and which do not.

4.4 Statutory “Syntax” and the “Basic units” of Criminal Behaviour

While much has been written on the subject of statutory interpretation, there is comparatively little writing on the subject of “breaking down” or “parsing” statutes. This may be because lawyers and legal academics regard reading statutes as a basic or even self-evident process. However, though reading and applying a statutory provision may seem self-explanatory once one has mastered the skill, this is not necessarily the case for the legally untrained eye.

New law students learn how to parse a statute early in their studies, but the skill is not presented in a standardised form. Statutory interpretation textbooks tend to gloss over parsing, spending at most a few pages on it, while the analytic stages of statutory interpretation receive several chapters.\(^\text{40}\) In practice, students learn how to read and break down a statute into its various components in related but not identical ways, depending on the preferences and teaching style of their particular teachers. This variety of approach means there is no commonly used set of terms for this process. Nor is there a standard name for the process itself. So far, I have referred to it variously as “breaking down” or “parsing” the statute. My preferred term is “parsing”,\(^\text{41}\) used by Deborah Schmedemann and Christina Kunz, because it captures the analogy with the process of grammatically parsing or diagramming a sentence: a process that focuses both on the discrete parts making up the sentence as a whole, and their logical or syntactical relationships to one another. For clarity, I will use that term from now on, recognising that others may use a different term for the same general process. Parsing any statute involves consciously

\(^{40}\) The most comprehensive treatment I have found is that of Schmedemann and Kunz, in a textbook tailored to first year legal writing courses aimed at teaching how to “think like a lawyer.” They spend a chapter on “the structure of legal rules,” explaining the parsing process by which a lawyer “works through the rule to discern its content and structure, then links the rule’s clauses to the pertinent facts of the client’s situation.” They explain that this process involves techniques like deriving individual offence elements and consequences, and identifying the logical relationships (conjunctive, disjunctive, aggregate, balancing, or a mixture) between discrete elements: Deborah A Schmedemann and Christina L Kunz, Synthesis: Legal Reading, Reasoning, and Writing, 3rd ed (New York: Wolters Kluwer, 2007).

\(^{41}\) Ibid, at 14.
and deliberately breaking it down into its logical constituents, understanding the logical relationships between these various components, then putting together the meaning of the provision as a whole based on this atomised understanding of its constituent parts, before finally applying the provision to the facts at hand.

There are further parsing techniques that are specifically useful in a criminal law context. Walking through the criminal statute parsing process, and analysing the various conceptual elements of an offence, will help in articulating the elements most central to the concept of overlap. Instructors teaching new law students how to read criminal statutes encourage them to break down offence provisions not simply in terms of subject(s), verb(s), and object(s) – though these certainly are relevant – but also by reference to the crucial criminal law conceptual building blocks of actus reus and mens rea. Even the categories of actus reus and mens rea can usefully be broken down further, by identifying the conduct required to commit an offence, any necessary surrounding circumstances, and for result crimes, the consequences. For each of these three categories, there can be corresponding actus reus and mens rea elements. These “three Cs” and their corresponding actus reus and mens rea requirements can be mapped according to a three-by-two matrix, in which each of the three Cs potentially has a corresponding actus reus and mens rea column. In this way, an offence can be atomised into six sets of components (see Table 4.1 below).

The division of offences into actus reus and mens rea elements, which are further subdivided into conduct, circumstances and consequences elements is a particularly – although not uniquely – Canadian approach to criminal offence analysis. Of course, every jurisdiction

---

47 For instance, Article 30(1) of the Rome Statute of the International Criminal Court specifies that there must be knowledge or intention in respect of the material elements of an offence. Material elements fall
has norms around statutory interpretation and how to differentiate elements of offences, but the 
approach that Canadian courts have explicitly adopted is different to the conventions in many 
other jurisdictions. An understanding of these six separate types of logical components of crimes 
is clear in the Canadian Supreme Court cases of De Sousa and Creighton, in which the court 
methodically analyses actus reus offence requirements regarding conduct and consequences, and 
charts the corresponding mens rea requirements for each.\textsuperscript{49} It is important to note that the 
technique of parsing is not without its difficulties, and can give rise to problems particularly at 
the stage of parsing the mens rea or fault elements of an offence.\textsuperscript{50} Parsing is not a flawless 
approach. However, its difficulties notwithstanding, parsing is a useful analytical tool in this 
chapter. It offers technique for subdividing legal offences – or legal descriptions of factual 
scenarios – into standardised categories. Parsing several statutes that appear to overlap with one 
another is a way to analyse that overlap.


\textsuperscript{50} For instance, see note 52 below and accompanying text, regarding the difficulty in deciding whether a 
voluntariness requirement should be categorized as part of an offence’s actus reus or mens rea.
### Table 4.1: Parsing a Criminal Offence

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This will be an act or omission by the defendant that the crown must prove.</td>
<td>This is the defendant’s required mental state in relation to the act or omission.</td>
</tr>
<tr>
<td></td>
<td>(Usually a verb)</td>
<td>Often this is not required, beyond the general voluntariness rule.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Usually a word like intentionally, wilfully, deliberately, recklessly, or (less frequently) negligently).</td>
</tr>
<tr>
<td>Circumstances</td>
<td>These are about the background circumstances or the state of affairs in which the defendant’s conduct takes place. Often are background facts about: 1. the accused person; or 2. the atmosphere or environment in which the offence takes place; or 3. the victim. (Can involve words like “while”).</td>
<td>This is the defendant’s required mental state in respect of any circumstances. (Usually a word like “knowingly,” “reckless as to whether,” or invoking a negligence standard, according to which a reasonable person ought to have known of the circumstance in question).</td>
</tr>
<tr>
<td>Consequences</td>
<td>These will be the harmful results or consequences of the defendant’s conduct. Not all offences specify a consequence. (Usually involves words like “causing” or “cause.”)</td>
<td>This is the defendant’s required mental state in relation to consequences. (Usually words like “wilfully,” “intentionally,” or “recklessly”).</td>
</tr>
</tbody>
</table>

Here, I will explain the contents of Table 4.1 in greater detail, beginning with the actus reus column. An offence’s *actus reus* in terms of *conduct* will be an act or omission by the defendant. Often statutory language expresses this in the form of a verb, describing what the accused must have done or omitted to do in order for the offence to be made out. For instance, this verb phrase denoting the actus reus as to conduct for theft is “to take,” for breaking and

---

51 Readers who are interested in reading more about this approach to parsing may wish to refer to Roach et al, *Criminal Law and Procedure*, supra note 45 at chapter 5.
52 The question of whether voluntariness should be regarded as part of the actus reus or mens rea is an example of the challenge that can be presented when parsing a criminal offence, particularly at the mens rea stage.
53 *Criminal Code*, RSC 1985, c C-46, s 322(1) (theft).
entering is “to break,” or in the case of assault is “to apply force.” Having identified the actus reus for conduct, it is sometimes easier to move through the three Cs slightly out of order, and next identify the actus reus in terms of consequences (if a consequence is specified). Consequences tend to be more straightforward to identify than circumstances. Consequences are often signified by words like “causing” or “resulting in.” When dealing with consequences, the common law concept of causation is invoked, and the prosecution must prove a causal link between the conduct and the consequences.

Having identified the conduct and consequences (if any), one can loop back and identify any circumstances in respect of actus reus. This is the most difficult, residual category, so it can be helpful approach it after the other two, to capitalise on a process of elimination. Elements that do not fit within conduct or consequences will be placed here. But a useful identifier for elements best placed in this category is that they often refer to characteristics or descriptions of:

1. the accused person;
2. the atmosphere or environment in which the offence takes place; or
3. the victim.

For instance, an example of a circumstance about the accused person is found in the offence of driving while impaired. The circumstance is about the accused person, namely, that he or she was impaired at the time of driving. The subordinating conjunction, “while,” is a clue to readers that they are dealing with a circumstance. An example of a circumstance that is about the victim are offences that relate specifically to child victims and specify the victim’s age range, such as child pornography offences, and certain sexual assault offences that specify the

---

54 Criminal Code, RSC 1985, c C-46, s 348(1) (breaking and entering with intent). Note that “entering” is a consequence, rather than part of the conduct. This illustrates how slippery the distinction between these categories can be. While “enter” is a verb, and does describe what the accused does, it also evidences a change in the world: the accused was outside, and now he is inside.

55 Criminal Code, RSC 1985, c C-46, s 265(1)(a) (assault). Note, there are other paths to conviction for assault involving different conduct, such as threatening another person by an act or gesture, but I have focused here on just one path to conviction.

56 Criminal Code, RSC 1985, c C-46, s. 253.

57 Criminal Code, RSC 1985, c 46-c, s 163.1(1) (defining child pornography as showing a person who is or is depicted as being under the age of eighteen years); s 163.1(2) (making child pornography); s 163.1(3) (distribution etc of child pornography); s 163.1(4) (possession of child pornography); s 163.1(4.1) (accessing child pornography).
victim’s age.\textsuperscript{58} Circumstances that relate to the physical environment in which an offence takes place include offences like public indecency, where an element of the offence is that it is carried out in public, or in the view of the public.\textsuperscript{59}

Having identified the actus reus elements of an offence, parsing next involves parsing the mens rea elements. In Canada, the mens rea is usually not statutorily defined.\textsuperscript{60} The starting presumption is that there will be symmetry between actus reus and mens rea, so that if there is an element in the actus reus column, one would expect to find a corresponding mens rea element. However, this is only a presumption, and there are many exceptions in which the presumption can be rebutted.\textsuperscript{61} The various mens rea requirements relate to the actus reus categories already parsed.

The *mens rea* with respect to *conduct* category will contain elements relating to the defendant’s required mental state in relation to the act or omission set out in the actus reus/conduct category. Usually these will be words like intentionally, wilfully, deliberately, or recklessly, or less commonly, negligently. For instance, mens rea as to conduct for assault is that the application of force to another’s body is *intentional*.\textsuperscript{62} This means that tripping and accidentally pushing another person cannot constitute assault, because it that application of force would be *unintentional*.

The *mens rea* category with respect to *circumstances* is about the defendant’s knowledge or awareness of the circumstances. These requirements are about defendant’s mental state, but of

\textsuperscript{58} Such as: *Criminal Code*, RSC 1985, c C-46, s. 151 (sexual interference with a person under the age of 16 years); s 152 (invitation to sexual touching with a person under the age of 16 years); s 153(1) (sexual exploitation of a young person between 16 and 18 years old towards whom the defendant is in a position of trust or authority).

\textsuperscript{59} *Criminal Code*, RSC 1985, c C-46, s 174(1) (being nude in a public place or exposed to public view while on private property).


\textsuperscript{61} For instance, in *De Sousa*, Sopinka J found that there were two components to the mental element of the offence of unlawfully causing bodily harm. The prosecution had to establish intention or recklessness with respect to the underlying offence (mens rea as to conduct); and reasonable foreseeability with respect to the bodily harm caused by the unlawful act (mens rea as to consequences). This was consistent with the Charter as it is not necessary to prove a mental element extending to the consequences of unlawful conduct: *R v De Sousa* (1992) 2 SCR 944. In *Creighton*, Lamer CJ reached a similar conclusion with respect to unlawful act manslaughter: *R v Creighton* (1993) 3 SCR 3.

\textsuperscript{62} *Criminal Code*, RSC 1985, c C-46, s 265(1)(a) (assault).
a slightly different nature to the ones just discussed regarding conduct, as they relate to knowledge, rather than to intention. Mens rea as to circumstances is typically described using words like “knowingly,” “knowing that,” “believing,” “reckless as to whether,” or invoking a negligence standard, according to which a reasonable person ought to have known of the circumstance in question. For instance, offences of laundering the proceeds of crime criminalise defendants who “deal with” (conduct/actus reus) proceeds of any property (circumstances/actus reus) “knowing or believing that all or part of that property” (circumstances/mens rea) were the proceeds of crime.\(^{63}\) That is, the words “knowing or believing” go to the mens rea regarding circumstances.

Finally, the *mens rea* with respect to *consequences* is just that: the defendant’s required mental state in relation to any specified consequences. This is usually indicated by words like “wilfully,” “intentionally,” or “recklessly,” or occasionally “negligently.” In the example of the offence of laundering the proceeds of crime, the mens rea as to consequences is that the defendant must intend to conceal or convert the proceeds of crime.\(^{64}\) Turning to another example, arguably the most classic example of a result crime is murder. There, the actus reus/consequence is that the defendant causes another person’s death. The mens rea for that consequence is that the defendant must either have intended to cause death, or been reckless as to causing death.\(^{65}\)

### 4.5 The Three Cs, Parsing, and Overlap

The parsing process I have described in the above section may seem elementary or obvious to some (particularly Canadian) legally trained readers for whom the process of reading statutes may be second nature. It may strike others as a rather detailed detour from this chapter’s central task of providing a descriptive account of overlap. However, my purpose in this account of parsing is this: understanding the way that a legally trained reader breaks down and parses a criminal offence makes clear the smaller units of meaning from which a statutory offence is built. And if the account of parsing strikes legal experts as elementary, so much the better – simplicity is a decided asset when analysing the conceptual building blocks of criminal offences in order to study the ways in which those components may overlap.

\(^{63}\) *Criminal Code*, RSC 1985, c C-46, s 462.31(1) (laundering proceeds of crime).

\(^{64}\) *Criminal Code*, RSC 1985, c C-46, s 462.31(1).

\(^{65}\) *Criminal Code*, RSC 1985, c C-46, s 229.
I do not suggest that the Canadian “three Cs” approach to parsing criminal offences is without flaws. For instance, as I flagged in Table 4.1 it is not always clear whether the voluntariness requirement is best categorised as part of the actus reus or the mens rea. Furthermore, while it is the prevailing approach in Canada, not all jurisdictions break down criminal statutes according to this same model. Indeed, other models of parsing or breaking down criminal provisions into smaller components could have served a similar analytic purpose in this chapter, though no parsing model is likely to be perfect. In light of all this, the Canadian approach to parsing is the particular parsing approach I have chosen to use in this chapter as part of my overlap analysis.

I spoke at the beginning of this chapter about the ways in which our ordinary language descriptions of behaviour can overlap. A concept of overlapping ordinary descriptions relies on there being some “basic unit” of behaviour, and some “basic description” of that basic unit. To be a fluent, natural language speaker means that even if one cannot articulate what those basic units might empirically be, one has certain intuitions about more and less natural ways to subdivide and describe behaviour. To be “fluent” in the specialised linguistic environment of the criminal law means being able to translate ordinary language and understandings of behaviour into legal language – or conversely, to understand the specialised language of a statute so that one can determine whether behaviour in the real world is captured within a legal provision’s scope.

Any behaviour that may fall under a criminal provision begins with a unique action, by a unique individual in a unique state of mind in a unique set of circumstances with a unique set of consequences. Imagine that criminally relevant behaviour is captured, whether literally or metaphorically, on a video, so that there is some objective, provable basis for a judgment about what happened. Even at the ordinary language level, there is no basic or fundamental description available that captures every element of that uniqueness. Descriptions are general, and use common terms. However, despite some contextual fluidity around the degrees, there will be a clear description available, or more plausibly, a determinate few available.

Now, understanding the actus reus and mens rea components of the “three Cs” offers a useful analytical lens for looking at the question of whether criminal offences overlap. Consider several offences that might arguably represent overlap – that is, we want to decide whether our
A descriptive account of overlap considers them to be examples of overlap, or not. These offences are the New Zealand offences of common assault,\(^{66}\) assault on a child,\(^{67}\) male assaults female,\(^{68}\) and assault on a police officer.\(^{69}\) The Act codifies the common law definition of assault, defining it as the intentional application of force to the body of another person, directly or indirectly.\(^{70}\) In New Zealand, lack of consent is not an element of the offence itself. Section 20(1) of the Crimes Act 1961 preserves the common law defence of consent, including an honest belief in consent.\(^{71}\) The Court of Appeal in *R v Lee* described the basic operation of consent as a defence to assault as follows: “if injury is not intended and there is no reckless disregard for the safety of others, then consent is a complete defence to any charge of assault, provided what occurred comes within the scope of the consent.”\(^{72}\) Furthermore, “where injury was intended or where the perpetrator was reckless, consent is still a complete defence, provided what occurred comes within the scope of the consent.”\(^{73}\) This means that, for instance, a hypothetical surgeon who is charged with assault for a consensual surgery on a patient would have a complete defence. In practice, this defence could be understood as operating as a shadow element of the offence itself – surgeons are not routinely charged with offence, only to be acquitted on the basis of a consent defence; rather, they are not prosecuted in the first place. In any assault case in which a defendant raises an air of reality as to a consent defence, the prosecution must disprove the consent defence beyond reasonable doubt.

I have included the defence in square brackets in the circumstances row of table 4.2, to indicate the way in which the defence might be parsed alongside the offence itself. For reasons of clarity, I have not reproduced this square bracketed “shadow element” in tables 4.3 to 4.5. One reason for this is that despite my metaphor of the defence constituting almost a “shadow element” of the offence itself, in strict terms, consent operates as a defence rather than an offence element. A second reason for preserving the separation between offence elements and

---

\(^{66}\) Crimes Act 1961, s 196 (common assault).

\(^{67}\) Crimes Act 1961, s 194(a) (assault on a child under 14 years).

\(^{68}\) Crimes Act 1961, s 194(b) (assault by a male on a female).

\(^{69}\) Crimes Act 1961, s 192(2) (aggravated assault: assault on a constable).

\(^{70}\) Crimes Act 1961, s 2(1). It also defines assault as including threatening acts or gestures, a separate path to conviction that I will not focus on during this discussion.

\(^{71}\) *R v Lee* [2006] 3 NZLR 42 (CA) at paras 160 and 311; and *R v Nazif* [1987] 2 NZLR 122 (CA) at 128.

\(^{72}\) *R v Lee*, *ibid*, at para 313.

\(^{73}\) *Ibid*, at para 314; there are some exceptions to this, for instance, in relation to fighting; also see, James Mountier, *What Happens on the Field Stays on the Field: When Should the Criminal Law Be Employed for Assaults During Sport?*, LLB(Hons), University of Otago, 2012 [unpublished], at 3.
circumstance elements is that some of the victim-specific offences, particularly assault on a child under the age of 14, interact in more complicated ways with the defence, as it is not clear that a child of less than 14 could ever consent to her own assault.

Common assault is the most basic assault offence defined in the Act, intended to cover assaults at the lowest tier of seriousness that are criminalised. It carries a maximum penalty of one year’s imprisonment. The section 194 offences of assault on a child, and male assaults female run in parallel with common assault, also covering “assault”, but limiting the application of the offence to particular circumstances involving specific sets of victims and offenders. Both are subject to maximum penalties of 2 years’ imprisonment. Assault on a police officer sits within a section labelled “aggravated assault,” but operates in parallel with common assault and its 1-year maximum penalty. Like the section 194 offences, it picks out a special class of common assault in which the victim is specific kind of person: here, a constable or any person acting in the aid of any constable, or any person in the lawful execution of any process. Below, I parse the four offences in table form (see Table 4.2 to Table 4.5).

<table>
<thead>
<tr>
<th>Common Assault</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct</strong></td>
<td>Apply force</td>
<td>Intention</td>
</tr>
<tr>
<td><strong>Circumstances</strong></td>
<td>1. Directly or indirectly (e.g. directly striking with one’s fist vs indirectly striking by throwing a rock) 2. Victim: another person [3. No consent]</td>
<td>1. Intention 2. Knowledge [3. Knowledge of or honest belief in consent]</td>
</tr>
<tr>
<td><strong>Consequences</strong></td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>
Table 4.3: Assault on a Child (Crimes Act 1961, s 194(a))

<table>
<thead>
<tr>
<th>Assault on a Child</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct</strong></td>
<td>1. Apply force</td>
<td>1. Intention</td>
</tr>
<tr>
<td><strong>Circumstances</strong></td>
<td>1. Directly or indirectly</td>
<td>1. Intention</td>
</tr>
<tr>
<td></td>
<td>2. Victim: another person</td>
<td>2. Knowledge</td>
</tr>
<tr>
<td><strong>Consequences</strong></td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 4.4: Male assaults Female (Crimes Act 1961, s 194(b))

<table>
<thead>
<tr>
<th>Male Assaults Female</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct</strong></td>
<td>1. Apply force</td>
<td>1. Intention</td>
</tr>
<tr>
<td><strong>Circumstances</strong></td>
<td>1. Directly or indirectly</td>
<td>1. Intention</td>
</tr>
<tr>
<td></td>
<td>2. Victim: another person</td>
<td>2. Knowledge</td>
</tr>
<tr>
<td></td>
<td>4. Defendant: male person</td>
<td>4. -</td>
</tr>
<tr>
<td><strong>Consequences</strong></td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 4.5: Aggravated Assault: Assault on a Constable (Crimes Act 1961, 192(2))

<table>
<thead>
<tr>
<th>Assault on a Police Officer</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct</strong></td>
<td>1. Apply force</td>
<td>1. Intention</td>
</tr>
<tr>
<td><strong>Circumstances</strong></td>
<td>1. Directly or indirectly</td>
<td>1. Intention</td>
</tr>
<tr>
<td></td>
<td>2. Victim: constable OR person acting in aid of a constable OR person in the lawful execution of any process</td>
<td>2. Knowledge that person is a constable etc (implied by intent requirement below).</td>
</tr>
<tr>
<td><strong>Consequences</strong></td>
<td>-</td>
<td>1. Intent to obstruct the constable or other person acting in execution of his/her duty</td>
</tr>
</tbody>
</table>

Parsing these provisions and breaking them down into their separate basic components, as set out in Table 4.2 to Table 4.5, allows us to see which basic offence units the four offences share in common, and where they diverge. I will begin with the commonalities. First, the four offences share the same *conduct* requirements. Each offence criminalises the behaviour of intentionally
(mens rea) applying force (actus reus). The first three offences also are identical in terms of their consequences, in that they do not require any consequences at all: common assault, assault on a child or assault by a male on a female can all include applications of force causing no injuries of any kind.

The offences also share some of the circumstances to which they apply. Because all four offences are based upon the definition of assault set out in section 2 of the Act, all require the circumstance that the application of force may be direct, or indirect. That is, the force may be applied directly, for instance, by the defendant striking the victim with his hand, or indirectly, such as by throwing an object at the victim. Second, all four offences concern human victims – this follows again from the definition of assault, which concerns applications of force to humans, rather than, for instance, to animals or to inanimate property.

Despite these commonalities, the offences are clearly not identical. The differences between their elements, or “basic units” of legal description, are chiefly differences in the further specific circumstances to which each applies. These are circumstances about the category of victim to which each offence applies, and the category of offender who can commit the offence. Common assault can be committed by any type of person against any other person. But assault on a child requires a victim who is under 14. Male assaults female requires a female victim and a male offender. Assault on a police officer applies only when the victim is a police constable or other person performing similar public duties.

Assault on a police officer differs from the other offences in a further way. Like the other offences, parsing it reveals there is no consequences requirement in the actus reus category: the offence can be committed without the assaulted police officer suffering any injury. But there is a mens rea requirement as to consequences – the defendant must have committed the assault with the intent to obstruct the police officer or other person in the commission of his or her duties. Essentially this is a motive requirement. Note that it does not imply an actus reus/consequences element however as the offence could be committed where a person intended to obstruct a police officer in carrying out her duties, but in fact failed to effectively obstruct her.

From the point of overlap in the descriptive sense, the question here is whether, at a descriptive level alone, the four assault offences overlap with one another. Imagine we have four videos of four units of behaviour. All four videos show a unique action by a unique individual in
a unique state of mind in a unique set of circumstances with a unique set of consequences. In each video, an adult male defendant performs the exact same action: he slaps the face of another person. In each video, the victim is not injured or visibly harmed as a result of the slap. From the point of view of the defendants’ conduct and the consequences of that conduct, the adult man in each video does exactly the same thing, which can properly be described in the same way. But if we look not only at conduct and consequences and consider also circumstances, then what the man in each video does differs a great deal, because videos show that each slap was administered in different circumstances. The victim in video two is a seven-year-old girl. The victim in video three is a 30-year-old woman. The victim in video four is a uniformed male police officer. The victim in video one could be anyone, but for the sake of argument, I will say here it is an adult man.

Table 4.6 below shows which legal descriptions are available for the behaviour in each of the videos. For video one, the only charge, or legal description, available is common assault, which is also available for the behaviour in the other three videos. For video two, the behaviour could be legally described as common assault, as assault on a child, or even as male assaults female, since the child is a girl. The behaviour in video three could be legally described as common assault or male assaults female. The behaviour in video four can be legally described as common assault or assault on a police officer, providing that the video also shows the defendant slapped the police officer with the intention to impede him in his duties. Furthermore, in a further video depicting a man slapping a female police officer, the charge of male assaults female would also be available, in addition to assault on a police officer and common assault.

74 I have used an adult male defendant for this example so that all four of the offences are available on these facts.
Table 4.6: Legal Descriptions Available for Behaviour in the Four Videos

<table>
<thead>
<tr>
<th>Video 1: man slaps man</th>
<th>Common Assault</th>
<th>Assault on a Child</th>
<th>Male Assaults Female</th>
<th>Assault on a Police Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Video 2: man slaps 7-year-old girl</td>
<td>✔</td>
<td>✔</td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Video 3: man slaps 30-year-old woman</td>
<td>✔</td>
<td></td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Video 4: man slaps male uniformed police officer with intent to obstruct duties</td>
<td>✔</td>
<td></td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>Video 4A: man slaps female uniformed police officer with intent</td>
<td>✔</td>
<td></td>
<td>✔</td>
<td>✔</td>
</tr>
</tbody>
</table>

Descriptively then, common assault is overlapped by all three of the victim-specific common assault offences discussed. And given the right circumstances, the victim-specific offences can also overlap with each other.

Any temptation to say here that one or other of those legal descriptions of the behaviour in the videos is descriptively better or more accurate than the others needs to be resisted at this descriptive stage. Plain language descriptions can be more or less specific, and less or more general. Similarly, legal descriptions of the same behaviours can be more or less specific, and less or more general. So, in theory at least any time a factual situation could be “appropriately” described by more than one common language description, a legislature might choose to enact several legal provisions dealing with that behaviour at similarly general and specific levels.
We might be tempted to ask the question, which is the descriptively most fitting account of the facts that are depicted in video two (the man slapping the 7-year-old girl)? Is the best description that a person struck another person, or would a description stipulating that the victim was a child be more semantically accurate in terms of conveying the important facts of the case? Of course, no matter how hard one might try to phrase these kinds of questions in purely semantic and descriptive terms, the act of assessing which description is “better” is by definition an evaluative question. Meaningful evaluation cannot take place in a vacuum: it must be done with reference to some kind of criteria, norms or standards. The criteria or standards according to which evaluations are made vary hugely by context.

In order to demonstrate how context and criteria shape and influence the process of evaluation, consider the following example in which I compare two distantly-related yet very different objects: a coil of climbing rope, and a coil of dental floss. Suppose a person asked me to determine which object is “better,” it would be sensible for me to ask, better by what metric? If the question asker clarified that they mean, which would be a better tool for me to use to floss my teeth, then my answer is clearly that the dental floss is better: it is custom fit for the purpose in question. Even if the dental floss in question is not my most favourite brand of dental floss, or I do not always remember to floss my teeth every day, it is clear that as compared to climbing rope, the dental floss is a vastly better tool for teeth cleaning. Now consider instead now that when I ask the question “better by which metric” the question asker clarified, “which is better for you to make a swing for your nephew?” According to this criterion, the climbing rope is clearly better. Dental floss is not strong enough to use to make a swing, whereas climbing rope is designed to be strong enough to safely and reliably support heavy weights. Again, there might be other ropes in existence that would be even better to use in making a swing, but as compared to dental floss, clearly the climbing rope is better.

Imagine now a third scenario: I need coins to feed a parking meter, and have only a fifty-dollar note. The only store in the area is a convenience store with a sign in the window stating that it does not give change for parking without purchase. I walk into the store and look for a purchase I can make to break my fifty-dollar note. The store is unusually specialised, stocking only two kinds of items: three-dollar packets of dental floss and forty-five dollar climbing ropes. I have no need for rope, but I recall that I am running low on dental floss. If I ask myself whether it is better for me to buy the floss or the rope, the clear answer seems to be the floss: it is useful.
object I would have had to buy at some point anyway, and serves my primary function of securing me ample change to use for parking at a modest cost. Even supposing that I only need five dollars’ worth of parking meter money, spending forty-five dollars on a climbing rope for which I have no use seems the worse option.

Consider finally a fourth variation. In this case, I learn that the dental floss is made in a small local factory, staffed by adults who are paid a living wage and enjoy fair working conditions, whereas the rope has been manufactured using extremely low-paid child labour in an economically disadvantaged country, and the children working in the factory are subjected to oppressive and unsafe working conditions. If I am asked which product is “better,” in the sense of being the more ethically produced product, I would answer, the dental floss.

The four variations I have just outlined all involve me evaluating in various contexts whether the dental floss or climbing rope is “better.” My answer to the question varied depending on the context and the relevant criteria I was applying. In all four cases, my judgment of whether the climbing rope or dental floss is “better” is evaluative and comparative. However, only the fourth example is normative in the sense of employing an evaluative criterion referencing moral norms. In all four examples, I judge floss or rope to be better than the other, but only in the final example does this judgment to have a normative or moral sting.

In making evaluations, whether it is a comparison between dental floss and climbing rope, or between two possible factual descriptions of the behaviour captured in video two, context and the criteria being used to make the evaluations shape and determine which evaluated item or description is deemed “better.” To the extent that it is tempting or even necessary to evaluate two possible descriptions of the behaviour in video two, it is important to be aware of the criteria that provide the parameters for that assessment. Recall that the behaviour shown in video two can be truthfully described as “an adult man slapping a young girl” or as “a person slapping another person.” If we decide that the more specific description is “better,” then (unless that evaluation is arbitrary and baseless) it is based on criteria according to which, for instance, specificity is preferable to vagueness, provided that the specified details are relevant; and factors such as the victim being a child are always or usually regarded as relevant in the case of physical violence.
During this chapter, I have carefully resisted any temptation to evaluate and compare the available overlapping legal descriptions of the behaviour shown in Videos 1 to 4A.\textsuperscript{75} That is because the content of the evaluative criteria that would need to be brought to bear in making those comparisons are some of the questions at issue in this dissertation as a whole: it would be circular to posit those criteria at this point in the dissertation. At this point in my analysis, it is sufficient to say that in a descriptive sense, the offences of common assault, assault on a child, male assaults female and assault on a police officer overlap with one another. The ordinary language descriptions of the corresponding pieces of behaviour overlap in the sense that they pick out the same “basic unit” of behaviour.\textsuperscript{76} The legal descriptions overlap in the sense that the ordinary language descriptions of the basic unit of behaviour can be translated to more than one available legal offence description. So, for example, the man in video two who slaps a seven-year-old girl could be charged with more than one offence for the same piece of behaviour. It is a separate evaluative question whether behaviour in the video is “better described by one of those overlapping offences than the others.

\section*{4.6 Conclusion}

This chapter has explored at a descriptive level the “basic units” in terms of which we understand and describe behaviour. Even at the level of ordinary language description, what constitutes the basic unit of a piece of behaviour depends on the context in which one is understands or describes that behaviour. As we saw in section 4.2, the basic unit of a sheet of postage stamps in the context of mailing a domestic letter is a single, complete postage stamp. But in the context of starting a campfire, it may be the entire undifferentiated sheet of stamps. And in the context of deciding to make some last-minute confetti for a celebration, the basic unit could be the hundreds of tiny fragments that would be achieved by shredding the entire sheet.

Although basic units of behaviour or basic descriptions are context dependent, in a given context, we indeed can propose a basic unit of behaviour and basic description. For instance, in the cat-on-the-mat example discussed above,\textsuperscript{77} having decided that the context concerns reporting on any animals’ position and placement in a particular room, “the cat sat on the mat” is a good candidate for a basic unit of behaviour, and basic description of that unit.

\footnotesize{\textsuperscript{75} See Table 4.6 above.} \\
\footnotesize{\textsuperscript{76} See discussion at the beginning of this section at 87.} \\
\footnotesize{\textsuperscript{77} See discussion of the example in section 4.2.}
As I discussed in section 4.3, ideally, the transition between basic factual descriptions of basic units of behaviour “in the world” to legal descriptions will be as clear a transition as possible. In practice, a range of factors can complicate this transition. For one thing, the distinction between fact and law is not always clear. For another, the very decision to translate a factual description of a unit of behaviour into a legal description imposes a legal context, or legal theoretical frame, onto that behaviour. Sections 4.4 and 4.5 of this chapter have examined the statutory syntax of criminal offences, that is, the syntax of legal descriptions of units of behaviour. Doing so helps to reveal when legal descriptions of behaviour overlap, in the sense that they cover the same “basic units” of behaviour. As Table 4.6 demonstrates, the offences of common assault, assault on a child, male assaults female and assault on a police officer overlap when applied to certain factual situations or units of behaviour. That is, the offences are an example of depth in the criminal law.

Having examined the concept of overlap, and depth, at a descriptive level in this chapter, the next chapter moves to a normative assessment of when descriptive overlap, or depth is problematic. That is, when does depth constitute overdepth in the sense that the depth is part of the problem of overcriminalisation?
Chapter 5: Overlapping Criminal Offences that are Part of Overcriminalisation

5.1 Introduction

The previous chapter presented in descriptive terms what it means to say that two or more criminal offences overlap with one another. As I emphasised in that chapter, it is helpful to keep the descriptive question of what is depth or overlap in the criminal law as separate as possible from the normative question of when depth or overlap is part of the problem of overcriminalisation. The overcriminalisation literature, when it refers to problems of overdepth, does not carefully distinguish between overlap that is part of overcriminalisation and overlap that is unproblematic.\(^1\) This chapter interrogates that difference.

My method in this chapter is to consider categories of descriptive overlap and analyse whether they seem to be vulnerable to the problems associated with overdepth and overcriminalisation discussed in chapter 3. Sections 5.2 to 5.5 set out several categories of descriptive overlap that seem to be “benign” or unproblematic and not part of the problems associated with overcriminalisation. In sections 5.6 and 5.7 I highlight two categories of descriptive overlap that frequently do give rise to troubles associated with overcriminalisation. Coupled with the earlier chapters, the taxonomical and analytical work of sections 5.2 to 5.7 provides an important foundation for the case studies discussed in chapters 7 to 12. In assessing those case studies, chapter 4 provides the analytical tools for assessing whether case study specific offences descriptively overlap with general offences. The categories of benign and problematic descriptive overlap discussed in sections 5.2 to 5.7 of this chapter are a useful starting place, providing valuable points of comparison in assessing whether descriptive overlap in the case studies is problematic and part of the problem of overcriminalisation as discussed in chapters 2 and 3.

5.2 Unproblematic Overlap: Tiered Hierarchies and Lesser Included Offences

A form of depth that commonly occurs in the criminal law is overlap between offences that are part of a tiered hierarchy of related offences. For instance, the hierarchy of assault and offences that require proof of harm or injury is built using a kind of nested structure, where more serious

\(^1\) See Chapter 2, at section 2.10 and 2.11.
offences are built up from the basic, entry-level offence of common assault. More serious offences add additional actus reus or mens rea requirements as to conduct, circumstances and consequences. In New Zealand, there is a hierarchy of assault-based offences, beginning with common assault at the lowest level, and then, as further culpability and consequence requirements are added, it builds to more serious varieties of assault, and then manslaughter and murder. Table 5.1, below, illustrates the way that the more serious offences build upon the lower-level offences, adding additional elements to reflect heightening culpability or consequences, or both.

Table 5.1: Nested Structure of NZ Assault Offences

<table>
<thead>
<tr>
<th>Offence</th>
<th>Actus Reus Elements</th>
<th>Mens Rea Elements</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>S 196: Common Assault</td>
<td>See Table 4.2</td>
<td>See Table 4.2</td>
<td>1 year</td>
</tr>
<tr>
<td>S 194(a): Assault on a child</td>
<td>Common Assault elements + Circumstances: Victim under age of 14</td>
<td>Common Assault elements</td>
<td>2 years</td>
</tr>
<tr>
<td>S 194(b): Male assaults female</td>
<td>Common Assault elements + Circumstances: Victim a woman or girl; Defendant a man</td>
<td>Common Assault elements</td>
<td>2 years</td>
</tr>
<tr>
<td>S 192(1): Aggravated Assault: Assault to facilitate other offences or avoid detection or arrest</td>
<td>Common Assault elements + Consequences: No consequences required</td>
<td>Common Assault elements + Consequences: Intent to (a) commit or facilitate commission of imprisonable offence, (b) avoid detection of self or other person in commission of other offence; or (c) avoid arrest following commission of another offence.</td>
<td>3 years</td>
</tr>
<tr>
<td>S 192(2): Aggravated Assault: Assault on a police officer</td>
<td>Common Assault elements + Circumstances: Victim a police officer etc Consequences: No consequences required</td>
<td>Common Assault elements + Circumstances: Knowledge Consequences: Intention to obstruct a police officer or other person in commission of duties</td>
<td>3 years</td>
</tr>
</tbody>
</table>

2 Chapter 4, section 4.5, Table 4.2.
<table>
<thead>
<tr>
<th>Offence</th>
<th>Actus Reus Elements</th>
<th>Mens Rea Elements</th>
<th>Maximum Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>S 193: Assault with intent to injure</td>
<td>Common Assault elements + Consequences: (no actual injury required)</td>
<td>Common Assault elements + Consequences: Intent to injure</td>
<td>3 years</td>
</tr>
<tr>
<td>202C: Assault with a Weapon</td>
<td>Common Assault elements + Circumstances: Uses a thing as a weapon</td>
<td>Common Assault elements + Circumstances: Intention to use thing as a weapon</td>
<td>5 years</td>
</tr>
<tr>
<td>S 189(2): Injuring with intent to injure or with reckless disregard for safety of others</td>
<td>Common Assault elements + Consequence: injures</td>
<td>Common Assault elements + Consequence: Intent to injure (ie same as s 193) or reckless disregard for safety of others</td>
<td>5 years</td>
</tr>
<tr>
<td>S 188(2): Wounding with intent to injure</td>
<td>Common Assault elements + Consequence: Wounds, maims, disfigures, causes grievous bodily harm (all more serious consequences than injuring)</td>
<td>Common Assault elements + Consequence: Intention to injure or reckless disregard as to safety of others (ie not full intent as to actual consequences that materialised) (ie same as s 189(2))</td>
<td>7 years</td>
</tr>
<tr>
<td>S 191(2): Aggravated injuring</td>
<td>Common Assault elements + Consequence: Injures (ie same as s 189(2))</td>
<td>Common Assault elements + Consequence: Intent to (a) commit or facilitate commission of imprisonable offence, (b) avoid detection of self or other person in commission of other offence; or (c) avoid arrest following commission of another offence (ie same as for s 192(1))</td>
<td>7 years</td>
</tr>
<tr>
<td>S 189(1): Injuring with intent to cause grievous bodily harm</td>
<td>Common Assault elements + Consequence: Injures (ie same as for s 189(2) and 191(2))</td>
<td>Common Assault elements + Consequence: Intent to cause GBH (ie intended a consequence more serious than the one that materialised. A kind of partial attempt)</td>
<td>10 years</td>
</tr>
<tr>
<td>S 188(1): Wounding with intent to cause GBH</td>
<td>Common Assault elements + Consequence: Wounds, maims, disfigures, causes grievous bodily harm (ie same as for s 188(2))</td>
<td>Common Assault elements + Consequence: Intent to cause GBH (ie same as for s 189(1))</td>
<td>14 years</td>
</tr>
<tr>
<td>Offence</td>
<td>Actus Reus Elements</td>
<td>Mens Rea Elements</td>
<td>Maximum Penalty</td>
</tr>
<tr>
<td>---------</td>
<td>---------------------</td>
<td>-------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>S 191(1): Aggravated Wounding</td>
<td><strong>Common Assault elements</strong> + Consequence: Wounds etc, (ie same as for 188(1) and 188(2)).</td>
<td><strong>Common Assault elements</strong> + Consequence: Intent to (a) commit or facilitate commission of imprisonable offence, (b) avoid detection of self or other person in commission of other offence; or (c) avoid arrest following commission of another offence (ie same as for ss 191(2) and 192(1))</td>
<td>14 years</td>
</tr>
<tr>
<td>S 173: Attempted Murder (subset of attempted murder, where act constituting the attempt was an assault)</td>
<td><strong>Common Assault elements</strong> + Consequence: no consequence requirement</td>
<td><strong>Common Assault elements</strong> + Consequence: Intention to kill</td>
<td>14 years</td>
</tr>
<tr>
<td>Subset of Manslaughter: Unlawful Act manslaughter, where the unlawful act is a kind of assault Ss 171, 177.</td>
<td><strong>Common Assault elements</strong> + Consequence: Death</td>
<td><strong>Common Assault elements</strong> + Consequence: No intention required as to consequences.</td>
<td>Any sentence up to and including life imprisonment.</td>
</tr>
<tr>
<td>Subset of Murder: Where the act effecting the killing of the victim is an assault Ss 167, 172.</td>
<td><strong>Common Assault elements</strong> + Consequence: Death</td>
<td><strong>Common Assault elements</strong> + Consequence: Intention to kill (ie same as s 173) or intention to assault and/or injure and recklessness as to whether death results</td>
<td>Mandatory life imprisonment sentence, minimum non-parole period of 10 years</td>
</tr>
</tbody>
</table>

This is a common structure for a set of related offences dealing with behaviour on a scale typically or plausibly taken to be from least to most serious.\(^3\) Consider for illustrative purposes the relationship between injuring and wounding offences. In New Zealand, the legal concept of wounding has been held to mean “a breaking in the continuity of the skin.”\(^4\) “To injure” is defined in the Crimes Act as “caus[ing] actual bodily harm,”\(^5\) which has been interpreted to mean a hurt or injury interfering with the health or comfort of the victim. An injury need not be

\(^3\) See for instance McMullin J’s description at footnote 11 below of injuring as a “crime less in quality” than wounding in *R v Waters* [1979] 1 NZLR 375 (CA), at 380.

\(^4\) *R v Waters* [1979] 1 NZLR 375 (CA) McMullin J for the Court, at 378.

\(^5\) Crimes Act 1961, s 2.
permanent, but must be more than transitory and trifling.\textsuperscript{6} That is, “injuring” does not require the breaking of the skin, but “wounding” does.\textsuperscript{7} The relationship between injuring and wounding is this: a person can be injured without being wounded, but cannot be wounded without being injured.

In the 1979 New Zealand case of \textit{R v Waters},\textsuperscript{8} the Court of Appeal considered the relationship between wounding and injuring offences. At trial, the appellant had been convicted of wounding with intent to cause grievous bodily harm under section 188(1) of the Crimes Act 1961 for an attack on a female complainant in which he had brought her to the floor, sat on her back and banged her face against the floor several times, causing her nose to bleed heavily.\textsuperscript{9} He appealed his conviction on the basis that a nosebleed was not a wound. The Court found as a general matter that a nosebleed caused by violence can be a wound: although wounds are most commonly involve “a fracture of the entire skin” that is external, they can also be internal, involving internal bleeding.\textsuperscript{10} However, in this case, the Court considered the medical evidence at trial “had not been sufficiently explicit to establish whether or not the complainant’s nose bleed was a wound.”\textsuperscript{11} Rather than acquitting the appellant, the Court substituted a conviction for injuring with intent to cause grievous bodily harm under section 189(1).

What is particularly interesting about the case in the context of my discussion of hierarchies of offences and lesser included offences is that McMullin J, writing for the Court, expressly states that the substituted verdict for the injuring offence is for a “crime less in quality” than the original wounding conviction:\textsuperscript{12} the wounding offence had a maximum penalty of fourteen years’ imprisonment,\textsuperscript{13} whereas the substituted injuring offence had a ten-year

\textsuperscript{6} \textit{R v Donovan} [1934] 2 KB 498, 509; and discussion in \textit{R v Waters} [1979], supra note 4, at 380.
\textsuperscript{8} \textit{R v Waters} [1979], supra note 4.
\textsuperscript{9} In addition, the appellant was also charged with rape at trial. The evidence was that in addition to his blows to the complainant’s head, he had threatened her with a knife, tied her hands behind her back and raped her. The jury acquitted him of the rape charge: \textit{R v Waters} [1979] 1 NZLR 375, at 376.
\textsuperscript{10} \textit{R v Waters} [1979], supra note 4, at 378-79.
\textsuperscript{11} \textit{R v Waters} [1979], supra note 4, at 379.
\textsuperscript{12} \textit{R v Waters} [1979], supra note 4, at 380. Interestingly, although the substituted offence had a lower maximum penalty than the original offence, the Court held that “it would be inappropriate to interfere with the sentence imposed by the [trial] Judge” due to “a number of serious features about this case” (at 380).
\textsuperscript{13} Crimes Act 1961, s 188(1).
Furthermore, the injuring offence did not require medical proof of bleeding: the extensive bruising and abrasions and the bleeding nose as a result of violence were more than sufficient evidence to establish injuring. This illustrates the idea that in some cases, a nosebleed caused by violence might not be a wound, but it would still be an injury. Injuring and wounding are both measures of physical harm. Injuring with intent to cause grievous bodily harm is a lesser-included offence of wounding with intent to cause grievous bodily harm.

This common structure of a tiered hierarchy of related offences involves overlap in the descriptive sense discussed in chapter 4. However, at first sight it does not seem troubling in a way that would suggest it is part of overcriminalisation. Let me demonstrate this by assessing it against the problems of overlap, and specifically of overdepth, discussed in chapter 3. First, tiered hierarchies of offences are not likely in and of themselves to cause some offences in a hierarchy of related offences to be subject to either disproportionately high or disproportionately low maximum penalties in relation to other offences within the hierarchy as long as the penalties

14 Crimes Act 1961, s 189(1).
15 R v Waters [1979], supra note 4, at 380.
16 Common law rules against double jeopardy provide some protections from the potential to “stack” overlapping charges against a defendant, both in terms of multiple prosecutions, and multiple punishments, for the same criminal conduct. The United States Supreme Court in Blockberger v United States (1932) 284 US 299 addressed the question of what constitutes “sameness” of offences for double jeopardy purposes in subsequent trials. According to Blockberger, two offences are the same if they require proof of the same elements and subsequent prosecution of conduct that has already been prosecuted under an offence that requires proof of the same elements will constitute double jeopardy. Contrastingly, if two offences each “requires proof of a different element,” then they can be treated as two separate offences, and do not raise double jeopardy concerns. See Blockberger, at 304.

In Ashe v Swenson (1970) 397 US 463, the United States Supreme Court proposed a second test, the “same transaction” test. According to this test, two offences can be understood as constituting the “same criminal offence” for double jeopardy purposes if the offences stem from the same criminal episode or transaction.

In Canada, the Kienapple principle provides that when a criminal transaction gives rise to two or more convictions on offences with substantially the same elements, the accused should be convicted of only the more serious offence. A conditional stay will be entered on the second and lesser charge. Kienapple v R [1975] 1 SCR 729 (SC).


The existence of these common law rules does not wholly alleviate concerns about overlap in criminal offences, as conceptualized in this thesis and within the broader literature on overcriminalization. For example, even when the common law has mechanisms to ensure that an accused is only convicted of one offence (in the presence of two or more overlapping charges), prosecutors retain considerable discretion about how to charge the offender, and that discretion raises the rule of law concerns that I have detailed in chapter 3, at sections 3.6 - 3.7.
are proportionately tiered. As can be seen in Table 5.1 above, the maximum penalties available for offences in a hierarchy increase as one progresses further up the scale of offence seriousness.

Secondly, tiered hierarchies do not give rise to rule of law concerns stemming from issues of uncertainty or abuses of prosecutorial discretion. There can be some uncertainty about which offence in a tiered hierarchy may be charged in a given instance. Suppose a person’s conduct satisfies the elements of a more serious offence, but the prosecutor decides strategically to charge instead a lesser-included offence: on these facts, the uncertainty and prosecutorial discretion in fact operates in the defendant’s favour. That is, someone who assaults a person with a weapon may not know for certain whether she is likely to be charged with assault with a weapon, assault with intent to injure, or simply common assault. But if that person is eventually charged with common assault, this does not seem on its face to be troubling from a rule of law point of view.

Nor is it the case that hierarchies of related offences, which include more serious offences and lesser-included offences, give rise to a risk of “charge stacking.” A prosecutor can choose to charge the most serious available offence that she thinks she can prove, knowing that if that offence cannot be established, a lesser-included offence may instead still be provable. But that seems fair enough, rather than a way for prosecutors to unfairly stack the deck against defendants. The concern with charge-stacking is not that prosecutors may charge the most serious available offence, but rather that they may overwhelm a defendant with a number of overlapping offences in order to raise the overall maximum penalty and induce defendants with a strong case to plead guilty to lesser charges, waiving their right to a jury trial.

A complicating factor here is the question of how systemic and implicit biases against some kinds of defendants could combine with overlap involved in tiered hierarchies of related offences to produce harms. Tiered offence hierarchies generate opportunities for charging discretion – to charge the offence that perhaps most directly translates into legal language the

---

17 See discussion in chapter 3, at section 3.9.
factual description of the basic unit of behaviour an accused engaged in, or to charge a lesser included offence, which may not as accurately translate the ordinary language description of the accused’s behaviour, but where that inaccuracy flatters the accused. Kenneth Davis has pointed out that:

A fundamental fact about discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate.

Wide literatures note that where discretion exists within a system, it is not always exercised evenly across different population groups. For instance, if prosecutors consistently lay more serious charges in an offence hierarchy against Indigenous or racialised suspects for “the same” conduct than they do for white suspects, then each individual charging decision might appear “fair enough.” However, at a systemic level, when combined with implicit bias, an apparently neutral tiered hierarchy of overlapping offences can result in unequal application of the criminal law and unfairness. Clearly, this point is not one that is confined to hierarchical tiered structures of criminal offences. As I noted, tiered hierarchies are built into the criminal law. And if structural biases operate at the level of charging decisions within a tiered hierarchy of charging options, they also operate more widely in other decision-making opportunities.

---

within the system. This is a complex area and warrants further study. For reasons of scope, while I flag it here, I cannot do justice to the full depth of this issue in this dissertation. But it is important to note that while lesser-included offences seem like a benign and unavoidable form of descriptive overlap, and in general not problematic instances of overlap or part of overcriminalisation, they can interact with other systemic biases within a legal system in troubling ways.

5.3 Unproblematic Overlap: Filling Within-Scope Gaps in the Criminal Law

A class of new or specific offences that might appear at first to descriptively overlap with other more general offences, but which in fact do not contribute to problems of overcriminalisation, or to raise fewer such problems, are those offences that fill gaps in criminalisation. If a new offence fills a gap by criminalising conduct that previously was not criminalised, and only fills that gap, then the new offence is not an example of descriptive overlap at all. It simply plugs a gap. If a new offence is not overlap descriptively speaking, then it is not depth, and cannot constitute overdepth. If it contributes to overcriminalisation, it is only because it represents overbreadth: that is, because it (newly) criminalises conduct that is outside the proper scope of the criminal law.

In this section, I will introduce two categories of gaps: “descriptive gaps,” and “within-scope gaps.” The first category of “descriptive gaps” refers to something close to the ordinary non-legal meaning of the word “gap.” The ordinary meaning of the word is: “a break or hole in an object or between two objects; a space interval or break.” This ordinary sense of the word gap is invoked in other non-legal linguistic contexts; for instance, in describing a gap in a fence, or a 6-year-old’s gappy smile after she loses her first tooth. In these non-legal examples, the word “gap” describes a space, hole, break in continuity, or spatial absence. In the context of this dissertation’s discussion of the law’s criminalisation or non-criminalisation of particular units of behaviour, I use the term “descriptive gap” for clarity. To say there is a descriptive gap in the law simply means that there no law exists about a particular matter or unit of behaviour.

Readers interested in reading more may wish to refer to the sources in footnotes 19 - 25 as a starting point.

See figure 5.1 below.

If one looks for them, there are infinitely many descriptive gaps in the criminal law. For instance, imagine a unit of behaviour in which I balance on one leg and hold my breath as I turn the key in my front door when I get home from work. This unit of behaviour is not currently criminalised. In this sense, it occupies a descriptive gap in the criminal law. If I engage in the unit of behaviour, I cannot be arrested, charged or convicted for having done so. In purely descriptive terms, the unit of behaviour falls through a gap in the criminal law. Yet, in the context of assessing when offences are part of overcriminalisation, this purely descriptive, ordinary usage sense of the word “gap” is not especially illuminating. If a new offence were introduced criminalising the unit of behaviour (standing on one leg and so on), the current descriptive gap would be filled. However, it would be no special argument in support of the new offence that it fills a descriptive gap. Commentators who wish to avoid overcriminalisation would rightly object that the new offence will contribute to overcriminalisation by virtue of overbreadth: standing on one leg and so on is neither harmful nor wrongful and is not within the criminal law’s proper scope. The example is a clear, if contrived, instance of a new offence that would fill a descriptive gap, but in doing so would extend the criminal law beyond its proper bounds, constituting overbreadth and contributing to overcriminalisation on that basis.

It is against this understanding of descriptive gaps that I introduce the second category of gap-filling offences: within-scope gaps. As I will explain, within-scope gaps are a subcategory of descriptive gaps. The relationship between the descriptive gaps and within-scope gaps is illustrated in the flow chart (or conceptual “family tree”) set out in Figure 5.1 below also illustrates the relationships of these gaps in the criminal law to forms of depth in the criminal law that are justified on pragmatic, evidential or fair-labelling grounds, as will be discussed in sections 5.4 and 5.5.

The term “within-scope gap” refers to descriptive gaps conduct in the criminal law as just defined, that within the proper scope of the criminal law. To say that the uncriminalised conduct is within the proper scope of the criminal law means that newly criminalising it will not contribute to overbreadth. Unlike descriptive gaps, the term within-scope gap includes an evaluative dimension. Implicit in my use of the term within-scope gap is the notion that a type of conduct that can and even should be criminalised is not yet criminalised. To say that a certain kind of as-yet uncriminalised conduct should be criminalised implies two claims. The logically prior claim is that the conduct in question is within the proper scope of the criminal law. That is,
if the conduct were to be criminalised, this would not violate the proper limits of the criminal law – whatever those are determined to be – and thus would not contribute to overbreadth in the criminal law. However, a finding that a certain kind of conduct is within the proper scope of the criminal law does not necessarily imply a second, stronger claim that the conduct should be criminalised. That is, a finding that criminalisation is permitted does not necessarily imply that criminalisation is also mandated. This latter, stronger claim is context dependent: a determination that a certain unit of behaviour or type of conduct should be criminalised depends on its criminalisation being mandated by the particular aims and values of the criminal law and the social context in which it is situated. Returning to the hypothetical standing-on-one-leg offence discussed above, though there is a descriptive gap in the criminal law concerning this unit of behaviour, it is not a within-scope gap. For reasons of space, this dissertation does not argue for an account of the specific proper limits of the criminal law. For the purposes of my argument regarding overbreadth, it is sufficient to say that the kinds of debates described in my discussion of overbreadth in chapter 2 are what determines whether a potential new offence is within the proper scope of the criminal law.²⁹ Debates about the proper functions, aims and principles underpinning the criminal law also determine the question of whether the criminal law not only can but should cover certain units of behaviour.

Because of this evaluative dimension, the presence or absence of within-scope gaps in the criminal law is not a wholly descriptive matter at all. Identifying a within-scope gap involves several steps: first, noting that a descriptive gap exists; second, determining that the unit of behaviour is within the proper scope of the criminal law, so that criminalisation of the behaviour will not violate the criminal law’s proper limits; and possibly third, that if the gap were to remain unfilled, the criminal law would fail to achieve or further some of its foundational principles, functions or aims.

Within-scope gaps can indeed exist in the criminal law. For instance, the emergence of a new technology might give rise to an entirely new kind of wrongful conduct, to which Parliament has not yet turned its attention.³⁰ Or a new technology may have effected a new way of carrying out a kind of conduct that is criminalised generally, with the mode of offending not

²⁹ Chapter 2, sections 2.3 – 2.9.
³⁰ For instance, cyberbullying. See section 5.6 below.
fitting exactly any existing general offence. This can occur for instance with new electronic means of committing fraud.
Unit of Behaviour: criminalised or is there a gap?

Descriptive Gap, ie behaviour not criminalised

Is the unit of behaviour within the proper scope of the criminal law?

No gap, ie behaviour already criminalised

Is the unit of behaviour within the proper scope of the criminal law?

Overbreadth

Is the behaviour covered by more than one overlapping offence?

Overbreadth only (not overdepth)

Within-scope gap

More than one offence

Overbreadth AND overdepth

No

Yes

Not overbreadth

One offence

Not depth, not overdepth

More than one offence

Are there sound or reasonable grounds for criminalising the unit of behaviour under more than one overlapping offence?

Yes

(e.g. labelling or evidential or pragmatic justifications)

No

Unjustified depth. I.e. overdepth, overcriminalisation

Justified depth, not overdepth, not overcriminalisation

Within-scope gap

No

Yes

One offence

No

Yes

Overbreadth

Is the behaviour covered by more than one overlapping offence?

Overbreadth only (not overdepth)

(Purely) descriptive gap
A within-scope gap can also exist with a type of conduct that has, for whatever reason, historically not been criminalised. An example of this is criminal law’s treatment of marital rape. As will be discussed in greater detail in chapter 11, until a generation ago rape by a husband of a wife was not a crime in most jurisdictions. In many jurisdictions, a spousal exemption applied for rape. During the time in which marital rape was not criminalised, conduct that met the legal definition of rape, but where the perpetrator was the victim’s husband, was subject to a spousal exemption. Rape within marriage fell through a (deliberate) descriptive gap in the criminal law. For the reasons discussed in chapter 11, this was a within-scope gap. First, it is normatively permissible to criminalise rape that happens within marriage, because marital rape is within the proper scope of the criminal law. Secondly, not only is criminalisation of marital rape normatively permitted, it is strongly positively justified, just as its non-criminalisation is unjustified.

The repeal of the spousal rape exemption did not recriminalise any kinds of rape outside of marriage; it simply extended the criminal law’s coverage to include rape that occurred within marriage. Importantly, this means new criminal offences that are just within-scope gaps in the criminal law are not only not part of overdepth and overcriminalisation, at a descriptive level, they are not even overlap. It is possible to imagine however a new offence designed to address an within-scope gap in the criminal law, which also gives rise to a degree of overlap as a by-product. For instance, a new offence might re-criminalise a small penumbra of behaviour adjacent to the behaviour currently existing in the within-scope gap in the law, even though the new offence’s primary design objective is only to close the descriptive and/or within-scope gap in the law.

To use a spatial metaphor, if I have a puncture in my bicycle tire and apply a patch to the tire, my primary purpose is simply to stop the small hole, or gap, in the tire where air is escaping. But to do this by means of a patch, I must necessarily apply the patch more widely – perhaps a two or three centimetre diameter around the puncture itself. Analogously, a new offence may fill

31 For a fuller discussion of the spousal exemption to the charge of rape, see the discussion in Chapter 11, section 11.5.
32 For a fuller discussion of my arguments for feminist re-interpretations of traditional liberal concepts of interests in bodily and sexual integrity as the central interests justifying the criminalisation of sexual violence, see chapter 12 at sections 12.7 and 12.9.
33 Though the question of whether they represent overbreadth is a separate matter.
a gap in the law like a perfectly fitted plug in a drain. Or it may cover the gap more like a patch over a puncture. Provided that the patch is not unduly enormous, a new offence that has been created to address a within-scope gap, but as a side effect somewhat overlaps with some surrounding offences seems likely to be unproblematic overlap.

The focus of this dissertation is when overlap in the criminal law constitutes overdepth, and contributes to overcriminalisation. New offences that fill within-scope gaps in the criminal law do not constitute depth, except in cases when the bicycle tire puncture analogy applies, and in order to fill a within-scope gap it is necessary to re-criminalise some behaviour surrounding the within-scope gap in addition to the gap itself. This section’s discussion is firmly within the scope of this dissertation however for the further reason: it is not always easy to determine at first glance that a descriptive gap in the criminal law is also a within-scope gap, such that filling the gap is not part of overbreadth in the criminal law. Determining whether any descriptive gaps are within-scope gaps will involve careful consideration of the aims, principles and functions underlying the criminal law as discussed in chapter 2.34

5.4 Unproblematic Overlap: Descriptive Overlap that is Justified for Pragmatic or Evidential Reasons

This section and the following section consider two categories of overlap or depth in the criminal law that may on their face give rise to overcriminalisation concerns, but which are justified by sound and reasonable reasons for specific criminalisation. These categories are reflected in Figure 5.1 above: evidential or pragmatic, and fair labelling justifications for criminalising a unit of behaviour under more than one overlapping offence appear near the bottom right portion of Figure 5.1. This section addresses the first of these kinds of justification for within-scope depth in the criminal law: depth that is justified for pragmatic or evidential reasons. The second category of justifications, fair labelling justifications for overlap or depth, is discussed in section 5.5.

A possible sound justification for depth in the criminal law is that although a particular kind of behaviour is criminalised by generally applicable offences, for practical or evidential reasons it is difficult to enforce the general offence with respect to the specific behaviour in question. Pragmatic considerations of this kind include, for instance, that the instances of the

34 Chapter 2, sections 2.3 – 2.9.
particular class of criminalised behaviour tend to be under reported, systemically undercharged, to very seldom result in convictions, or some combination thereof. This may be because of systemic factors, such as for instance, biases among police or prosecutors that lead them to treat certain units of behaviour criminalised by a criminal offence less seriously than others. That is, in practice, although a particular type of behaviour is criminalised by existing offences, the way that the existing general offences are enforced may amount to under-criminalisation of a class of within-scope wrongful behaviour.

At this stage in my analysis, it may seem tempting to return to gap metaphors: if a class of behaviour is criminalised “on paper” but that criminalisation is not reliably enforced in practice, could this be described figuratively as an additional category of “gap” – perhaps a “de facto” or “enforcement gap”? For reasons of conceptual clarity, it is important to resist the temptation to return to gap metaphors. The reason for this is illustrated Figure 5.1 above. Recall that the first place in which the flow chart branches in two is at the question: is a particular unit criminalised or is there a gap? The only circumstances in which there is a gap and the unit of behaviour is not criminalised are when there is a descriptive gap and/or a within-scope gap. The kinds of justification for depth in the criminal law discussed in this section and in section 5.5 are located in a very different part of the flow chart. They arise only when, first, there is not a gap because the conduct is already criminalised; and second, the existing offences covering the conduct are within the proper scope of the criminal law and do not constitute overbreadth. For this reasons, I speak of the considerations in this section and section 5.5 as justifications for depth, rather than slipping back into gap metaphors.

The non-fatal strangulation case study discussed in chapters 7, 8 and 9 is an example of (proposed) descriptive overlap in the criminal law that is arguably justified by practical and evidential considerations. It is already an assault to apply pressure to the neck of another person without her consent. The new specific non-fatal strangulation offence will descriptively overlap with more general strangulation offences. But the case study is an example of descriptive overlap or depth in the criminal law that is justified because of practical and evidential difficulties in enforcing general assault offences with respect to strangulation assaults. In cases like the example of non-fatal strangulation, where a behaviour is already criminalised under an existing

35 See the left side of Figure 5.1 as discussed above in section 5.3.
offence, or several offences, but due to some practical reason it is difficult to prosecute that behaviour under those offences, I will argue that the introduction of a new, (descriptively) overlapping offence that has been specially designed to deal with those practical difficulties does not necessarily give rise to the normative problems associated with overcriminalisation.

It is still important to assess the reasonableness, soundness and persuasiveness of proposed practical or evidential justifications for specific criminalisation of already criminalised conduct, such as non-fatal strangulation. The categories of potential justifications for overlap discussed in this section and section 5.5 are not quickly applied yes-or-no decision-making rules. Instead, the categories proposed in this and the next section are prompts for normative analysis. Justifying overlap because, for instance, a specific offence will addresses practical or evidential problems is a highly contextual normative process.

5.5 Unproblematic Overlap: Descriptive Overlap that is Justified for Fair Labelling Reasons

The second category of justifications for the presence of overlap in the criminal law is that it is necessary to specifically criminalise a certain unit of behaviour that is already criminalised by more general offences for fair labelling reasons. This second category of justifications for descriptive overlap is different from the practical and evidential justifications discussed in the previous section. In order for a fair labelling argument to apply, it is not necessary that there be any practical or evidential difficulty in applying existing general offences to the conduct in question. The issue rather is that the general offence that covers the conduct in question in some respect does not label the nature of the offending. The sexual assault case study in chapters 10, 11 and 12 is an example in which the descriptive overlap between a set of specific offences (offences of sexual violence) and a set of general offences (general assault offences) is justified in part by fair labelling interests, so that the overlap does not constitute overdepth in the criminal law. According to these fair labelling interests, if offences of sexual violence were not specifically criminalised, the central harms of sexual violence would not be labelled by the criminal law.

Viewed in one way, sexual assault is a form of assault understood more generally. As such, the two offences could be regarded overlapping at the descriptive level. Sexual assault necessarily involves the intentional application of force to the body of another person, though it
also includes further, specific elements. As my discussion in chapters 10, 11 and 12 makes clear however, there are strong arguments, both historical and philosophical, for regarding the harms and wrongs captured by the offence of sexual assault as separate from the harms and wrongs captured by other forms of assault. According to the theory of fair labelling, the offence applied to an offender should fairly represent the nature of that wrongdoing. Suppose that there were no such offence as sexual assault, and all forms of assault whether sexual or otherwise were addressed under the rubric of general assault offences. Given that there are key descriptive and normative differences between sexual violence and general violence, a criminal code arranged in this way would be missing something factually and normatively crucial. Such a code would fail to fairly label and fairly represent the distinct nature of the wrongdoing of sexual violence.

In chapter 11, I note that specific offences of sexual violence, separate from general assault offences, date back to the earliest criminal codes. However, the prevailing theories of the central and defining harm of sexual violence have evolved over time since those earliest codes, and remain in conversation with one another today. Although theories as to what the central and unique harm of sexual violence is have evolved over time, what has not changed is the overarching and commonly held view that there is something descriptively different about the central harm of sexual violence that means it should be picked out by its own label.

Analysing whether overlap between two or more offences is justified by a fair labelling interest because the central harm of a specific offence would not otherwise be labelled is a process comprising several steps. First, it is necessary to determine whether the offences descriptively overlap, in the sense that they each describe the same unit of behaviour. As can be seen in Figure 5.1 above, an alternative way to frame this question is to ask whether one of the potentially overlapping offences in fact fills a within-scope gap left by the other offences. In chapter 12, I use the technique I introduced in chapter 4 to parse New Zealand’s common assault

---

36 Chapter 12, at sections 12.10 – 12.13.
38 On “useful” as opposed to “useless” distinctions between overlapping offences see, Stuart P Green, Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age, Digital edition. (Cambridge, MA: Harvard University Press, 2012) at chap 1, note 222 and associated text.
39 See chapter 11, at section 11.2.
and rape offences.\textsuperscript{40} In doing so, I establish that both offences can “properly”\textsuperscript{41} describe the unit of behaviour involved in an example unit of behaviour that could be described in ordinary language as sexual assault. This is a purely descriptive question, which does not ask (at this stage of the analysis) whether one of the overlapping descriptions of the unit of behaviour is “better” than the other.

We come to those evaluative, normative questions at the next analytical stage. Determining whether there is a fair labelling interest that justifies the presence of descriptive overlap cannot be reduced to a purely descriptive question. Asking whether a the descriptive overlap between offences of sexual violence and offences of interpersonal violence more generally is justified on the basis of fair labelling interests is another way of asking, for instance: “does the offence of rape do a better job of labelling the essential harms of sexual violence than the offence of common assault?” This is a normative question.

At this normative level, in order to assess whether the descriptive overlap between offences of sexual violence and general offences of interpersonal violence is justified by fair labelling arguments, it is necessary to determine what are the essential harms at the heart of offences of sexual violence, as compared to interpersonal violence more generally, that require distinct labelling by the criminal law. Answering this question is a key focus of chapters 11 and 12, in which I analyse competing theoretical understandings of the central harms and interests implicated by sexual violence. Having reached a conclusion as the central harm of a particular unit of behaviour, and the central harms labelled by the overlapping offence descriptions that criminalise that unit of behaviour, it is once again a normative question whether fair labelling interests justify the specific labelling of a particular harm in spite of the offence’s descriptive overlap with other more general offences.

5.6 Problematic Overlap: Crimes du Jour

Sections 5.2 to 5.5 of this chapter have looked at examples of offences that descriptively overlap with one another but either do not give rise to problems associated with overcriminalisation, or if

\textsuperscript{40} Also see chapter 12, section 12.14, at Table 12.1 and Table 12.2, which parse New Zealand’s common assault and sexual violation by rape offences.

\textsuperscript{41} I use “properly” in the sense introduced in chapter 4: can I with grammatical and idiomatic correctness use the statutory descriptions contained in common assault and rape offences to describe the unit of behaviour in question?
they do give rise to some risks of overcriminalisation, arguably possess countervailing benefits that outweigh those risks of criminalising certain conduct more than once.

I turn now to a class of descriptive overlap that is one of the most often cited in the literature as problematic and as being part of overcriminalisation. These are new, specific offences that are enacted reactively in the face of moral panics, or high profile incidents of crime so that legislators can show they are “doing something” about a perceived crisis. As discussed in chapter 3, overcriminalisation theorists refer to such offences under a number of labels, such as “crimes du jour,” “crimes of the month,” or “designer offences,” and re-criminalise under a new label conduct that is already criminalised by existing offences. As David Garland has noted, the duration, lasting social impact and intensity of moral panics can vary greatly.

It is important to acknowledge here that the term “moral panic” is a loaded one. One person’s “moral panic” about a social issue may be another’s “justified concern about and responsiveness to a pressing social problem.” Commentators have noted that it is a common rhetorical technique in the language of cultural debate to claim that a social reaction or call for:

---


43 Chapter 3, section 3.3.


45 Luna, Overextending the Criminal Law, supra note 17 at 15.

46 Robinson and Cahill, “Can a Model Penal Code Second Save the States from Themselves?”, supra note 143 at 170.


change is merely a moral panic.\textsuperscript{49} This move is designed to take the wind out of the sails of an opponent’s call for action and change. As with other rhetorical moves, it can be employed to good or ill effect. Whether one views an increase in public discourse around a particular issue as a timely rise in awareness or a moral panic can be a matter of perspective. However, it is less the concept itself that is in dispute in any particular social debate than whether the concept in fact applies to the debate in question. That is, one side may regard the social reaction as exaggerated or overblown, while the other sees it as measured and proportionate.

To say that different perspectives may exist as to where a given instance of criminalisation stands on the spectrum between “moral panic” and “justified concern about and responsiveness to a pressing social problem” does not mean that we are committed to relativism on such questions. It is not difficult to identify a case as sitting somewhere on the scale between moral panic and justified concern about and responsiveness to a pressing social issue: in a case where there is debate on both sides about whether an issue is a moral panic or a serious issue, the case sits in this spectrum.

It is possible to develop an analytical schema that is neutral as to where any given instance of criminalisation sits on such a spectrum. At a high level, my proposed neutral schema is as follows: to the extent that it is plausible to regard a proposed criminalisation as being the outcome of a moral panic rather than a justified response to a pressing social issue, the criminalisation represents a problematic form of overlap and is part of the problem of overcriminalisation.

Determining whether any particular instance of criminalisation is the outcome of a moral panic as opposed to being a justified response to a pressing social problem depends on more detailed subsidiary questions. For instance, what is the issue that the new offence proposes to address, and how clearly has this issue been articulated by those advocating the new offence? To what extent do existing criminal offences already address that issue or goal, and how successfully do any existing offences address the issue at present? These questions imply sub-questions, such as: what maximum penalties are available under the current offences? Are there practical difficulties, for instance, evidential difficulties, with prosecuting the specific conduct in

question under the general offence?\(^5\) How is the general offence functioning in practice in relation to the unit of behaviour that will be captured by the proposed new offence? If there are difficulties prosecuting this subset of offending under the current general offence, is a particular problem confined only to the specific offence conduct that is the subject of the moral panic/public outcry, are there problems more generally with the offence design, that should be remedied at that level? Is there something so different about the specific conduct at the heart of the public outcry from the rest of the conduct that falls under the general offence that arguably warrants labelling them and/or sentencing them differently?

Another way of thinking about this neutral analytical schema is as follows: justified responses to pressing social problems are not part of overcriminalisation, and whether or not criminalisation of a particular unit of behaviour is justified is highly context dependent. It will depend on whether there is indeed a problem or goal of the kind that is assumed. If there is no problem, then there is no need for the “solution” of a new offence. If there indeed is a problem that can be addressed via criminalisation, the next question is whether that problem is best addressed using criminalisation as opposed to another kind of instrument. If criminalisation indeed does seem to be the best instrument choice for addressing the particular problem, the question of whether a proposed offence is justified will depend on the design and characteristics of that particular offence: that is, whether the proposed new offence is well designed with respect to its purpose. One of the reasons that offences enacted in response to moral panics are problematic and can be part of the problem of overcriminalisation is that they are frequently too hastily designed and enacted, with insufficient care taken in articulating the problem an offence aims to address, and insufficient time spent assessing whether the proposed offence is well suited to address a particular problem or further a particular goal.

The best way to know the answers to these contextual questions is to consider carefully, rather than to assume, that proposed new instances of criminalisation are necessary, well designed, and fit for purpose. I do not propose that an analytic schema of this kind would bypass controversy in the case of moral panics or high-profile issues. But a schema of this kind is a useful analytic tool for policy and law makers in determining how to respond to a high-profile

\(^5\) Green, Thirteen Ways to Steal a Bicycle, supra note 38 at chap 1, note 164 and associated text.
social issue, and face the question of whether enactment of a new specific offence that overlaps with existing general offences is an appropriate measure, or instead, part of overcriminalisation.

As I foreshadowed in Chapter 3, a famous example of a crime du jour that would likely not score well on the neutral schema I have just discussed was the United States federal offence of carjacking enacted in the 1990s. In 1992, a Maryland woman and her one-year-old daughter had their car hijacked. During the course of the incident, the woman was killed. The case caused a national media sensation, and the mistaken impression proliferated that “carjacking” cases of this kind were common and becoming ever more frequent and serious. In fact, these kinds of car robberies were not new. What was new was the way that under a newly coined label of “carjacking” and framed as a related spate of offending they caught the public’s imagination. In the face of what was perceived as a new, pressing and escalating carjacking epidemic, there was public and media demand for political action to address the “crisis”.

The conduct involved in carjacking cases was already criminalised by existing criminal laws against car theft, assault, robbery, kidnapping and homicide, with severe sentences available. At both state and federal levels, legislators reacted to the perceived crisis by enacting new specific carjacking offences. This action was less to solve a real problem – the conduct was already criminalised and subject to severe penalties – than to give voters the impression or feeling that their legislators are taking the “problem” seriously, and doing something about it. Robinson and Cahill have noted that crimes du jour of this kind are frequently drafted as if the existing general offences with which they overlap did not exist. The actual purpose of the carjacking offences seems to have been almost entirely symbolic – the new offences were more difficult to prove than the existing general offences, which offered more than sufficient penalties, so the specific offences were almost never charged.

---

51 Chapter 3, section 3.2.
52 Beale, “Many Faces of Overcriminalization”, supra note 17 at 757.
53 Stuntz, “Pathological Politics”, supra note 18 at 531.
54 Ibid.
56 Robinson and Cahill, “Can a Model Penal Code Second Save the States from Themselves?”, supra note 143 at 171.
57 Stuntz, “Pathological Politics”, supra note 18 at 532.
Generally the call for a designer offence like carjacking is triggered by an increase in the public profile of a particular kind of offending, creating the impression – real or mistaken – that a certain kind of offending is of special concern. Given the perceived crisis, an immediate and low cost way for legislators to be seen to be addressing the problem is to enact a new offence. Examples of crimes du jour abound. A Canadian example usefully illustrates how a specific offence passed in response to concern over high profile cases both descriptively overlaps with existing general offences, and is associated with overcriminalisation concerns. The Canadian offence of distributing intimate images of a person without consent came into effect in 2015.\(^{58}\)

The new offence, and the omnibus Bill C-13 within which it was embedded, were introduced in response to growing media and public interest in the problem of cyberbullying and “revenge porn,” particularly in relation to children and teenagers.\(^{59}\) The two high profile Canadian cases that had particularly spurred this media and public interest were those of teenaged girls Amanda Todd and Rehtaeh Parsons.\(^{60}\) Intimate photographs of each of the girls had been circulated online, and both had endured bullying and harassment about the images online and at school. For both Todd and Parsons, these campaigns of harassment culminated in their deaths by suicide at the ages of fifteen and seventeen respectively.

Bill C-13, the Protecting Canadians from Online Crime Act,\(^{61}\) introduced into the Canadian Criminal Code a new offence of distributing intimate images without consent. Many proponents of the new offence argued there were (within-scope) gaps in the criminal law regarding the cyberbullying of young people like Todd and Parsons, and that the offence was necessary in order to fill that gap.\(^{62}\) However, critics of Bill C-13 and the new offence objected that cyber bullying and the behaviour in terms of which Parsons and Todd were victimised was already sufficiently criminalised by existing offences, such as intimidation, criminal harassment,

---

\(^{58}\) *Criminal Code*, RSC 1985, c C-46, s 162.1; inserted by Bill C-13, the Protecting Canadians from Online Crime Act, SC 2014, c 31, s 3.


\(^{61}\) 2\(^{nd}\) Sess, 41\(^{st}\) Parl (as passed by the House of Commons 20 October 2014).

assault and sexual assault, defamatory libel and extortion by libel, mischief in relation to data, and child pornography. The Canadian Bar Association reported that the new offence would provide no additional protection for children and youth like Todd and Parsons who are the victims of image-based online bullying as it would only re-criminalise the conduct that was already criminalised under child pornography offences.

The new offence, section 162.1 of the Canadian Criminal Code provides that:

(1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty
   (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
   (b) of an offence punishable on summary conviction.
(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,
   (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
   (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
   (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.
(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

The child pornography offence, section 163.1 of the Criminal Code, with which the new provision overlaps, provides that it is an offence to, among other things, possess, transmit, make available or distribute or possess for these purposes, a photo, film or other visual representation showing, among other things, a person who is under 18 and engaged or depicted as engaged in a

---

63 Jane Bailey, Canadian Legal Approaches to “Cyberbullying” and Cyberviolence: An Overview (Ottawa, Ontario, 2016) at 41–46, Ottawa, Ontario; Bailey, “Time to Unpack the Juggernaut”, supra note 62 at 695; David Fraser, Getting the Facts Straight as We Rush to Legislate Cyberbullying Canadian Privacy Law Blog (20 December 2013), online <http://blog.privacylawyer.ca/2013/12/getting-facts-straight-as-we-rush-to.html>; also see, CCSO Cybercrime Working Group, Cyberbullying and the Non-Consensual Distribution of Intimate Images (Ottawa, 2013), Ottawa; also see Lyrissa Barnett Lidsky and Andrea Pinzon Garcia, “How Not to Criminalize Cyberbullying” (2012) 77 Mo L Rev 693 at 697–98.
65 Criminal Code, RSC 1985, c C-46, s 162.1 (quotation omits subsection 4, which provides that it is a defence to the charge if the distribution serves the public good).
sex act or the dominant characteristic of which is to depict for a sexual purpose a sexual organ or the anal region of a person under 18.66

Because of descriptive overlap between the new offence and child pornography offences, the new offence would arguably do little to address the problem that could not be achieved simply by enforcing existing general provisions.67 Insofar as the new offence was a crime du jour or a crime enacted swiftly in response to concern about high profile cases of cyberbullying of vulnerable children and teenagers, the new offence contributes to descriptive overlap without effectively responding to the perceived crisis at all. (Although the new offence did newly criminalise distribution of intimate images of adult victims, this was not the focus of the high-profile cases that drove the introduction of the new offence).68 Critics also objected to Bill C-13 on a second, broader basis. This second objection relates not to the new overlapping offence, but to the fact that the anti-cyberbullying component of the bill was embedded in an omnibus bill that also increased law enforcement surveillance powers. The concern was that the bill’s heightened surveillance powers would erode civil liberties to an unconstitutional degree.69

The theme running through both of these criticisms of Bill C-13 is that the bill responds to a moral panic about cyberbullying.70 Critics of Bill C-13 emphasised the air of confusion and sensationalism surrounding the news media coverage of cyberbullying.71 Commentators have noted that media coverage of high profile suicides of teenagers who have experienced online bullying tends to “oversimplify the details of each case in an effort to establish a clear pattern”72 and to focus on single, extreme cases and treat those cases as emblematic of a larger epidemic.73 Tanya Bilsbury argues that the media and parliamentary debate surrounding Bill C-13 lacked

66 Criminal Code, RSC 1985, c C-46, s 163.1(1), (2), (3) and (4).
68 Canadian Bar Association, Bill C-13, supra note 64 at 3; Plaxton, The CBA Report on Bill C-13, supra note 64 at 6.
72 Felt, “The Incessant Image”, supra note 60 at 148.
73 Deschamps and McNutt, “Cyberbullying”, supra note 71 at 50; Cartwright, “Cyberbullying and Cyber Law”, supra note 71 at 2.
“[a]ny reliable understanding of the current extent of the problem” of cyberbullying; instead, the media variously and conflictingly characterised cyberbullying as a problem that was “decreasing, increasing, rare, rampant, an exaggerated issue, and a national epidemic.”

Furthermore, critics of Bill C-13 argued that the anxiety and panic surrounding the issue of cyberbullying of vulnerable youth allowed legislators not earnestly but cynically to use the issue as a Trojan horse within which to smuggle increased state surveillance powers into law. Jane Bailey emphasises that these two facets of the moral panic theme are interconnected: the “conceptual elasticity” of the term cyberbullying “has, to a certain extent, facilitated co-optation of tragic suicide cases and protection of ‘innocent’ children as a guise for a long-standing agenda to expand state surveillance.”

The Canadian cyberbullying example is interesting because it is not as clear cut as the American carjacking example. While on the one hand the new offence of non-consensual distribution of intimate images descriptively overlaps with child pornography offences, it also freshly criminalised the distribution of images of adults, and provided a lesser offence in respect of youth who distribute intimate images of other youths, where the label of child pornography is

---

76 Also see, Deschamps and McNutt, “Cyberbullying”, supra note 71 at 48–49.
78 Criminal Code, RSC 1985, c C-46, s 163.1(3) distribution of child pornography; s 163.1(4) possession of child pornography; s 163.1(4.1) accessing child pornography.
arguably a poor fit.\textsuperscript{79} This means, although the new offence descriptively overlaps with child pornography offences, it also fills a small descriptive gap in the criminal law regarding the non-consensual distribution of adult images. Assuming that such conduct is within the proper scope of the criminal law, the new offence does fill a within-scope gap. Given that the emphasis of the bill was on protecting children from cyberbullying, it is not clear whether this aspect of within-scope gap filling is a happy accident or a matter of careful design. In addition to this gap-filling aspect, the descriptive overlap between child pornography offences and the new offence may arguably be justified by a fair labelling argument that teenagers who non-consensually share intimate images of each other commit a distinct wrong to that reflected in child pornography offences. In light of the within-scope gap filling offered by the offence, and the fair labelling justifications for the descriptive overlap between the new offence and child pornography provisions, the new offence itself seems not to contribute to the problem of overcriminalisation.

Yet on the other hand, the context of possible moral panic which spurred on the enactment of the bill as a whole remains important context. The emphasised aims of the bill were protecting vulnerable children and teenagers from cyberbullying, and the high levels of public concern surrounding high profile cases of cyberbullying helped to propel the bill through the legislative process, and helped to distract from other parts of the omnibus bill. While it is not an issue of overlap, the fact that the bill expands state surveillance raises some of the same rule of law concerns that problematic overlap can raise. This example illustrates that crimes du jour enacted in response to moral panics need to be carefully examined to establish whether they represent descriptive overlap that is part of overcriminalisation, or whether they are problematic for other reasons.

Consider now two recent, less murky examples of proposals for what would, if enacted, arguably be crimes du jour. In October 2016, Winston Peters the leader of the New Zealand First party announced the party’s policy to create a specific “coward’s punch” or “king hit” offence to cover unprovoked one-punch attacks “of such force to the head that it is likely to cause incapacitation, injury or death.”\textsuperscript{80} Peters proposed that the new offence would have a minimum  

\textsuperscript{79} Plaxton, \textit{The CBA Report on Bill C-13}, \textit{supra} note 64 at 6.


126
sentence of eight years’ imprisonment,\(^{81}\) and said it was modelled on the approach taken by several Australian states in “cracking down” on attacks of this kind.\(^{82}\) The Australian offences were enacted in response to a number of high profile “one-punch” assaults and deaths, which had typically involved drunken, late-night violent assaults occurring in public, particularly in or near pubs and bars.\(^{83}\) The assaults usually involved an intoxicated young man punching another young man in the head, with the victim suffering serious or fatal head injuries either as a result of the punch itself, or from hitting his head on the ground or curb as a result of the initial punch.\(^{84}\) The new Australian specific offences impose strict liability for one-punch assaults causing death: unlike murder, the offences do not require proof of subjective intention or recklessness, and unlike manslaughter, the offences do not require proof that death (as opposed to lesser physical injuries) was reasonably foreseeable to the ordinary person.\(^{85}\)

---


\(^{82}\) Criminal Law Amendment (Homicide) Bill 2008 (WA), s 12 inserting a new s 281 into the Criminal Code 1913 (WA) (10-year maximum penalty); Criminal Code Amendment (Violent Act Causing Death) Act 2012 (NT), s 4, inserting s 161A into the Criminal Code Act (NT) (16-year maximum); Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014, inserting s 25A into the Crimes Act 1900 (NSW) (20 to 25-year maximum); Safe Night Out Legislation Amendment Bill 2014, cl 14, inserting s 302A to the Criminal Code (Qld) 1899 (life imprisonment maximum); Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014 (Vic), inserting s 4A into the Crimes Act 1958 (Vic) (20-year maximum).


Peters refers to cases fitting the same profile in his call for New Zealand to emulate the Australian approach: 86

What has happened to this country when a man walks into a dairy and is killed by a punch. That’s what happened to Matthew Coley in Invercargill. His 16-year-old killer got 22 months’ jail, but only served 11 months on remand. Why can’t a man wait for a burger without fear of attack? That’s what Steve Radnoty was doing when he was killed in Dunedin. His partner said afterwards life was now a nightmare. The killer got three years, but was eligible for parole after only 12 months. That’s too soft.

Implicit in Peters’ call for a specific “one-punch” offence is the acknowledgement that one-punch assaults are already criminalised. Indeed, Peters states that the men who punched and killed Matthew Coley and Steve Radnoty were charged and convicted for their offending and received 22-month and 3-year sentences. The point of contention for Peters is whether those sentences were sufficient, both in respect of the raw sentence, and after allowing for parole eligibility. If a specific coward’s punch offence were enacted in New Zealand, it would overlap with existing assault offences, and would be a crime du jour. The offence would descriptively overlap with general assault offences. Determining whether it is justified or is part of the problem of overcriminalisation would depend on careful analysis using the neutral analytic schema discussed above.

The second New Zealand example is also from 2016, when Peters and the New Zealand First Party called for the introduction of a specific looting during a civil emergency offence after three families’ houses were burgled while they had evacuated during a tsunami warning following an earthquake. Peters said that the people who had committed the burglaries, and those who had looted evacuated buildings after the 2010 and 2011 Christchurch earthquakes, were “evil” and that Parliament “should have done something about it” after the 2010 and 2011 earthquakes. Peters was not specific about the form that a specific civil emergency looting offence should take, but suggested that Parliament should “agree to pass legislation that will deliver a sentence that will make anyone else, when tempted [to loot], think twice.” 87 Minister of Corrections Judith Collins and Minister of Justice Amy Adams agreed that looting is “revolting”


Deputy Leader of the New Zealand First Party Ron Mark called it a “serious gap in our law” that “people caught looting can only be charged with burglary,” implying that a 10-year maximum penalty is too low for looting since “anyone convicted of looting should be sentenced to 10 years hard labour.”\footnote{New Zealand First Party and Ron Mark, Press Release: Train Looters Should Be Slammed Hard \textit{Scoop} (18 November 2016), online <http://www.scoop.co.nz/stories/PA1611/S00333/train-looters-should-be-slammed-hard.htm>.

\footnote{Sachdeva, “Earthquake”, \textit{supra} note 88.} Minister Adams asked officials to provide advice on possible options such as a specific looting offence, specifying looting as a form of aggravated burglary, or adding looting as a new aggravating factor at sentencing.\footnote{Sachdeva, “Earthquake”, \textit{supra} note 88.} Peters has not publically discussed a specific looting offence in 2017. However, New Zealand is prone to earthquakes, and it is quite possible that if another earthquake occur requiring evacuations should occur, followed by burglaries of empty properties, calls for “something to be done” could well resume. If a specific looting offence were enacted under such circumstances, it would overlap with existing burglary and trespassing offences, and could be described as a crime du jour. As with the one-punch example just discussed, determining whether the descriptive overlap between the new offence and existing general offences is justified or is part of the problem of overcriminalisation will depend on careful analysis using the neutral analytic schema discussed above.

Specific, overlapping offences enacted in response to moral panics or perceived specific law and order crises of the kinds just discussed very often strike us as inherently more troubling than examples of overlap like lesser included offences. The concept of moral panic holds a clue as to why this should be so. If enacting a new specific offence is part of a panic response, rather than a considered policy response to a clearly defined problem, then it may be particularly likely to fall prey to the problems associated with overcriminalisation: more likely to simply recriminalise already adequately criminalised conduct; or in the cases in which new types of conduct are freshly criminalised, to raise overbreadth concerns; and more likely to result in
overlapping offences that are inconsistently or rarely charged in practice because they are more complex and difficult to prosecute than the general offences with which they overlap.

5.7 Problematic Overlap: Very general overlapping offences

A further type of overlapping offences that some commentators refer to as highly susceptible to the problems of overcriminalisation are very general “catch all” offences, that overlap with more specific offences and mop up any descriptive gaps between them. These very general offences are often spoken of in the context of fraud offences. In the United States, commentators have highlighted federal mail and wire fraud statutes as examples of overlapping, sweeping and open-ended statutes that overlap with more specific fraud offences and contribute to overdepth in the criminal law. The mail and wire fraud offences are sufficiently open-ended to cover “virtually any dishonest scheme” or new kind of fraud, as well as acts of public corruption and private dishonesty that, by label alone, are not generally associated with wire or mail fraud. But these open-ended and general offences overlap also with many specific fraud offences.

Ellen Podgor has argued in favour of more precise, specific fraud offences, on the basis that they avoid the ambiguity and prosecutorial discretion associated with broad generic provisions like mail and wire fraud. But Podgor has also critiqued the emerging trend of enacting new offences to cover every new factual kind of fraud. She argues for a balance – we should avoid excessively broad and ambiguous offences because they lead to uncertainty problems and accord prosecutors with too much discretion, but we should also resist the temptation to extend indefinitely the list of specific offences. Stuart Green makes an analogous argument in the context of theft.

---

97 Podgor, “Do We Need a Beanie Baby Fraud Statute”, supra note 93.
98 Ibid, at 1032.
99 Green, Thirteen Ways to Steal a Bicycle, supra note 38.
Podgor’s focus on the risks associated with general “catch all” offences provides an interesting counter-example to those I explore more deeply in this dissertation. My discussion so far – and the case studies – also focus on overlap between general offences and specific offence that recriminalise certain units of behaviour that are already covered by the generic offence. When a general offence and a specific offence overlap, this dissertation considers whether the presence of the specific offence is redundant and contributes to overdepth and overcriminalisation. Podgor’s work, which focuses on United States examples, suggests that in the case of overlap between extremely broad, general “catch all” offences, and more specific offences, it may sometimes be the broader, more open-ended offence that contributes to problems of overcriminalisation.

The category of problematic overlap introduced in this section is most often discussed in relation to offences of fraud and corporate offending. It is beyond the scope of this dissertation to analyse in detail the particular circumstances in which a generic fraud offence becomes so general as to fall into what Jeremy Horder calls the vice of “moral vacuity,” and to raise the rule of law dangers of vagueness and uncertainty. Although this section’s category of overlap that is likely to contribute to overcriminalisation does not arise in relation to the gendered violence case studies that form the focus of this dissertation, further investigation of this category of overlap is a potentially promising area for future research.

5.8 Conclusion

In chapter 4, I defined descriptive overlap. My aim in chapter 5 has been to consider in normative terms what kinds of descriptive overlap are problematic in the sense that they are part of the problem of overcriminalisation, and give rise to the concerns described in chapter 3.

100 Jeremy Horder, “Rethinking Non-Fatal Offences against the Person” (1994) 14 Oxf J Leg Stud 335 at 339. Horder contrast “moral vacuity” with “the vice of particularism.” Also see chapter 12, at section 12.11.

101 For an analysis in a non-criminal, tax avoidance context of whether general anti-avoidance rules (GAARs) contravene the rule of law because they are vague and uncertain, see: Rebecca Prebble and John Prebble, “Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law: A Comparative Study” (2011) 55 St Louis U LJ 21. The article concludes that although GAARs of the kind that operate in New Zealand and Canada breach the rule of law, this is justified; also see G S Cooper, Tax Avoidance and the Rule of Law (Amsterdam, The Netherlands: IBFD Publications, The Netherlands, 1999).
My motivating concern in investigating overlap and identifying some overlapping criminal provisions as problematic is not simply a technocrat’s interest in neatness or elegance in a statutory scheme or code.\textsuperscript{102} Although a code may be “tidier” the less overlap it contains, tidiness is important chiefly to the extent that it facilitates deeper normative values, such as the interest in the set of criminal statutes being understandable, knowable, and certain so that people have effective notice of the law to which they are subject.

In sections 5.2 to 5.5 this chapter considered several categories of descriptive overlap that seem to be “benign” or unproblematic, and not to give rise to problems associated with overcriminalisation. Sections 5.6 and 5.7 discussed two categories of descriptive overlap that frequently do give rise to troubles associated with overcriminalisation. Setting out and normatively analysing these categories of descriptive overlap is an important foundation for the case studies I will consider in chapters 7 to 12. That is, a useful place to begin with each case study is to compare the case study to the often benign and often problematic categories of descriptive overlap discussed in this chapter. Chapter 6 will introduce the two case studies that I will address in chapters 7 to 12, and sets out why gendered harm is an illuminating lens through which to consider questions of when descriptive overlap is problematic and part of overcriminalisation.

\textsuperscript{102} I speak of “elegance” here in the way a logician or mathematician might in describing an elegant proof. An elegant proof may be one that is clever and succinct. In the context of overlap, an elegant system of criminal offences might be one in which there is minimal overlap, and thus minimal redundancy. See Steve Seiden, “Can a Computer Proof Be Elegant?” (2001) 32:1 ACM SIGACT News 111 at 112.
Chapter 6: Gender as a Lens for Overlap

6.1 Introduction

The two case studies I consider in this dissertation both concern gendered harms, and the criminalisation of these harms by means of overlapping offences. Gendered harm is an illuminating lens for examining questions of overlap, questions of how to criminalise effectively and fairly, and how to avoid contributing to overcriminalisation. As will be explored in the following six chapters, overlapping offences addressing gendered harms engage in interesting ways the diagnostic criteria set out in chapter 5 for determining whether a particular instance of overlap is problematic or not.

6.2 What is Gendered Harm?

It is important here to be clear about what I mean by the concept of “gendered harm.”¹ The term refers to harms and injuries that are “predominantly carried out against women and continue due to the unequal status of women in society.”² I note here that I use the terms “woman” and “women” to include transgender women, and those who self-identify as women. I note that other transgender people also experience a heightened risk of sexual violence. I also emphasise that “woman” is not an undifferentiated category.³ Gender intersects with race,⁴ class and economic status, disability, sexual orientation, gender identity and other aspects of identity to produce differential vulnerabilities to harms that may fairly be characterised as gendered harms.⁵ The

ways in which gender intersects with a number of other dimensions in the lives of women\textsuperscript{6} should not be understood as static, linear or straightforwardly additive.\textsuperscript{7} Just as there is no essential experience of womanhood, there are many experiences of “working class-ness,” “racialised-ness,” or “lesbian-ness.” Individuals’ experiences are defined by not just one marker of identity, such as gender, or race, but by the many aspects of a person’s identity and experiences, and the intersections and relationships between them.\textsuperscript{8} As Barbara Risman has noted, “one must always take into consideration multiple axes of oppression; to do otherwise presumes the whiteness of women, the maleness of people of color, and the heterosexuality of everyone.”\textsuperscript{9} Thus, when I speak of gendered harms as being harms that apply disproportionately to women, I acknowledge that not all women experience gendered harms in the same ways, or at the same rates.

I also note here the debate in feminist literature about whether women who suffer gendered harms, particularly gendered violence, should be described and understood as victims or as survivors of that violence.\textsuperscript{10} One perspective is that the term “victim”\textsuperscript{11} suggests passivity, vulnerability, and powerlessness,\textsuperscript{12} and is stigmatising, implying that the “victim” of an offence is forever damaged, marked out and defined by her victimisation.\textsuperscript{13} The alternative construction


\textsuperscript{13} Van Dijk, “Free the Victim”, supra note 11 at 2.
of the “survivor” arose in the 1970s in reaction to then dominant representations of victims.\textsuperscript{14} The term “survivor” is thought to capture an “active, independent and empowered identity,”\textsuperscript{15} emphasising proactive recovery efforts, rather than permanent damage and victim identity. In the context of this dissertation I do not take a view on this debate and use both terms, emphasising that those who have experienced gendered harm should be free to describe their experience and identity using the terminology that they prefer.\textsuperscript{16} When I use the term victim to refer to women who have experienced gendered violence, I mean it not in a stigmatising sense, but in the criminological sense that the person described was the person harmed or wronged by the offender.

Adrian Howe wrote that gender-specific social injuries are harms that are inflicted on and experienced by women as women.\textsuperscript{17} Any individual’s likelihood of sustaining various kinds of harms is influenced by that individual’s “social location.” Joanne Conaghan explains by analogy how social location can put certain groups at heightened risk of certain harms: just as “workers are more likely than managers to be injured on the job,” so too “women are more likely to be raped than men.”\textsuperscript{18} Gendered harms are harms that women are more likely to suffer because they are women. Since this is a statistical matter, having categorised a particular harm as gendered, it is no contradiction to say the harm can be, or sometimes actually is, suffered by some men as well as women.\textsuperscript{19} To a certain extent, statistical patterns in perpetration and victimisation regarding such offences reflect socially constructed differences between men and women. These socially constructed differences include those based on gender stereotypes and systemic power differences between men and women. The determining question in identifying a harm as gendered is whether it a harm which, at this historical moment, in this setting, “happen[s]
overwhelmingly to women.” The concept of gendered harm allows violence against women to be understood not simply as discrete harms experienced by individual women, but rather as connected harms that affect women as a consequence of a social power structure.

6.3 The Power of Naming Gendered Harms

Law is a societal artefact. It is made by people, and reflects the perspectives and values of the societies and people who made it. As many feminist theorists have noted, it is a simple empirical matter that most lawmakers and lawyers in Anglo-European states have been men; and “white, educated, economically privileged men” in particular. While more recently, most jurisdictions have seen increases in the proportions of female lawmakers and members of the legal profession, embedded in the law is a long history and practice of valuing male or masculine perspectives, values and practices. Since law is gendered and, at least historically, has been made and shaped by men, it makes sense that the law has historically privileged men’s interests and values, assuming them to be universal while at a systematic level excluding the specific perspectives of women, and other minority or disempowered groups. Despite sustained law reform efforts, contemporary law and legal systems perpetuate many of these dynamics.

Given this context, the concept of “gendered harm” is useful as more than a neutral definition of a type of harm, but as a way of drawing attention to the criminal law’s historical and continuing difficulties in seeing and evaluating harms that disproportionately affect women. An important theoretical impetus for Adrian Howe and the other feminist commentators who

---

20 Graycar and Morgan, Hidden Gender of Law, supra note 1 at 272 (emphasis in original).
25 Smart, “The Woman in Legal Discourse”, supra note 23 at 32.
first developed the concept of gendered harm is that by having a concept and a name for harms suffered overwhelmingly by women, *because* they are women,\(^{26}\) we can better see those “hidden injuries” for what they are.\(^{27}\) Writers from quite distinct feminist perspectives have made these arguments.\(^{28}\) Robin West observed that “[a]n injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality.”\(^{29}\) Radical feminist Catharine MacKinnon has written of the importance of naming gendered injuries, such as the harms of sexual harassment, so there is a conceptual language for thinking about and identifying the harmful behaviour in practice.\(^{30}\) Furthermore, having identified gendered injury in practice, feminist law reformers can propose strategies for change so that the law can better address these harms.\(^{31}\) I return to this theme below in sections 6.5 to 6.7, when discussing the rich feminist literature on the promise and limits of law reform.

Writers have observed in criminal\(^{32}\) and civil law\(^{33}\) contexts, as well as international criminal law contexts,\(^{34}\) that the legal system is generally better structured to recognise and

---


\(^{31}\) Howe, “Problem of Privatized Injuries”, *supra* note 27 at 432–33.


redress harms that are primarily experienced by men, or are socially coded as male or as “non-gendered”\textsuperscript{35} than it is at addressing harms that are primarily experienced by women.\textsuperscript{36} For instance, criminal law covers a wide range of property offences, and implicitly conceives of the paradigm instance of assault as being two able bodied men fighting each other. Contrastingly, as will be discussed in chapter 7, until recently male assaults on women within the home were criminalised, but rarely charged.\textsuperscript{37} Violence within the home and the family was regarded as a private matter, in respect of which State authorities and non-family members rarely intervened.\textsuperscript{38}

Tort law is similarly less likely to address harms that are coded as feminine by gendered myths, stereotypes and assumptions.\textsuperscript{39} For instance, early fright and emotional distress negligence cases purported to be gender neutral but assessed a plaintiff’s response to a fright as “normal” or “abnormal” according to an effectively male standard.\textsuperscript{40} Women’s fright-based bodily injuries, such as miscarriage and premature birth, were not understood as interferences with physical integrity causing compensable physical harms, but rather as abnormal, hysterical and hypersensitive responses.\textsuperscript{41} Even in cases where a jurisdiction’s tort law has adapted to begin to take account of previously unrecognised gendered harms, there can be a complex interplay between positive features and persisting shortfalls. For instance, Bruce Feldthusen has written of the “striking development” in the Canadian law beginning in the late 1980s of growing numbers

\begin{thebibliography}{99}
\item \textsuperscript{36} West, “The Difference in Women’s Hedonic Lives”, \textit{supra} note 29 at 82; Ann C Scales, “Feminists in the Field of Time” (1990) 42 Fla L Rev 95 at 98; Deborah Tuerkheimer, “Underenforcement as Unequal Protection” (2016) 57 Boston Coll L Rev 1287 at 1290.
\item \textsuperscript{37} Chapter 7, section 7.2.
\item \textsuperscript{39} Conaghan, “Gendered Harms and Tort”, \textit{supra} note 19 at 408.
\end{thebibliography}
of civil actions relating to sexual abuse.\textsuperscript{42} Feldthuusen and others have written optimistically of the possible opportunity such developments could provide to survivors of sexual abuse,\textsuperscript{43} both to gain financial compensation in respect of their injuries, and to achieve symbolic and therapeutic benefits.\textsuperscript{44} There is no distinct tort of sexual battery in Canadian law. Rather, battery with sexual characteristics, such as behaviour that might be described in criminal law as sexual assault, child sexual abuse or incest, fall under the general tort of battery, with the sexual aspects of the claim being relevant to damages.\textsuperscript{45}

Some aspects of this developing jurisprudence are designed to respond positively to feminist concerns. For instance, in a move designed to make tort law more responsive to the interests of victims of sexual violence, the Supreme Court of Canada has held that there is not a specific tort of sexual battery requiring proof by a plaintiff of non-consent. Instead, consent operates as a defence, which the defendant must raise and establish on the balance of probabilities.\textsuperscript{46} Consent or non-consent is assessed according to an objective rather than subjective standard – that is, the defendant must establish that there was a reasonable basis for his belief in consent, such that a reasonable person in the defendant’s position would have believed, based on the plaintiff’s conduct and the surrounding circumstances, in the plaintiff’s consent.\textsuperscript{47}

Elizabeth Adjin-Tettey writes that although the Supreme Court intended that this defence of constructive consent, with the evidential burden resting on the defendant, would “benefit


\textsuperscript{45} Feldthuusen, “The Canadian Experiment with the Civil Action for Sexual Battery”, supra note 42 at 282.


\textsuperscript{47} Adjin-Tettey, “Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery”, supra note 44 at 10.
victims of sexual abuse, in fact it makes it more onerous to obtain a civil remedy.”

This unintended negative effect is because objective assessments of consent may find constructive consent when the woman in fact did not consent, because the plaintiff does not “meet the standard of the ‘typical’ victim” or does not behave in the way that many myths and stereotypes construe the “reasonable” woman as being likely to respond to unwanted sexual overtures. Adjin-Tettey emphasises women who are already marginalised, such as racialised, Indigenous or impoverished women, are particularly likely to fare badly according to objective consent assessments. Writers have also critiqued the legal system’s failure to adequately quantify damages for torts involving gendered harms, such as sexual battery. In both criminal and civil law, the default legal subject has long been assumed to have male characteristics, and is assessed according to male qualities and values.

Robin West has offered an account of why the law has historically failed to recognise and prioritise harms experienced primarily by women as effectively as it does harms experienced

48 Ibid, at 3–4 and 11.
52 Also see footnote 38 above, discussing the common law interspousal immunity to the tort of trespass to the person.
primarily by men, or by both genders generally. She argues that not only do women experience certain harms at much higher rates than men, in addition women’s subjective experiences of suffering are different to men’s. That is, West makes both quantitative and qualitative claims about gendered harm. Beginning with the quantitative claim, she argues that women suffer greater amounts of pain than men, because many interactions between men and women are subjectively experienced as pleasurable for men while at the same time causing women pain. This asymmetrical distribution of pleasure and pain between men and women in certain interactions is reflected in the oxymorons we use to describe the interactions. West gives the examples of “date rape” and “sexual harassment” as terms that reflect the tension between the diverging male and female subjective experiences of the same event.

For the man, the office pass was sex (and pleasurable), for the woman, it was harassment (and painful): for the man the evening was a date - perhaps not pleasant, but certainly not frightening - for the woman, it was a rape and very scary indeed…[M]any men are simply oblivious – they do not experience at all – external conditions which for women are painful, frightening, stunting, torturous and pervasive.

West also lists a number of types of gendered harms, some of them criminalised and some not, that are indeed experienced disproportionately by women, including intimate and family violence, sexual assault and sexual harassment.

Further to West’s quantitative argument is the additional claim that women experience pain not just in situations which are not painful for men, or at different rates than men, but that “the pain we feel is itself different” in a qualitative sense. West’s argument in support of this qualitative claim is somewhat murkier than the one for her quantitative claim. She initially offers a concrete example of a pain that women feel differently from men: the pain of childbirth. But this does not seem to be the main basis for her qualitative claim. Rather, she argues that there is a

---


further insult added to injury when women, members of a disempowered group, suffer pain as a result of gendered harms such as rape, sexual harassment, or spousal abuse. The pain of rape, for instance, is not just the pain of the sexual assault itself; often that pain is compounded for the woman who experiences it by the operation of structural gender inequalities and rape myths and stereotypes according to which her suffering may be minimised or dismissed, or she may be disbelieved or blamed for her own suffering.\textsuperscript{60}

West suggests that legal culture’s perceptual error with respect to, and lack of understanding of, gender-specific pain accounts for its “blanket dismissal” of such pain. That is, the law either ignores such harms, or fails to adequately address them because it does not fully understand them.\textsuperscript{61} Writing in the context of tort law, Jay Fineman argues that:\textsuperscript{62}

Many of the indignities women suffer are not seen as tortious in part because the law consistently privileges the interests and perceptions of men over those of women.... Being punched is the sort of injury easily understood by men; being verbally abused is less frequently encountered by them and, according to the traditional view of the stoic male, less easily understood as seriously injurious. Therefore, the ordinary abuses women suffer in everyday life ... simply don’t fit the picture of a tort.

The law is worse still at perceiving and representing the subjective pain in an intersectional manner.\textsuperscript{63}

In the following chapters, I examine two case studies.\textsuperscript{64} In addressing each case study, I consider the ways in which gendered harms should be criminalised, and whether or not criminalising them under specific offences that overlap with more general, non-gendered offences constitutes problematic overlap of the kind that contributes to the problems of overcriminalisation. A theme I will return to in my case study chapters is the relationship between the power of naming and conceptualising gendered harms and questions of whether specific offences re-criminalising gendered harms are forms of descriptive overlap that nonetheless do not give rise to the problems of overcriminalisation.

\textsuperscript{60} \textit{Ibid}, at 82.
\textsuperscript{63} See section 6.1 at notes 3 - 9 and associated text.
\textsuperscript{64} Chapters 7 to 12.
6.4 Criminal Law Reform, Government Intervention and “Wraparound” Responses to Gendered Violence

The previous sections emphasised that the way that the criminal law names, and omits to name, certain harms is a way in which social power is exercised. It is therefore important to ensure that gendered harms are named by the criminal law, as this is a form of harm that traditionally has been, and today often still is, overlooked by the criminal law. The focus of my dissertation is criminal offence design, and questions of whether overlapping criminal offences targeting particular gendered harms are problematic and represent part of overcriminalisation, or whether they can justify their overlap sufficiently to avoid problems associated with overcriminalisation. Thus, by definition, my starting point and my focus is how the state can best use the criminal law to address gendered harms.

While criminalisation is my focus, I do not intend that focus to be so singular as to miss the wider context in which criminal legislative reform sits. It would be misleading to suggest that complex social problems of gendered and family violence could be addressed solely or even primarily via adjustments to criminal law. First, any changes to the substance of criminal offences rely for their implementation on a number of criminal justice system actors, such as police, medical staff, prosecutors, the defence bar and judges. Legislative change can only be as effective as its enforcement in practice. Public awareness is also important in order to avoid under-reporting. Even more importantly, addressing a problem such as family violence is clearly not only a criminal justice matter. For instance, if a battered woman is economically dependant on her male batterer and is unable to obtain affordable housing away from him, or to feed and

66 Elisabeth McDonald and Yvette Tinsley, From “Real Rape” to Real Justice (Wellington: Victoria University Press, 2012) at 393.
clothe her children, this will be a clear barrier for her if she wishes to leave the violent relationship.

It is common for gendered violence advocacy groups to note the importance of “systemic” and “integrated” government and community approaches to addressing gendered violence, by providing multi-agency services that can “wrap around” the victim’s specific needs. This approach will involve a range of policy, in areas such as affordable housing, social welfare assistance, education, health care, as well as the involvement of non-state actors such as the media, community groups, feminist organisations such as rape crisis centres and women’s refuges, churches and so on. Thus, while my focus is questions of criminalisation, and whether certain gendered harms are best covered by offences that specifically target that harm, I advocate this study as one piece of a necessarily wider government policy regarding gendered violence to be carried out across multiple agencies.

But even when using language of integrated, multi-agency government interventions and solutions, it is important take an even wider view, and to acknowledge the ways in which government and legal interventions to address social problems can be problematic.

6.5 Is the Legal System an Appropriate Tool for Addressing Gendered Harms?

Feminist literature on the question of whether the legal system can be effectively mobilised to help protect women from gendered violence and prevent future violence overlaps in various ways along a spectrum between two poles: at one end of the spectrum are those who regard the law as the most appropriate tool for addressing gendered harms; at the far end, are those who do

---


not. The promise and limits of law reform is a contested area of feminist theory about which much has been written on many sides. My discussion here is intended as an introduction only, rather than a more comprehensive treatment of this debate. On the one hand, many feminist theorists and activists have advocated engagement with the law and a project of law reform in addressing gendered harms. As Ruth Lewis et al have noted, this position means critiquing the content of existing laws, while seeing the law’s potential as a tool to address current social harms and inequities.

However, others have rejected engagement with the law as futile. According to this point of view, the law is “[in]sufficiently mutable and open” to realistically expect it to usefully enact meaningful change. Instead, law is so deeply entrenched in patriarchal history, that inevitably reproduces and encodes patriarchal social order, and western liberal ideology, such that “decades of struggle around law reform have been futile because the law is so thoroughly a reflection of patriarchal interests.”

According to this second category of “abstentionist” positions, the law is too intertwined with patriarchal interests to ever be reinvented or effectively repurposed as a tool to further the

---


71 Lewis et al, “Law’s Progressive Potential”, supra note 70 at 105 (categorising the various feminist positions that cautiously welcome engagement with the law as including: “‘feminist realists,’ arrest studies researchers, ‘sceptical reformers’ and rehabilitation proponents”).


73 Lewis et al, “Law’s Progressive Potential”, supra note 70 at 105 (categorising the feminist positions that see no value in legal intervention as: “‘abstentionists’ and ‘community justice’ proponents”).


interests of women and girls. As Nicola Lacey has explained, this scepticism and outright rejection of law’s ability to address problems such as gendered violence is two-fold. First, in strategic terms, to convincingly argue that a legal system premised on liberalism is part of the problem would suggest that law “no longer represent[s] a straightforwardly usable tool for feminist legal strategy.”

Secondly, the normative conceptual resources offered by a legal system founded on liberal political principles are themselves value laden and “marked by masculinity.”

As I will discuss further in the following sections, a central downside to an extreme abstentionist position is that, short of immediate commitment to outright revolution, to give up on law as a site and tool of social change seems to be to cede too much ground. To not press for law reform means giving up on the prospect of a legal system and state that reflects the interests of women as well as men.

6.6 The Liberal State and Feminist Reform

A concern at the heart of abstentionist positions discussed above is that concepts that are central to the self-image of the law such as “rights,” “justice,” “equality” and “autonomy,” which we are accustomed to thinking of as goods almost in their own right, are in fact far from politically or normatively neutral. In order to understand the feminist argument that these liberal legal principles may be so steeped in patriarchal ideology as to be conceptually inconsistent with a feminist project of social transformation, it is necessary have an understanding of the intellectual history of liberalism. This is a vast literature, and for reasons of space, I have limited my discussion of it to a high-level overview.

78 Lacey, “Feminist Legal Theory Beyond Neutrality”, supra note 77 at 196; see also, Smart, “The Woman in Legal Discourse”, supra note 23 at 40.
82 This is necessarily a reductive process. Readers interested in deeper analyses of liberal theory may find my footnotes a useful starting point for further reading.
Western legal systems are built upon a framework of, and at least intend to reflect, liberal values. The classic liberal vision is a civil society composed of autonomous, rights-bearing individuals each of whom is free to rationally and self-interestedly define and pursue his own satisfactions. The central value of liberalism is autonomy, and the related notion of choice. Liberalism sees self-determination as central to the “meaningful pursuit of human life...[and] the capacity for autonomy [as] central to what it means to be a person.” According to this liberal vision, individuals making their own choices about how to achieve their own desires maximises overall good within a society. The state is justified in restricting individuals’ autonomy and freedom of choice, for instance by criminalising certain conduct, only where this is necessary to protect others from harm.

Feminist scholars, as well as critical legal and critical race scholars, have criticised liberalism for being blind to context such that it overlooks issues of gender, race, class, privilege

---

87 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 85 at 105.
89 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 85 at 105.
and power. Legal systems built upon frameworks of liberal values purport to be politically neutral, but in practice operate to “consolidate and reproduce aspects of social institutions as a formal institutional level.” Feminist theorists have explicated ways in which liberalism overlooks long-entrenched power differentials in society.

Liberalism rests on two sets of presumptions about the autonomy and self-interested rationality of individuals: first, that autonomy and self-interested rationality are fundamental values; and secondly, that all persons equally should have the opportunity and capacity to exercise autonomy and self-interested rationality. Both of these presumptions have been met with feminist criticisms, but criticism of each fundamental presumption of liberal theory suggests a different strategy in pursuing feminist change. Proponents of feminist care ethics such as Carol Gilligan and Nel Noddings reject the first presumption. Rather than seeing individualism, autonomy and self-interested rationality as fundamental values, they emphasise the moral significance of the relationships between people and the ways in which people depend upon and care for one another. A thorough rejection of liberalism’s conception of justice and individual rights suggests a radical restructuring of society, law, politics and other markers of social life.

91 Wells and Quick, Reconstructing Criminal Law, supra note 19 at 483; Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities”, supra note 83 at 8.
95 Feminist writers have also noted how pregnancy, a process during which a woman gestates another new body and life within the boundaries of her own body, also complicates the traditional liberal view of the liberal subject as atomised and separate from others: Deborah Tuerkheimer, “Conceptualizing Violence Against Pregnant Women” (2006) 81 Ind LJ 667 at 706; West, “Jurisprudence and Gender”, supra note 84 at 17–18.
Other feminists accept the first presumption and a liberal conception of justice and rights, but point to the second presumption’s blind spot in assuming that all individuals are equally well placed to exercise autonomy and self-interests in pursuit of the good life. This approach prioritises working to bring about a state of affairs in which all people really do have equal opportunities to exercise autonomy and pursue the good life. That is, this view emphasises a goal of substantive, rather than formal, equality.\(^9^6\) Susan Moller Okin writes that due to women’s historic subordination, and the ways this subordination continues to be embedded in and reproduced by social structures systems of power, such as the family and paid work, formal equality alone is insufficient to overcome the ways in which women are systematically disadvantaged.\(^9^7\) My own view is one of sympathy to both sets of feminist criticisms, but with a pragmatic emphasis on the second. As noted elsewhere in this chapter, the law and liberal theory are flawed tools of feminist social change.\(^9^8\) However, in spite of these flaws, they are nonetheless tools. Given that the legal systems and societies that are the focus of this thesis are indeed founded on liberal values and legal systems, it is useful to investigate ways in which we can work with and develop those existing systems to further feminist ends. In order to do this, it is useful to have an understanding of the limitations and blind spots of liberal theory and the law.

Feminist critics of liberal theory’s tendency to overlook the degree to which women’s choices are more constrained than men’s trace this oversight back to liberalism’s earliest formulations.\(^9^9\) Wendy Brown has written of liberal “origin myths,”\(^1^0^0\) according to which men emerge from a “state of nature”\(^1^0^1\) to procure rights for themselves, and against each other, within political society.\(^1^0^2\) Brown’s choice of the gender specific noun “men” is deliberate.\(^1^0^3\) She

---

\(^9^7\) Susan Moller Okin, “Forty Acres and a Mule’ for Women: Rawls and Feminism” (2005) 4:2 Politics, Philosophy & Economics 233 at 244.
\(^9^8\) See section 6.5 above, this section at notes 116 - 118 and accompanying text below, and section 6.7 at notes 137 - 146 and accompanying text.
\(^1^0^0\) Brown, States of Injury, supra note 70 at 182.
\(^1^0^2\) For famous early articulations of social contract theory, see: Hobbes, Leviathan, supra note 101; Locke, Two Treatises of Government, supra note 101; Rousseau, Discourse on the Origin and
states that the liberal subject “is male rather than generic.”\textsuperscript{104} Liberal origin myths focus on a male liberal subject “who moves freely between family and civil society, bearing prerogative in the former and rights in the latter.”\textsuperscript{105} Women on the other hand lacked the freedom to move from the private sphere to the public, and were subject to male authority within the family. Writing in the nineteenth century, Kant and Blackstone regarded women as having “no civil personality,”\textsuperscript{106} and found it quite reasonable that they were instead represented in civil society by their husbands, fathers, or other male family members.\textsuperscript{107} Women existed only as members of a male-headed household.\textsuperscript{108} They did not have legal personhood since that was a quality that could be achieved only in civil society, and not within the familial, private sphere.

These liberal origin myths conceive of women existing in a private sphere, while men exist, interact with one another, and enjoy rights in a public sphere, while also exercising prerogative in the private sphere, over their wives and daughters. The law has also long treated the public and private spheres differently. This distinction classifies as public those parts of life that are conducted “out in” society, such as paid work, politics and trade; what goes on in the home, within the family, and in the bedroom, is regarded as private. While the state can regulate public, political parts of life and society, matters within the private sphere have historically been seen as outside of the state’s proper authority. As the Canadian then Justice Minister Pierre Trudeau famously remarked in 1967, having introduced a bill that would decriminalise homosexual sex, “the state has no place in the bedrooms of the nation.”\textsuperscript{109} In classical

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{103} Also see, Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities”, \textit{supra} note 83 at 8.
\end{flushleft}

\begin{flushleft}
\textsuperscript{104} Brown, \textit{States of Injury, supra} note 70 at 182.
\end{flushleft}

\begin{flushleft}
\textsuperscript{105} \textit{Ibid}.
\end{flushleft}

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{107} Rauscher, “Kant’s Social and Political Philosophy”, \textit{supra} note 102
\end{flushleft}

\begin{flushleft}
\textsuperscript{108} Brown, \textit{States of Injury, supra} note 70 at 182.
\end{flushleft}

\begin{flushleft}
\textsuperscript{109} “No Place for the State:” The Day Ottawa Got out of the Nation’s Bedrooms \textit{The Globe and Mail} (29 February 2016), online <https://www.theglobeandmail.com/opinion/editorials/no-place-for-the-state-the-day-ottawa-got-out-of-the-nations-bedrooms/article28956096/>; CBC Television News, Trudeau: “There’s No Place For the State in the Bedrooms of the Nation” \textit{CBC Archives} (21 December 1967),
\end{flushleft}
formulations of liberalism, the private sphere is not a sphere of legal rights, but rather one of private, “natural,” and familial relations of duty, love and custom. The public and private dimensions of social life were set up in binary and hierarchical relation to one another, with the public dimension associated with elevated values socially defined as masculine, and women historically relegated to the private sphere, and associated with less valued characteristics.

Feminists criticise the public/private distinction. In the context of gendered harms, the belief that the state does not belong in the bedroom, or the home, is associated with failures to recognise and adequately respond to, for instance, the harms of intimate partner violence and family violence. If matters of the home and family are private matters, then the state is less likely to regard them as criminal matters, or public policy matters in which it should take an intervening interest. If women are conceived of as existing in a private sphere, and as not belonging in the public sphere, then violence and oppression in the home that disproportionately affects women, is liable to be ignored by the state. In the context of criminalisation, gendered harms associated with the private sphere are likely to go uncriminalised, or if criminalised, be under- or un-enforced. While feminist law reforms have made some inroads in challenging and dismantling the public/private distinction, aspects of the dichotomy and its legacy remain part of the legal system. Feminists have argued that although today women are legal persons, with roughly the same range of formal political and civil rights as men, these rights are a more useful and natural fit for men’s needs than for women’s because they are defined according to liberal concepts and historical biases. As Brown puts it:
these [civil and political] rights [newly accorded to women] are of more limited use to women bound to the household and have different substantive meaning in women’s lives. It is as gratuitous to dwell upon an impoverished single mother’s freedom to pursue her own individual interests in society as it is to carry on about the property rights of the homeless.

As I indicated above, feminist views of the usefulness of the law as a tool for social change are located along a spectrum rather than representing a binary. Carol Smart argues that we must “grasp the nettle that law is not simply law[...]: it is not a set of tools or rules we can bend into a more favourable shape,” and should “recognize the power of law as a technology of gender... productive of gender difference and identity.” However, for Smart, it is important “not to be silenced by this realization” or let it “lead to despair.” Despite the historical interconnections between liberal legal principles, norms and processes and patriarchal ideology and history, as I discuss later in this chapter, giving up on the law as a tool of social change would be a significant loss.

6.7 Gendered Harm and Unintended Consequences of State Intervention

As discussed above, gendered harms such as those implicated in domestic violence, sexual violence, and violence against children are highly complex social problems. Addressing these kinds of problems requires integrated multi-agency policy and practice across many government agencies, as well as community groups. For instance, in addition to criminal justice responses to domestic violence, successfully helping women affected by intimate partner violence often requires integrating responses across areas such as health, housing, income support, education and early childhood education, as well as non-government groups such as women’s refuges, and church groups.

---

115 See above, footnotes 70 - 78, and accompanying text.
117 Ibid.
118 For further discussion of feminist arguments in favour of engagement with law reform methods, see below at footnotes 137 - 145 and accompanying text.
119 See section 6.4 above.
This state intervention takes a range of forms, such as: economic support for single women caring for children or for women leaving violent relationships who do not have paid work outside the home; the prosecution of abusers in the criminal justice system; the issuing of protection orders against violent partners; oversight of the welfare of women’s children; and increased regulation of institutions such as rape crisis centres and women’s refuges which began in a more grassroots fashion.

In this context, feminist writers like Wendy Brown, Kristin Bumiller and Janet Mosher have noted the problematic consequences that can follow from even careful, well-intentioned state intervention to address gendered harm. Social trends such as the feminisation of poverty, and growing proportion of female-headed households have seen growing numbers of women and children dependent on the state for survival. Increasing rates of state protection for women have seen corresponding increased surveillance and control over women’s lives and choices. In the particular context of gendered violence, when the state steps in to protect battered women from abusive intimate partners, it is not necessarily an empowering experience for those women. Some writers have likened the state’s role in relation to such women to that

---


122 Bumiller, In an Abusive State, supra note 34 at 66.


of the “new man” in their lives. Brown has pointed to the ways in which state “protection” can become a technique of domination and control, stripping women of their freedom to make their own choices, and making them passive and dependant:

Whether one is dealing with the state, the Mafia, parents, pimps, police, or husbands, the heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector’s rules.

Women relying on state assistance in order to leave an abusive partner may find the experience of state dependency, surveillance and control to be traumatic in ways that curiously echo their experiences of intimate partner abuse.

When the state takes an intervening interest in problems of gendered harm, it necessarily must determine the criteria by which it offers assistance. Any state-funded system of assistance must have such criteria, to ensure fairness and consistency, and for budgetary reasons. The particular content of the state’s chosen criteria for assistance is always open to critique. For instance, if criteria are set too restrictively to practically further the policy goal of helping women and children to escape from abusive homes, or if the administrative burden placed on women by onerous reporting requirements is so heavy that women are demoralised and traumatised by state control and surveillance, that is a clear basis for criticism of those particular criteria. But the setting of criteria is not in itself problematic – it is in the nature of states to make rules.

In addition to setting criteria determining which women are eligible to receive support and protection, the state also redefines the language and concepts by which women are encouraged or pressured to understand their experiences of violence. That is, when the state intervenes by creating rules and criteria, it exercises social power. As I discussed above, by

---


130 Cahn, “Policing Women”, supra note 129 at 821; Mosher et al, Walking on Eggshells, supra note 125 at ix; Chiu, “Confronting the Agency in Battered Mothers”, supra note 99 at 1241.
making law and policy, the state engages in \textit{naming}.\textsuperscript{131} Naming is one of the things that rules do. As noted in the previous paragraph, it is the nature of the state to make rules, so it is also in the nature of the state to engage in naming. However, it is important to be conscious of this naming process, and the names that the state dispenses. When the state intervenes by creating rules, and criteria, for when women qualify for state assistance, the issue arises whether the names it gives to women who do and do not meet its criteria, and their experiences, are suitable.

One way in which the state engages in naming when it implements policy on a social problem like gendered violence, though not the only way, can be by introducing professionalised and expert discourses about the problems and needs of the women it aims to protect.\textsuperscript{132} For instance, a social worker determining a woman’s entitlements to social welfare benefits assesses her experiences of violence in the official, medico-legalised terms using therapeutic and administrative language determined by the state.\textsuperscript{133} There may be good reasons for the use of this increasingly professionalised discourse. But there can also be negative consequences for the women described in this discourse. In this illustration, the process of seeking state help and entitlements not only constrains such a woman’s field of choices, but undermines her ability to form her own narratives about her own experiences of violence and poverty.\textsuperscript{134} Nancy Fraser writes that the social welfare system engages not only in “need satisfaction” but also “the politics of need interpretation,” such that grassroots discourses or self-understandings of experiences like intimate partner violence may conflict with and be suppressed by professional and official assessments of these problems.\textsuperscript{135}

The concern then is that for women who have experienced gendered violence, interactions with the state, far than freeing them from victimisation, may simply further entrench

\textsuperscript{131} See above, at section 6.3.
\textsuperscript{132} \textit{Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory} (Minneapolis: University of Minnesota Press, 1989) at 156; Bumiller, \textit{In an Abusive State}, supra note 34 at 66; also see: Kathy Ferguson, \textit{The Feminist Case against Bureaucracy} (Philadelphia: Temple University Press, 1984).
\textsuperscript{133} Bumiller, \textit{In an Abusive State}, supra note 34 at 68 & 90–94.
\textsuperscript{134} Also see Sameena Mulla, \textit{The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention} (New York University Press, 2014) at 11.
\textsuperscript{135} Nancy Fraser, \textit{Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory} (Minneapolis: University of Minnesota Press, 1989) at 156.
them in a subject identity defined by victimisation and passivity. The still deeper concern is that
this might be not a bug, but a feature, of the system of state intervention. Brown has asked: 136

[is the state] a specifically problematic instrument or arena of feminist political change[?] If the institutions, practices, and discourses of the state are as inextricably, however
differently, bound up with manhood in a male dominant society as they are with capital
and class in a capitalist society and with white supremacy in a racist society, what are the
implications for feminist politics?

It is useful here to return to the notion of a spectrum of feminist views on the question of
whether the law can be a productive tool in empowering women and facilitating social change.
At one end of the spectrum, is the notion that the law is a tool so compromised by its long history
of patriarchalism that it cannot be trusted, and should be abandoned. At the other end of the
spectrum, is an un-complicated sunny optimism, according to which legal reforms are all that is
needed to undo structural inequalities. I have deliberately painted those extremes as exaggerated
caricatures. In practice, most theorists hold more nuanced positions in between, both
acknowledging law’s history, and entrenched values, and seeing the potential to use the law as a
tool for social change, even though it is a tool with certain limitations and challenges.

Many feminist theorists and activists still favour engagement with law reform methods. 137
They argue that too much ground is ceded if the feminist movement wholly gives up on the state
as an agent and mechanism of positive change – options to reform the law and achieve
empowering results for women would be lost. 138 Lewis et al view the debate between those who
see the solution to gendered violence problems as lying in law reform, and those who think
engagement is futile as overly polarised. They point to a middle path of “sceptical reform,”
involving commitment to the view that there is value to women in working to reform the law,
while also being aware and wary of “previous failings of the law to progress women’s concerns
and of the imbeddedness of law in masculine culture.” 139 This middle ground acknowledges the

136 Brown, States of Injury, supra note 70 at 169.
137 Ibid, at 172; Piven, “Ideology and the State”, supra note 72 at 250.
138 Brown, States of Injury, supra note 70 at 172; Rosemary Hunter, “Border Protection in Law’s Empire -
139 Lewis et al, “Law’s Progressive Potential”, supra note 70 at 114–15 [spelling “imbeddedness” in
original]; for examples see, Mary Heath and Ngaire Naffine, “Men’s Needs and Women’s Desires:
Feminist Dilemmas About Rape Law ‘Reform’” (1994) 3:1 Aust Fem LJ 30 at 51; Thornton, “Feminism
and the Contradictions of Law Reform”, supra note 74; Catharine A MacKinnon, “Feminism, Marxism,
Method, and the State: Toward Feminist Jurisprudence” (1983) 8:4 Signs 635 at 644; also see, Kwong-
difficulties effecting change through law reform, but still sees the law as an appropriate site of feminist struggle. To not press for law reform means giving up on the prospect of a legal system and state that reflects the interests of women as well as men.

Critical race feminist scholars have also spoken of this middle path. They acknowledge and problematise the challenges involved in trying to further the interests of women and people of colour using law. But they have also pointed to the privilege implied by the too quick rejection of the law as a tool for change. Already marginalised groups, such as people of colour, or women, do not have the privilege of being too selective about what tools they use. Patricia Williams, responding to the Critical Legal Studies “rights critique,” argues that Black people in America, having endured a long history of painful “rightslessness” beginning during the time of slavery, do not have the luxury of giving up on rights out of principle. She argues that rather than turning our backs on rights as a flawed individualistic concept, we should “see through or past them” to reconceive rights in a new way. Mari Matsuda describes the pragmatic “dualist” or “double-voiced” approach adopted by feminist and critical race activists: while “there are times to stand outside the courtroom door and say ‘this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom’” so too there are “times to stand inside the courtroom” and “embrac[e] legalism as a tool of necessity, making legal consciousness [our] own in order to attack injustice.”

It is a complex task to hold two seemingly conflicting ideas in one’s mind at once: to both acknowledge that state interventions to “protect” women from gendered violence can further disempower women, entrenching them in a subject position of victimhood, while nonetheless refusing to abandon the legal system as a site of feminist struggle. Carol Smart similarly sees law as at once a means of “liberation” and “a means of reproduction of the

141 Ibid.
oppressive social order. Law both facilitates change and is an obstacle to change.”

Keeping hold of both these ideas at once is a challenging mental task, but it is a worthwhile and necessary one. As Matsuda observes, speaking of law students, but expressing an idea that equally applies to lawyers, policy makers and theorists alike:

the mediocre law students are the ones who are still trying to make it all make sense. That is, … to understand law as necessary, logical, and co-extensive with reality. The students who excel in law schools – and the best lawyers – are the ones who are able to detach law and see it as a system that makes sense only from a particular viewpoint. Those lawyers can operate within that view, and then shift out of it for purposes of critique, analysis, and strategy.

Thus, my project in considering criminal legislative approaches to gendered violence is situated within this ongoing feminist dialogue. It is important to think critically about the law, and the state, as mechanisms of social change – they are not politically neutral. Law and other tools of the state are capable of inflicting harm in the process of trying to prevent and alleviate harm. But the law and the state are also powerful actors and tools for addressing social harms.

6.8 Gendered Harm and Overlap: A Roadmap

The following six chapters address two case studies. Both case studies are instances of criminalisation of gendered harms using specific, targeted offences that descriptively overlap with other more general offences. Using the criteria set out in chapter 5, both case studies consider whether the descriptive overlap between specific and general offences is problematic overlap in the sense of being part of the problem of overcriminalisation, or whether the descriptive overlap is unproblematic or justified.

The first case study, covered in chapters 7, 8 and 9, deals with domestic and intimate partner violence. The particular focus of the case study is a proposed specific non-fatal strangulation offence in New Zealand. Non-fatal strangulation assaults clearly involve gendered harm. Strangulation is a form of intimate partner and family violence that is correlated with a much-increased risk of eventual femicide. Intimate partner assault more generally is also highly

gendered: in violent relationships, particularly those involving severe violence, it is “almost inevitably the man who is the offender and the woman who is the victim.” Writing in a Canadian context, Elizabeth Sheehy has explained that domestic violence that culminates in homicide is more gendered still: “[i]ntimate femicide is a gendered crime: women are more likely to be killed by their male partners and former partners … than by others, and women are four to five more times more likely to die at the hands of their partners than are men.” Thus, strangulation assaults in the context of intimate relationships is unambiguously a gendered harm.

Equally clear is that, if enacted, New Zealand’s proposed offence of non-fatal strangulation will descriptively overlap with the jurisdiction’s existing set of general assault offences. Strangulation is a form of assault. The unit of behaviour in which a person intentionally applies pressure to another person’s throat without her consent and impedes her breathing or circulation can be described specifically as strangulation, or more generally as assault. As such, although New Zealand law does not yet contain a specific non-fatal strangulation offence, strangulation assaults are clearly already criminalised as assaults. The clarity of this example, both as a clearly gendered harm, and a clear instance of descriptive overlap, makes it an excellent starting point in considering when and whether specific gendered violence offences that descriptively overlap with generally applicable offences are problematic and part of the problem of overcriminalisation.

The second case study, set out in chapters 10, 11 and 12, concerns the criminalisation of sexual violence. The case study focuses on the sexual violence offences that are known in various jurisdictions as rape or sexual assault. As with the first case study, the harm of this

---

147 For further statistics on this point, see Chapter 7, section 7.11.
second case study is clearly highly gendered: the majority of victims of sexual violence are women and girls and gender non-conforming people, and an even greater majority of perpetrators are men. However, the sexual violence case study is a more complex example than the strangulation case study in terms of descriptive and normative overlap. In chapters 4 and 5, I explained the importance of approaching separately the descriptive question of whether two offences overlap with one another, and the normative question of whether particular instances of descriptive overlap are problematic and represent overcriminalisation. An important reason for this is to avoid circularity. That is, to avoid defining overlap as something that is by definition problematic and part of the problem of overcriminalisation; and conversely, to avoid defining overlap so that when a potential instance of overlap turns out not to be problematic and part of overcriminalisation, a circular logic dictates that it must not have been descriptive overlap after all.

In respect of the strangulation case study, it is a straightforward matter to keep descriptive and normative questions about overlap separate. It is clear that a specific strangulation assault offence will describe behaviour that is already criminalised by general assault offences. However, analysis of the case study also makes clear that strangulation in a domestic violence context is a particularly dangerous form of assault, in that it can cause serious injuries and death, and is a risk factor for future fatality. That is, the harms at the centre of specific offence are somewhat distinct from those of assaults more generally. Furthermore, for a number of evidential and awareness-related reasons, strangulation is a particularly difficult form

---

150 For further statistics on the gendered nature of sexual assault, and the ways in which gender intersects with other dimensions of women’s lives, such as race, class, gender identity, sexuality, disability and women who have previously been victimised, see chapter 10, section 10.1, at footnotes 8 – 13 and accompanying text.

of assault to prosecute under general assault offences. On this basis, its criminalisation under a specific offence appears to be justified, and does not seem to give rise to the problems associated with overcriminalisation. But still, it remains clear that general assault offences and a specific non-fatal strangulation offence each could be used to describe the conduct of intentionally applying pressure to the neck and impeding breathing.

As I will explain here, the relationship between the descriptive and normative questions about overlap in the second case study is more complex, appearing at first to potentially lead to something of a paradox. For reasons I will also explain, this paradox is not peculiar to this case study. Though it is more pronounced in the sexual violence case study, a similar paradox haunts the overlap analysis more generally. The interconnection between the descriptive and normative matters relating to overlap in the sexual violence case study is as follows.

Based on the order of the analysis in chapters 4 and 5, it generally makes sense to begin an overlap analysis by asking first whether offences in question descriptively overlap with one another before turning to the normative question of whether any descriptive overlap is part of the problem of overcriminalisation. In the case of the sexual assault case study, I order my analysis somewhat differently. Before the sequential descriptive and normative overlap analyses, I begin with a discussion of several important contextual details of the case study. One important contextual detail is that rape or sexual assault is clearly no “crime du jour”: since the earliest criminal codes, legislators have considered that there is something different and special about the central harm of sexual violence that merits its separate criminalisation under the specific offence of rape. Another important situating detail is that, as the offence name “sexual assault” suggests, it would be possible to design a criminal code in which behaviour we describe as sexual assault is not criminalised under a specific sexual assault offence, but rather is simply criminalised by general assault offences, and treated one of several paths to an assault conviction. Nevertheless, it is hard to imagine someone today arguing that the offence of rape or sexual assault is part of the problem of overdepth in the criminal law, and constitutes overcriminalisation.

In light of this initial context, sexual violence is an interesting case study to use in working backwards in order to assess: whether that intuition that specific criminalisation of sexual assault is not overdepth and overcriminalisation is in fact correct; and if so, why it is that
sexual assault, to the extent that it descriptively overlaps with other general offences, is not problematic overlap.

At first glance, the relationship between sexual assault and general assault offences looks like a clear example of descriptive overlap, and normative questions about whether such overlap is part of the problem of overcriminalisation appear to be a tidily separate matter. However, as I explore in chapters 10 to 12, the conclusion that sexual assault descriptively overlaps with general assault is in fact premised on embedded normative understandings of how to view the central harm of sexual assault and assault. The notion of sexual assault and general assault as overlapping is premised on a liberal theory of sexual assault, according to which the central harms of sexual assault involve the interference with the victim’s bodily and sexual integrity and autonomy. This is not how rape was conceptualised in early criminal codes, where it was understood as a crime against male property interests in women’s and girl’s bodies. Understood in this way, the offence of rape seems not to descriptively overlap with assault offences, but rather potentially with offences such as theft, misappropriation and trespass.

Being conscious of the historical ways in which the offence of rape has been understood helps to make clear that when we regard current sexual assault offences as overlapping with general assault offences, we are doing so based on modern, liberal theorisations of the harms of sexual assault. That is, the notion that sexual assault is a kind of battery, in which an attacker unlawfully and intentionally applies force to the body of a victim without her consent, and in so doing, infringes her interests in bodily autonomy, and bodily integrity. My own understanding of the central harm of sexual assault is informed by feminist re-imaginings of harms of bodily autonomy, bodily integrity and sexual integrity: that is, understanding these harms in embodied ways that reflect the physical and emotional dimensions of the harms of sexual violence.152 As I discuss in chapter 12, if the central harm of sexual violence is understood through the lens of traditional liberalism, it indeed appears to be essentially a battery, and as such, descriptively overlaps with general assault offences. However, viewed through the lens of a feminist relational adaptation of liberal concepts of bodily autonomy and bodily and sexual integrity, the central harm of sexual violence is embodied, but also emotional, psychic and sexual harm. Viewed in

152 See discussion in chapter 12 at section 12.7.
this way, there is a convincing sense in which sexual assault offences and general assault offences do not overlap even descriptively because they address distinct central harms.

In one respect, the central paradox of sexual violence as at once a clear example of descriptive overlap, and a clear example of offences that do not overlap with one another, might strike the reader as a sign that this second case study is a weak overlap case study, or in fact, not properly a case study of overlap at all. But in another sense, this conceptual slipperiness that characterises the heart of the sexual violence case study in fact illustrates a general characteristic of questions about overlap. The slipperiness of the division between descriptive and normative accounts of overlap is pronounced in this second case study. But I argue that the obviousness of this slipperiness in the case of sexual violence can also help us to detect the less obvious, but still present, slipperiness in the prima facie much clearer example of descriptive overlap set out in the strangulation case study. The arguments in the strangulation case study that the new specific strangulation offence in fact addresses a pragmatic and evidential “gap” that exists when attempting to prosecute strangulation assaults under general assault offences could be read as a re-evaluation that the specific strangulation offence and general assault offences do not descriptively overlap after all.

Taken together, analysis of the two case studies allows us to explore whether or not specific offences addressing particular gendered harms or sexual violence and domestic violence, which (potentially) descriptively overlap with more general offences, contribute to the problem of overcriminalisation. The case studies also illustrate that the ways in which a legal system generally, and criminal justice responses in particular, are contingent human constructions. There is not one correct way to structure a set of criminal offences. The configuration and articulation of a set of offences is the result of the choices and priorities of policy makers and legislators at a particular time, but not necessarily for all time. It happens that at this particular moment, gendered harm is a significant, pressing social issue in New Zealand, Canada and many other countries. That will necessarily be part of the calculus in the next chapters as I use the diagnostic criteria set out in chapter 5 to assess whether specific, overlapping offences addressing gendered harms are appropriate in each of the three case studies, or whether they represent overcriminalisation and its associated dangers. At some future time, if real progress has been made and rates of gendered harm significantly decreased so that they no longer present a striking
and pressing social problem, then the calculus might again change. In this perhaps utopian vision, the case for overlapping offences addressing gendered harms may well be different.
Chapter 7: Non-Fatal Strangulation: Inherent Dangers and Risks

7.1 Introduction

This chapter and following two chapters consider the first of two case studies of specific gendered violence offences that overlap with more general criminal provisions. This first case study is the argument in New Zealand for a stand-alone offence of non-fatal strangulation. Chapters 10, 11 and 12 present the second case study: the longstanding practice of criminalising sexual assault and sexualised violence separately from general assault offences.

The case studies illustrate in different ways how offences may overlap, or appear to overlap, with one another. Both sets of case study chapters consider whether the overlap or apparent overlap is in fact overlap in a descriptive sense, and if so, whether the descriptive overlap is part of the problem of overcriminalisation, or instead is justified with respect to particular interests. The order in which I consider the case studies is deliberate. I consider the case for a specific non-fatal strangulation offence first for several reasons. Importantly, of the two case studies, the offence of non-fatal strangulation is the clearest and most straightforward example of a specific offence that will descriptively overlap with existing general assault offences. In a country like New Zealand in which no specific strangulation offence currently exists, nonetheless, it is clearly not legal to strangle another person – incidents of strangulation are criminal assaults and can be charged as such. If and when the proposed specific non-fatal strangulation offence is enacted, it will specifically re-criminalise conduct already covered by general assault offences. By beginning with the clearest example of overlap, this first case study can then ground the sexual violence case that follows, which is a more complex example of overlap.

Secondly, non-fatal strangulation in the context of intimate partner violence is a clear example of criminal harm that is gendered in the sense discussed in the previous chapter.\(^1\) Intimate partner violence is overwhelmingly an offence committed by men against women, and within that already highly gendered context, strangulation is a particularly gendered mode of intimate partner violence.\(^2\) Thirdly, as noted in chapter 5, a category of specific offences that overlap with existing general offences that are frequently problematic, and give rise to problems.

---

\(^1\) See chapter 6, section 6.2.
\(^2\) See section 7.11, particularly at footnotes 121 - 122 and associated text.
associated with overcriminalisation are “crimes du jour.” These are offences that are created due to political pressures and incentives to pass new legislation in the face of high profile crimes, perceived crime control crises and “moral panics.” These incentives apply even when the conduct in question is already adequately criminalised by existing criminal legislation. Although crimes du jour are not the only potential source of problematic overlap in the criminal law, when a new overlapping offence is proposed, it is prudent to assess whether the offence seems to be a designer offence that is being suggested only to appear to do something about a perceived problem, without any reference to whether the offence is likely to address the problem, or whether there is even really a problem at all.

As discussed in chapter 5, “moral panic” can be a loaded and slippery term: one person’s moral panic can be another person’s welcome and justified response to a pressing problem. However, it is hard to imagine a credible claim that the concern about the prevalence of domestic violence generally, and non-fatal strangulation in particular, constitutes moral panic. Rather, intimate partner violence and family violence are problems that have only relatively recently come to be understood as public problems, rather than private familial matters that are outside of the proper reach of public scrutiny, much less, criminalisation.

Furthermore, the process by which New Zealand’s specific non-fatal strangulation offence was proposed and came to be included in the Family and Whānau Violence Legislation Bill that is currently progressing through the House was anything but a knee-jerk reaction. The proposed offence was premised on expert, in-depth reports from the Family Violence Death Review Committee and the Law Commission. Once introduced, the Bill has also enjoyed cross-party and public support; despite a change of government since the select committee report, the Bill has been picked up by the new government. As the Bill will form a major focus of this and the next chapter, arguments in favour of the new offence have been evidence-based, and have focused on the seriousness of strangulation and on difficulties prosecuting the conduct under general assault offences. As such, the policy arguments that have occurred in New Zealand in

---

3 See chapter 5, section 5.6.
4 See discussion below at section 7.2.
5 See section 7.3 below for an outline of the current progress of the Family and Whānau Violence Legislation Bill through the New Zealand Parliament at the time of submitting this dissertation.
support of the proposed new offence illustrate the kind of analysis and evidence that should ideally accompany the consideration of a potentially overlapping offence.

This first case study is spread across three chapters. In this chapter, I make two claims: first, that due to the inherent character of strangulation, specifically criminalising it does not give rise to problems associated with overcriminalisation; and second, that because strangulation is a red flag for future homicide, effectively criminalising this conduct is extremely important. The offence is distinct from other modes of assault both because strangling someone is a particularly dangerous and harmful mode of assault, and because strangulation incidents are a well-established statistical risk factor for homicide. Chapter 8 considers pragmatic and evidential reasons why it is particularly difficult to detect, investigate, prosecute and secure convictions for strangulation assaults. The chapter also sets out the ways in which the proposed new offence would address the present difficulties. In Chapter 9, I turn to a deeper overlap analysis of the case study, examining whether and how the proposed new offence will descriptively overlap with existing general assault offences, whether that descriptive overlap is part of the problem of overcriminalisation, and what the answers to these questions can tell us about the relationship between overlapping criminal offences and overcriminalisation more generally.

Taken together, the three chapters present the case that although a new offence of non-fatal strangulation will descriptively overlap with existing general assault offences, there are reasonable and sound pragmatic and evidential justifications for this depth. On the basis of these justifications, the overlap between the new non-fatal strangulation offence and general assault offences will not constitute overdepth, and will not contribute to the problem of overcriminalisation. Furthermore, to the extent that overlap between the specific offence and general assault offences might prima facie raise overcriminalisation concerns, in light of the inherent dangerousness and status as a risk factor for future fatality the positive case for a specific offence outweighs those concerns.

A roadmap of the rest of this chapter is as follows. The chapter begins by describing how a specific non-fatal strangulation offence came to be recommended and included in the Family and Whānau Violence Legislation Bill 2017 that is currently before the New Zealand Parliament. It then introduces the two themes running through the arguments in favour of the

---

6 Section 7.3.
specific non-fatal strangulation offence.\textsuperscript{7} The rest of the chapter considers the first of the two themes:\textsuperscript{8} the notion that strangulation is both inherently dangerous, and a statistical risk factor for lethality.\textsuperscript{9} It explains the distinction between “dangerousness” and “risk”,\textsuperscript{10} and addresses questions of when the criminalisation of risk may contribute to overcriminalisation.\textsuperscript{11}

\textbf{7.2 History of Criminalising Intimate Partner and Family Violence}

A sense of the history of the criminalisation of intimate partner violence and family violence is important context for New Zealand’s proposed non-fatal strangulation offence. For reasons of space, in this section I gesture towards this historical context rather than supplying a fuller history of socio-legal responses to domestic violence.\textsuperscript{12} This section refers to international trends, while focusing specifically on specific examples from New Zealand.

Historically, family violence and intimate partner violence was tolerated by society and understood as a private, unseen matter rather than a public matter falling within the scope of the criminal law. Feminist legal scholar Reva Siegel has noted that until the late nineteenth century, Anglo-American law “structured marriage to give a husband superiority over his wife in most aspects of the relationship.”\textsuperscript{13} This legally sanctioned superiority included a husband’s right of “chastisement”\textsuperscript{14} or “correction”\textsuperscript{15} – that is, the right to physically punish his wife for disobeying

\begin{flushleft}
\textsuperscript{7} Section 7.4.
\textsuperscript{8} Sections 7.5 - 7.16.
\textsuperscript{9} Section 7.5.
\textsuperscript{10} Section 7.5.
\textsuperscript{11} Sections 7.12 - 7.16.
\textsuperscript{13} Siegel, “The Rule of Love”, supra note 12 at 2122.
\end{flushleft}
him, provided that the chastisement did not result in permanent injury.\textsuperscript{16} The chastisement right was formally repudiated in Anglo-American legal systems during the late nineteenth century.\textsuperscript{17} However, even after the chastisement right ceased to overtly exist, violence occurring in marital relationships was generally still regarded as a private matter with which police and courts were reluctant to interfere.\textsuperscript{18} Cheryl Hanna has written that “[p]rior to the 1970s, the typical police response to domestic violence was to mediate the situation; advising the husband or boyfriend to ‘take a walk around the block’ was often the extent of police intervention.”\textsuperscript{19}

By the 1970s, the women’s movement identified violence in the home as an important issue.\textsuperscript{20} Internationally, and in New Zealand, women’s refuges and domestic abuse shelters, and rape crisis centres, began to be established as grass roots means of supporting women in violent intimate relationships and women who had suffered sexual violence. In New Zealand, the first women’s refuge was established in Christchurch in 1973, and the first permanent rape crisis centre in Auckland in 1978.\textsuperscript{21} From the 1970s, social views and official policies began to change so that increasingly it was considered acceptable for police to intervene in violence occurring within intimate and family relationships.

In 1982, New Zealand enacted targeted domestic violence legislation introducing non-violence orders\textsuperscript{22} and non-molestation orders,\textsuperscript{23} and giving police powers of arrest without laying


\textsuperscript{17} Siegel, “The Rule of Love”, \textit{supra} note 12 at 2129; Sewell, “History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating”, \textit{supra} note 12 at 984; Cheryl Hanna, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions” (1996) 109 Harv L Rev 1849 at 1857 (noting that in United States, wife beating was illegal in all states by 1920).

\textsuperscript{18} Siegel, “The Rule of Love”, \textit{supra} note 12 at 2130.


\textsuperscript{21} In New Zealand, for instance, the first women’s refuge was established in Christchurch in 1973: Aviva Family Violence Services, Our History, online <http://www.avivafamilies.org.nz/About/Our-History/>; Cook, “Women’s Movement”, \textit{supra} note 20; and the first permanent rape crisis centre was established in Auckland in 1978: Christine Dann, \textit{Up from Under: Women and Liberation in New Zealand, 1970–1985} (Bridget Williams Books, 2015) at 142.

\textsuperscript{22} Domestic Protection Act 1982, s 4.

\textsuperscript{23} Domestic Protection Act 1982, s 13.
formal criminal charges. In 1985, rape within marriage became a criminal offence.\textsuperscript{24} By the late 1980s, Police began to proactively arrest violent offenders rather than necessarily waiting for victims to complain. Police also began referring victims directly to women’s refuges.

Following those initial changes in the 1970s and 1980s, from the mid-1990s, family violence in New Zealand has received an “unprecedented level of attention” and been a major matter of public concern.\textsuperscript{25} This concern has been expressed by government, non-governmental agencies and academics via “countless formal groups, meetings, conferences, strategies,\textsuperscript{26} reviews, and investigations,”\textsuperscript{27} new legislation\textsuperscript{28} and public awareness campaigns\textsuperscript{29} over the past more than twenty years. The notion that family violence is a private matter has undergone serious challenges, and police, courts, officials,\textsuperscript{30} public figures,\textsuperscript{31} and the public\textsuperscript{32} are more

\begin{flushleft}
\textsuperscript{25} Janet Fanslow, \textit{Beyond Zero Tolerance: Key Issues and Future Directions for Family Violence Work in New Zealand} (Wellington, NZ, 2005) at 6, Wellington, NZ.
\textsuperscript{28} Domestic Violence Act 1995, which was considered groundbreaking at the time for its focus on safety and support for victims and re-education for perpetrators.
\textsuperscript{29} Family Violence \textit{It’s Not OK}, online <http://areyouok.org.nz/>.
\textsuperscript{30} Writing in New Zealand in 2005, Janet Fanslow remarked on the “unprecedented level of attention” being paid to family violence issues in New Zealand, pointing to a number of government initiatives and statements made during that year prioritising family violence prevention: Fanslow, \textit{Beyond Zero Tolerance: Key Issues and Future Directions for Family Violence Work in New Zealand}, supra note 25 at 6; writing in 2009, Feinrich and Contesse spoke of the emphasis over the preceding decade on family violence issues in New Zealand: Jeanmarie Fenrich and Jorge Contesse, “\textit{It’s Not OK}”: \textit{New Zealand’s Efforts to Eliminate Violence Against Women} (New York City, 2009) at 4, New York City; writing in 2014, Herbert and Mackenzie spoke of twenty years’ worth of measures attempting to address family violence, including “countless formal groups, meetings, conferences, strategies, reviews, and investigations … undertaken by government, non-government agencies and academics” Herbert and Mackenzie, \textit{The Way Forward}, supra note 27 at 1; see also the NZ Family Violence Clearinghouse Timeline of Government measures relating to family violence: “Timeline - Government | New Zealand Family Violence Clearinghouse”, supra note 27.
\textsuperscript{31} In 2004, retiring Governor-General Dame Silvia Cartwright used her farewell speech to contrast New Zealand’s peaceful image abroad with the “nightmare” and “dark secrets” of violence at home: Audrey
\end{flushleft}
aware of domestic violence as a critical crime, health, and equality issue. However, Deborah Tuerkheimer argues, “criminal law paradigms, developed when violence against wives was lawful” still operate “to obscure defining characteristics of domestic violence” and to make it difficult to effectively prosecute.33

Today, violence against wives and women intimate partners is no longer lawful – domestic violence is criminalised under general offences such as assault, sexual assault, threatening offences and property offences.34 However, as Tuerkheimer’s comment highlights, the harms of intimate partner violence are not always well captured by existing criminal offences, paradigms and procedures.

7.3 Proposal for a Non-Fatal Strangulation Offence in New Zealand

The establishment of the New Zealand Family Death Review Process in 2008 is another important landmark in the research and policy landscape described in the previous section. In its 2014 annual report, the Family Violence Death Review first brought to prominence in New Zealand the issue of a specific offence of non-fatal strangulation. The report emphasised non-fatal strangulation as “an important lethality risk indicator” and a “‘red flag’ for future serious abuse and fatality.”35 The Committee recommended the introduction of a specific offence of non-fatal strangulation. The following year, in response, the Minister of Justice referred to the Law Commission a new project to consider the creation of a non-fatal strangulation offence in the family violence context.36

The central recommendation of the Law Commission’s March 2016 report was the creation of a new offence of non-fatal strangulation or suffocation of another person, subject to a

---

33 For instance, in New Zealand, the “It’s Not OK” public awareness programme launched in September 2007, and continuing today: “Family Violence”, supra note 29.
34 Section 7.2.
maximum penalty of seven years imprisonment. The Commission also recommended that strangulation convictions for family violence incidents should be recorded as family violence offences on the offender’s criminal record, and that strangulation should be listed in the Sentencing Act 2002 as an aggravating sentencing factor. The Minister of Justice Amy Adams responded positively to the Commission’s recommendations. In September 2016, the Minister announced the Ministry of Justice’s “Safer Sooner” programme of sweeping changes to New Zealand’s family violence legislation, including the introduction of a specific non-fatal strangulation offence.

The Family and Whānau Violence Legislation Bill 2017 was introduced on 15 March 2017 and had its first reading on 11 April 2017, before being referred to the Justice and Electoral Select Committee. Submissions on the Bill closed on 24 May 2017, and the Select Committee reported on the Bill on 16 August. Following a general election in September 2017, and several weeks of coalition negotiations, a new left-of-centre, Labour Party-led coalition government was formed in October 2017. Labour’s Minister of Justice Andrew Little is now the minister in charge of the Bill. The Bill introduces a specific non-fatal strangulation offence, worded as follows:

Everyone is liable to imprisonment for a term not exceeding 7 years who intentionally or recklessly impedes another person’s normal breathing, blood circulation, or both, by doing (manually, or using any aid) all or any of the following:

(a) blocking that other person’s nose, mouth, or both:

(b) applying pressure on, or to, that other person’s throat, neck, or both.

38 *Ibid*, at 3, R3.
43 *Ibid*.
Submissions to the Law Commission during the preparation of its report, and submissions to the Select Committee as it reviewed the Bill, have been largely supportive of a specific non-fatal strangulation offence. Those who made submissions in favour of a new offence have acknowledged that a specific non-fatal strangulation offence will descriptively overlap with existing general assault offences to at least some degree.

The Law Commission’s report makes clear that it approached the question of whether to recommend a new specific offence of non-fatal strangulation with an attitude of healthy scepticism. The basis for this initial scepticism was that the new offence would re-criminalise forms of assault already covered by existing general provisions. The Commission expressed concerns paralleling some of those explored in Chapter 3 of this dissertation: that overlapping offences can lead to “inconsistent charging practice and inappropriate undercharging.”\(^ {45} \)

That is, the Commission’s starting position was that it needed to be persuaded that the creation of a new specific offence is justified and necessary, rather than likely to exacerbate the problem of overcriminalisation.

For instance, the Commission refers to the advice of the Legislation Advisory Committee that in order for the creation of a new offence to be justified, it must be shown that the new offence will successfully address the policy objectives, and that those objectives could not be achieved equally well by other mechanisms.\(^ {46} \) There was broad support for the new offence during the Commission’s targeted consultation process.\(^ {47} \) The Commission notes that its own reasoning process followed a similar trajectory to that of “a couple of consultees” who similarly “were initially not in favour of a separate offence because, as a matter of principle, they preferred generic offences, but they conceded there was a case for a separate offence in this instance.”\(^ {48} \)


\(^{47}\) New Zealand Law Commission, *Strangulation*, supra note 37 at 53 and at Appendix B of the report for a full list of consultees.

\(^{48}\) *Ibid*, at 6.
7.4 The case for a Specific Offence of Non-Fatal Strangulation

The Family Violence Death Review Committee, Law Commission, Minister of Justice, Justice and Electoral Select Committee and various institutions and individuals who have made submissions to the Law Commission and Justice and Electoral Select Committee Select have recommended the creation of a specific offence of non-fatal offence strangulation. In order to make sense of such an offence from the point of view of overlap, it is useful here to delve into their arguments for a specific strangulation offence. Two key themes emerge from the various arguments for the new offence. The first theme is the inherent dangerousness of strangulation and that it is also a risk factor for escalation of violence and future fatality. The second theme is the difficulty of proving and prosecuting non-fatal strangulation.

I take care in this and the next chapter to draw these themes out separately. Of course, the themes are not entirely discrete: they also speak to one another, each amplifying the intensity of the other. But in order to assess how effective a specific offence of non-fatal strangulation would be at addressing the two key themes, it is important to be clear about how particular characteristics of the new offence are targeted at those themes. It is important to avoid conflating two logically distinct sets of justifications. The rest of this chapter deals with the first theme: the dangers and risks of strangulation. I turn to the second theme in Chapter 8.

7.5 First Theme: Dangers and Risks of Strangulation

The first theme in the New Zealand arguments for the creation of a specific strangulation offence draws on international medical and legal research emphasising that strangulation in a domestic violence context is both inherently dangerous and a risk factor for future violence and fatality.

Strangulation, (sometimes referred to as choking, throttling, or garrottting) is defined as compression of the neck by an external force, such as hands, or a ligature, obstructing blood or

---

49 Several writers have pointed out that while it is common for victims of intimate partner violence to refer to having been “choked” by an abuser, this is colloquial rather than strictly correct use of the word. Choking and strangulation are distinct concepts: choking is an internal blockage of the windpipe by food or some other object; strangulation is external pressure to the neck: Manisha Joshi, Kristie A Thomas, and Susan B Sorenson, “‘I Didn’t Know I Could Turn Colors’: Health Problems and Health Care Experiences of Women Strangled by an Intimate Partner” (2012) 51:9 Soc Work Health Care 798 at 800; George E McClane, Gael B Strack, and Dean Hawley, “A Review of 300 Attempted Strangulation Cases: Part II: Clinical Evaluation of the Surviving Victim” (2001) 21:3 J Emerg Med 311 at 311.

airflow and causing asphyxia (that is, a lack of oxygen supply to the brain and body).\textsuperscript{52} Strangulation is an \textit{inherently dangerous} act, which means it is dangerous in and of itself any time that it occurs. But in addition, a history of previous incidents of strangulation is a serious \textit{risk factor} and red flag for the future escalation of violence, and fatality.

It is important here to be clear on the distinction I draw between strangulation’s inherent dangerousness, and its status as a risk factor for fatality. The concepts of “dangerousness” and “risk” are clearly closely related – both convey a notion of possible, but not necessarily certain, future harm. That is, a threat, probability, or likelihood of a harmful outcome that may or may not eventuate depending on how circumstances unfurl in a particular case. The distinction I draw here relates to causation: to say strangulation is an \textit{inherently dangerous} act means that any time a person, A, strangles another person, B, the action of strangulation both \textit{causes} and could \textit{cause} person B to suffer physical harm, psychological trauma, or death. To talk of strangulation as a \textit{risk factor} for future fatality means that male partners who have strangled their female intimate partners on at least one occasion are statistically more likely than those who have not strangled an intimate partner to eventually, on another occasion, go on to kill their partners. For any particular man who, having once strangled a female partner, does in fact go on to kill his partner at a later time, it is not the case that the earlier strangulation event \textit{caused} him to do so. The earlier strangulation event and the eventual fatal event are \textit{correlated}, in that both events involved the same actors and took place in the context of an abusive relationship in which the violence escalated over time. But the earlier event did not \textit{cause} the later event to happen.

\textbf{7.6 Dangerousness and the Causing of Harm}

HLA Hart and Tony Honoré offer a clear and common sense account of causation that is useful in articulating the distinction between dangerousness, understood in causal terms, and risk, understood in non-causal, probabilistic or statistical terms.\textsuperscript{53} Hart and Honoré see the paradigm of causation as human bodies manipulating objects in order to bring about desired changes in

\begin{thebibliography}{9}
\end{thebibliography}
those objects. These manipulations of objects can be described by transitive verbs like “push, pull, bend, twist, [or] break.” Suppose for instance that I pick up a twig in my hands and snap it in two. By manipulating the twig, I have caused it to break. My action of snapping or breaking the twig is in itself what causes the twig to break: I use my hands to exert direct pressure on the twig, thus snapping it.

Hart and Honoré note that we also attribute causal connections in situations that diverge from the simplicity of this paradigm. Frequently, we recognise causal relationships in cases where there are intermediate steps between an initial cause and a final effect. In such cases, the causal chain between an initial cause and a final effect comprises many links, with each link comprising a cause and effect pairing. That is, we can speak of event, A, as causally related to effect, D, if the two are related by a causal chain of linked pairs of causes and effects: event A causing B; with B then causing C; and C in turn causing D. Hart and Honoré argue that the basis for attributing causal connection in these non-paradigmatic cases is whether the connection between each purported cause and effect pair in a longer chain is sufficiently similar to the relation between cause and effect in the paradigm case. For a causal chain to be strong, such that A is causally related to D, each cause and effect link in the chain must pass the “resembles or is analogous to” the paradigm test.

Consider the simple example of a child throwing a stone at a window and breaking it. Although the example is simple, it is not as simple as the paradigm case – the child did not cause the glass to break by directly manipulating the glass itself. Instead, there is an intermediate causal step. The first link in the causal chain is the relationship between event A and effect B. Event A is the child’s manipulation of the object, the stone, by exerting force on the stone and causing it to move through space. Event A causes effect B: the stone reaching and striking the window at a particular velocity. The relationship between A and B is analogous to the paradigm relationship between cause and effect: the act of exerting force on the stone had the effect of moving it through space in a particular direction at a particular velocity.

54 Ibid, at 28.
55 Ibid.
56 Ibid, at 29.
57 Ibid, at 31.
The second link in the causal chain is the connection between B, the stone reaching the window at a particular velocity, and C, the window breaking. B can be understood not only as an effect of A, but also as an event: the stone reaching and striking the window. It is this event (B) that in turn directly causes the window to break: effect C. The relationship between event B and effect C meets Hart and Honoré’s “resembles or is analogous to” the paradigm test. Although event B does not itself involve a human manipulation of an object, it is an “interfere[nce] with or interv[ention] in the course of events” that would normally have taken place. The event of a fast moving stone striking a glass window is “a difference from the normal course” of events in which the window would have simply sat undisturbed (except by perhaps by weather or the occasional disoriented bird) in its own part of the wall. It is this difference from the normal course of events – the stone striking the window – that “accounts for the difference in outcome”: the broken window. This means that although this stone throwing example is not the paradigm case all of the cause and effect links in the causal chain sufficiently resemble, or are analogous to, the paradigm case that we can confidently say that event A, the child’s throwing of the stone, caused effect C, the broken window.

7.7 Using Evidence or Background Knowledge to Assess Causal Relationships

Assessing the causal relationship between a potential cause and effect pair may involve having available a great deal of background information. In some cases, this background information may take the form of general or common-sense knowledge about the ways in which certain objects and forces characteristically behave. In other cases, ordinary background knowledge may not be sufficient to shed light on whether an event or force is causally related to a particular effect. In such cases, specialised scientific evidence or advice from experts about how certain objects and forces characteristically behave may be required to shed light on the presence or absence of a causal connection analogous to that seen in the paradigm of causation. Take for instance the stone throwing example considered in the previous section: our everyday background understanding of the characteristics of stones and of glass windows tells us that a window can be broken when a stone strikes it at a particular speed. Most children have at some point been warned to be careful when playing with balls near windows. Most people have at

---

58 Ibid, at 29.
59 Ibid.
60 Ibid.
61 Ibid.
some time broken a window or a glass, or at least seen one break, and understand that glass is brittle and can break when struck with force. This kind of everyday knowledge aids us in discerning that the child throwing the stone was the cause of the broken window: the child caused the stone to move; and the moving stone striking the window caused the window to break, just as my snapping a twig caused the twig to break.

Consider here another example of background information informing our assessment of a non-paradigmatic causal chain. Suppose a small candle is burning in a candleholder on a table. I take a glass and place it upside down over the candle. After a few seconds, I notice the flame has gone out. In order to assess whether my placing of the glass over the candle (event A) was the cause of the flame going out (effect B) it is important to have certain background information about how flames, candles and glasses tend to behave. If we understand that flames require oxygen in order to burn, then we know that cutting off a flame’s source of oxygen will cause the flame to go out. If we understand that oxygen cannot penetrate glass or a solid table top, then we will know that once a glass is placed upside down on a table, the only oxygen present under the glass will be whatever oxygen was there when it was first set down. Taken together, this background information allows us to understand that by placing a glass over the candle, I have cut off the flame’s source of oxygen. Once the flame exhausts its limited remaining supply of oxygen already in the glass, it will be starved of oxygen and combustion will cease.

We might have acquired this knowledge about flames and oxygen in an explicitly scientific or educational context – for instance, we may have learned about the mechanics of combustion in high school science class, or by reading an article. But we might also have acquired it via less academic, more “common sense” means – someone might have missed science class but still know from personal experience in the kitchen that a good way to put out a fire that has started in a pot on the stove is to promptly put the lid on the pot. Such a person might not express that knowledge in terms of oxygen and combustion, and instead might say something like “I’ve found that totally enclosing a fire reliably puts it out.”

In either case, whether we know about oxygen and combustion from science class, or about pots, lids and grease fires from near misses in the kitchen, a person with either kind of background knowledge is well placed to assess the causal relationship between my placing the glass over the candle and its flame going out. Conversely, a person who knows nothing about fire...
either from formal learning or everyday experience will have a hard time assessing whether my act of placing the glass over the flame caused it to go out.

7.8 Dangerousness of Strangulation: Fatal Strangulation

In this section and the following section, I apply Hart and Honoré’s core idea of causation to the act of strangulation, and the harms associated with it, and draw on scientific and medical evidence to demonstrate a clear causal relationship between strangulation and these harms. These sections explain the ways in which strangulation is dangerous in a causal sense.

In these sections, I aim to strike a balance. For reasons of space I do not attempt to give a full literature review of this extensive field, though readers interested in reading further may find my footnotes a useful starting point. However, it is important to convey some details of the physical and psychological harms that the act of compressing a person’s throat can cause to a victim in order to convey that the inherent harms of strangulation are greater and more long-term than is widely understood. Further, an introductory knowledge of some of the internal and delayed injuries that strangulation can cause is a useful background for the discussion in chapter 8 concerning the difficulties in detecting and capturing evidence of internal injuries caused by strangulation that is suitable for criminal prosecution purposes.

There are deep medical and forensic science literatures concerning strangulation as a cause of traumatic death and injury.62 This literature demonstrates that the physical act of strangulation – or in Hart and Honoré’s terms, the physical manipulation and application of force to the neck – has a clear causal relationship to a range of serious injuries, psychological harms and can cause death either at the time of the strangulation incident or hours, weeks or even years later. I will begin with strangulation assaults that are fatal, before turning in the next section to the non-fatal but still serious harms caused by strangulation assaults.

---

The act of strangulation is the compression of the neck or throat. Incidents of strangulation that are fatal, in the sense that the victim falls unconscious during the act of strangulation and either dies immediately, or after some delay, are very close to Hart and Honoré’s paradigm of causation: the abuser places his hands on the victim’s neck and applies force, thereby blocking structures in the neck, preventing airflow, blood circulation or both.\(^{63}\) Just as we know that when I exert snapping pressure on a twig I cause it to snap in two, we similarly know, based on scientific experimentation, that as little as 2 kilograms of pressure to the neck is enough to cause the blocking of the jugular vein.\(^{64}\) We know that between 10 and 18 kilograms of pressure, depending on the position and direction of force on the throat, can block the airway.\(^{65}\)

The effects of blockages to the airway or circulatory system are rapid. The brain needs a continuous supply of oxygen: when that supply is interrupted, brain cells quickly malfunction and die.\(^{66}\) Strangulation can cause unconsciousness within five to ten seconds,\(^{67}\) and brain damage,\(^{68}\) brain death,\(^{69}\) or death within minutes.\(^{70}\) Death from strangulation can be caused in one of three ways: by mechanically constricting veins, arteries or airways in the neck; by injury to the spinal cord or brain stem; or by cardiac arrest.\(^{71}\)


\(^{64}\) Iserson, “Strangulation”, supra note 64 at 182.


\(^{70}\) Dana R Anderson, Understanding the Physical and Psychological Experiences of Intimate Partner Strangulation Survivors, PhD, Alliant International University, 2016 [unpublished], at 24; Family Violence Death Review Committee, Fourth Annual Report, supra note 35 at 98.

\(^{71}\) Iserson, “Strangulation”, supra note 64 at 181; Bernard Knight and Pekka J Saukko, “Fatal Pressure on the Neck”, in Knight’s Forensic Pathology (London: Arnold, 2004) 368 at 368–71; Andreas Christe et al,
Although the causal chain between an abuser’s act of strangulation may be short, leading to immediate, or nearly immediate physical harms and death, it is also possible for a strangulation victim to avoid death during the strangulation incident and initially appear to be unharmed immediately following the actual strangulation incident, but to have sustained brain or other injuries that while not initially evident can worsen and go on to cause death hours, days or weeks after the strangulation event itself. Brain cells die at different rates, and swelling in the brain may not be immediate, but delayed swelling of the brain can be deadly. Bruising and swelling of structures in the throat may not fully develop until more than 24 hours after a strangulation event, so victims may suffer sudden life threatening respiratory complications such as airway blockages, and fatal airway collapse after an initial asymptomatic period. Another potential source of delayed harm can stem from victims inhaling vomit during strangulation. After an initial asymptomatic delay, this aspirated vomit can cause the victim to develop...
aspiration pneumonia or pulmonary oedema, a potentially deadly accumulation of fluid in the lungs.

In addition, the pressure to the neck structures of strangulation can cause an injury to the carotid artery. This arterial injury, known as carotid artery dissection, is recognised as a leading cause of stroke in young adults. The injury can cause a stroke hours, weeks, or even years after a strangulation event. Furthermore, this damage to blood vessels in the neck can be cumulative, so that the greater the number of strangulation events a woman has survived – particularly events during which she lost consciousness – the more elevated her risk for stroke may become. Casey Gwinn writes movingly of a conversation he had with a 52-year-old woman who at nineteen-years-old had been strangled to unconsciousness by an abusive boyfriend on nine occasions over the course of their two-year relationship. After each strangulation incident, she had appeared to recover. She had left the relationship after two years and had “never looked back.”

The woman told Gwinn that she had now been in a happy, healthy relationship for the last thirty years, but

---

82 Gael B Strack et al, “Why Didn’t Someone Tell Me? Health Consequences of Strangulation Assaults for Survivors” (2014) 19:6 Domestic Violence Rep 87 (the article has multiple co-authors but relates this anecdote from second author Casey Gwinn’s perspective).
83 Ibid, at 87.
the past few years had revealed the hitherto latent, and now active, legacy of the abuse she had suffered as a young adult.\textsuperscript{84}

As she spoke, she was angry and deeply troubled…[S]he began to shake….“Four years ago, I had my first cryptogenic stroke. Two weeks ago, I had my third cryptogenic stroke. I survived, but my neurologist told me that if I have one more brain bleed, he thinks it will kill me.” Now she was crying and shaking. She said, “He is going to kill me 30 years after he abused me!” And then she looked right at me and said, “Why didn’t someone tell me? I deserved to know and now I am going to die.” All I could muster was, “We didn’t know 30 years ago. I am so sorry.” And I hugged her. She was right though. She deserved to know the potential health consequences of being strangled.

Injury to other organ systems from strangulation causing delayed death is rarer, but there are isolated case reports in the medical literature of strangulation causing multiple organ failure,\textsuperscript{85} injury to the diaphragm,\textsuperscript{86} and a life-threatening emergency known as “thyroid storm.”\textsuperscript{87}

Taken together, the medical and experimental research tells us that strangulation can cause life threatening injuries, medical crises and death. It is clearly dangerous and can be deadly. In the words of the Family Violence Death Review Committee “there is a fine line between a non-fatal and a fatal strangulation.”\textsuperscript{88}

### 7.9 Dangerousness of Strangulation: Non-Fatal Strangulation Injuries

Before the 1980s, the clinical literature regarding strangulation injuries was chiefly written by forensic pathologists and based on post-mortem examinations investigating the results of

\textsuperscript{84} Ibid.


\textsuperscript{88} Family Violence Death Review Committee, Fourth Annual Report, supra note 35 at 98.
homicidal, suicidal and accidental strangulation deaths. Hawley and co-authors’ influential 2001 article describe it as:

no coincidence that the best medical evidence of strangulation is derived from post mortem examination (autopsy) of the body … [because it] affords the ability to examine all of the tissues of the neck, superficial and deep, and track the force vector that produced the injuries. In living people, the assessment of the patient is limited to superficial examination of the skin, and two-dimensional shadows by radiography.

As a consequence, these studies generally emphasised the most serious injuries to the deep tissues and vital structures of the neck and brain injuries of the kinds described in the section above that indeed had caused death either during the event itself or within hours or days. Phenomena such as the long-term heightened risk of stroke or brain deterioration that could be causally related to strangulation incidents but take years to manifest were not a focus of the literature of this period. This began to change in the early 1980s with the publication of several key articles focusing on non-fatal strangulation injuries that the prior literature had tended to overlook. This new focus emphasised not just the potential for strangulation to cause death in the immediate or short term, but also its potential to cause serious injury and long term disability, psychological and emotional trauma, as well as a range of other harms that, while not life-

---

92 See section 7.8 above.
threatening, are harmful in and of themselves, and as tools in a wider campaign of coercive control.⁹⁵

In the 1990s, physicians and professionals working in the field of intimate partner violence came to believe that manual strangulation is much more common than previously reported,⁹⁶ and began writing about strangulation in the context of intimate partner violence.⁹⁷ According to estimates, between 23 and 68 per cent of women victims of intimate partner violence have experienced at least one strangulation assault in their lifetime.⁹⁸ The intensity of the terror that strangulation induces in a victim makes it an extremely effective tool of coercive control.⁹⁹ It is a particularly personal or “in-your-face” form of abuse¹⁰⁰ – the abuser and victim

---


are physically close, at literal arm’s length – and the abuser uses his hands to apply pressure to the victim’s throat, impeding her breathing, circulation or both. The act of strangulation credibly communicates the threat that “I can kill you with my bare hands whenever I want to.” Indeed, Gwinn et al argue that many abusers and rapists do not strangle their victims to kill them, but rather “to let them know they can kill them – any time they wish.”

Strangulation is painful and terrifying. Studies have confirmed that the inability to breathe, and the resulting sensation of “air hunger” are terrifying and at a physiological level activate panic responses. Women who have survived strangulation incidents report that the experience was more shocking and frightening than other severe kinds of battering they had also experienced. Research indicates that even a single experience of strangulation can instil enough fear in a victim that the abuser can maintain control over her even without having to commit further abuse. Gwinn et al quote a strangulation survivor’s account of the effectiveness of strangulation as a tool of coercive control against her:

[W]hen I came out of that [strangulation incident] I was more submissive – more terrified that the next time I might not come out – I might not make it. So I think I gave him all my power from there because I could see how easy it was for him to just take my life like he had given it to me.

1110; Joan B Kelly and Michael P Johnson, “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46:3 Family Court Review 476 at 481.  
The threatening nature of strangulation itself often reinforced and compounded by verbal threats to kill during the assault or earlier threats made prior to the strangulation incident.\(^{107}\) Survivors of strangulation assaults report having believed during their assaults they were going to die.\(^{108}\) Survivors frequently suffer post-traumatic stress disorder (PTSD),\(^{109}\) depression,\(^{110}\) and a range of other psychological\(^{111}\) and neurological harms.\(^{112}\)

### 7.10 Dangerousness of Strangulation: Cumulative Traumatic Brain Injury (CTE)

An interesting aspect of strangulation’s dangerousness that researchers have begun to explore is the connection between repeated strangulation incidents and cumulative traumatic brain injury, or chronic traumatic encephalopathy (CTE). CTE is a degenerative brain disease associated with a history of head impacts and minor or major brain injuries.\(^{113}\) During the past two decades, research has found a strong link between CTE and repeated blows to the head during contact

---


\(^{109}\) Sylvia A Vella, Cognitions and Behaviors of Strangulation Survivors of Intimate Terrorism, California School of Professional Psychology, Alliant International University, 2013 [unpublished].


Sports, and from military combat, particularly, exposure to explosive blasts. More recently, a smaller group of researchers have noted that domestic violence survivors are another group likely to be at high risk for CTE as a result of the cumulative effects of blows to the head and strangulation events.

Since this damage is cumulative, many incidents of minor brain damage can compound over time, amounting eventually to serious damage that may seriously disable the victim. Journalist Rachel Louise Snyder describes women whose have been “completely ruined” by brain injuries caused by strangulation: one woman “gets to the porch and can’t remember where she was going. Another woman lost the ability to read and write and child protective services took her children because they felt she could not take care of them.”

CTE involves cumulative and gradual low-level, perhaps individually undetectable, brain damage effects. The causal relationship between an individual strangulation incident and whatever low-level brain damage that particular incident causes is close to the paradigm of causation: pressure to the neck causes an interruption of circulation or airflow, which causes the brain to receive insufficient oxygen, which causes brain damage. However, the ways in which low-level brain damage consequences of separate strangulation events and other assaults interact and compound over time to constitute CTE is much further from this paradigm.


Ibid.
Imagine a woman who experienced fifty separate strangulation events in the year 2000, and then received a CTE diagnosis in the year 2015. None of the fifty strangulation events caused any of the other strangulation events. This means we are not considering a single causal chain, but fifty causal chains. Each causal chain connects a single strangulation incident to the specific brain injury or other physical harms that the incident caused. The chain then connects (or does not connect) that particular unit of brain damage with the eventual cumulative brain damage that has manifested as of 2015. These causal chains will likely form a kind of web, as later strangulation assaults cause damage to parts of the brain that have already been damaged by earlier strangulation incidents.

This picture of a tangled web of fifty potential causal chains, extending over a fifteen-year period, is much further from the paradigm of causation than the case of a child throwing a stone and breaking a window, or the case of a single strangulation incident causing blood vessels to be impeded, and causing unconsciousness, brain damage and death in the course of several minutes. The example of the potential causal relationships between fifty strangulation incidents and a CTE diagnosis fifteen years later will be ontologically and epistemologically difficult to assess and compare to the paradigm of strangulation. Certainly, given the rising awareness and growing scientific understanding of CTE, we are better placed today to assess these possible complex causal relationships than we would have been twenty years ago. However, even in light of this science, the assessment is complex because of the number of links in the potential causal chains, and the lengthy time frames over which these potential causal relationships would extend. The longer the time over which a causal chain extends, the more opportunities there are for intervening events to potentially break the chains.

The dangers of strangulation are not all the same, because the causal relationships between strangulation and its possible harms vary in terms of how closely they map onto Hart and Honoré’s paradigm of causation. While CTE is analytically more distinct from the paradigm of causation than other consequences such as impeding circulation and airflow, nonetheless it is important to understand that that when scientists note CTE as a danger of strangulation assault, they are making a causal claim that it is reasonable to believe is valid in many cases.

In short, taken together, and viewed through Hart and Honoré’s account of causation, the scientific and medical evidence surveyed in sections 7.8 to 7.10 demonstrates that the physical
act of strangling another person can cause a wide range of serious harms, and so strangulation should be understood as inherently dangerous every time it occurs.

7.11 Strangulation and Lethality Risk: A “Red Flag”

As noted in the above, arguments for specific non-fatal strangulation offences often emphasise that it is a particularly dangerous form of assault, and that it is a statistical “red flag” for future fatality. As we seen in the first sections of this chapter, the statement that strangulation is inherently dangerous is a causal claim: the act of strangling a person both does and can cause harm both in the immediate and in the long term. I now consider arguments in favour of a specific offence of non-fatal strangulation that emphasise that strangulation is a red flag for eventual fatality in intimate partner violence contexts. Unlike statements about the strangulation’s inherent dangerousness, this is not a causal claim. Rather, it is a statistical observation based on empirical studies of rates of violence, intimate partner violence, and intimate partner deaths, that prior strangulation incidents are correlated with higher rates of eventual fatality. The next sections of this chapter give an overview of the quantitative studies indicating that strangulation is a red flag for future fatality. The expression “red flags” means risks. The chapter will also therefore consider the circumstances under which offences of risk prevention may or may not contribute to the problems of overcriminalisation.

Within the already gendered context of intimate partner violence, strangulation is a particularly gendered mode of intimate partner violence. Strangulation occurs at high rates in abusive relationships. A range of studies looking at samples of male-on-female and female-on-male violence found, first, higher rates of male-on-female violence than female-on-male violence, and second, that male-on-female violence involves strangulation at much higher rates than female-on-male violence. Wilbur et al found that strangulation tends to occur late in an

119 Supra, at section 7.5.
120 Also see chapter 2, section 2.7, discussing the relationship between offences of risk prevention, “pre-inchoate offences,” or “prophylactic crimes” and overbreadth in the criminal law.
122 Joshi and Sorenson, “Intimate Partner Violence at the Scene”, supra note 83 at 123, table 2; Heather C Melton and Joanne Belknap, “He Hits, She Hits: Assessing Gender Differences and Similarities in Officially Reported Intimate Partner Violence” (2003) 30:3 Crim Just Behav 328 at 340, table 3; Colleen
escalating cycle of violence. A substantial proportion of intimate partner homicides of a woman by a man are committed by strangulation. Previous incidents of strangulation in abusive relationships have been found to be significant risk factors for female victims eventually being killed. A key study by Glass et al has shown that women in abusive intimate relationships are more than seven times more likely to eventually be killed by their abuser if the abuse has included strangulation events. In New Zealand, Family Violence Death Review Mcquown et al, “Prevalence of Strangulation in Survivors of Sexual Assault and Domestic Violence” (2016) 34:7 Am J Emerg Med 1281; Peter Mygind Leth, “Intimate Partner Homicide” (2009) 5:3 Forensic Sci Med Pathol 199 at 202; Shilan Caman et al, “Differentiating Male and Female Intimate Partner Homicide Perpetrators: A Study of Social, Criminological and Clinical Factors” (2016) 15:1 Int J Forensic Ment Health 26 at 29, table 2.


Committee has reported that in a high proportion of family violence deaths it has reviewed there was a history of strangulation prior to the death.\textsuperscript{127}

It is important to emphasise here that studies finding strong correlations between strangulation and eventual fatality do not make causal claims. If a man strangles his partner on one particular occasion, and then in fact goes on to kill her on a future occasion, the earlier strangulation assault cannot be said to have \textit{caused} the eventual homicide. Causally speaking, the two events are discrete. Of course, the earlier strangulation incident and the eventual homicide are \textit{correlated}: they involve the same offender, same victim, and both take place within the same relationship, although the intensity of the abuse within the relationship may have changed over time. Thus, arguments that strangulation should be specifically criminalised because it is a red flag for future fatality are based on the premise that since strangulation incidents are a predictor of escalating violence and fatality, one way to attempt to intervene earlier in the abuse cycle in order to prevent serious harm and death is to treat strangulation incidents as an opportunity to intervene and prevent fatalities.\textsuperscript{128}

7.12 \textbf{The Risk Society and Crime Control}

It is useful here to contextualise the notions of risk and dangerousness within the wider literature on risk, dangerousness, uncertainty and the limits of government control that has developed over the last several decades.\textsuperscript{129} This literature spans several academic disciplines, including criminology, and social, political, and legal theory,\textsuperscript{130} pointing out the extent to which modern

\begin{footnotesize}
\textsuperscript{127} Family Violence Death Review Committee, \textit{Fourth Annual Report}, supra note 35 at 100.
\textsuperscript{128} \textit{Ibid}, at 82.
\textsuperscript{129} Kelly Hannah-Moffat, “Moral Agent or Actuarial Subject: Risk and Canadian Women’s Imprisonment” (1999) 3:1 Theor Criminol 71 at 72.
\end{footnotesize}
society is a “risk society”\textsuperscript{131} governed by the “managerial”\textsuperscript{132} and “preventive state.”\textsuperscript{133} Such writing argues that “risk-based routines and practices of government pervade most areas of our lives,”\textsuperscript{134} from considering the risk factors for disease in our diet and exercise choices, and in screening for diseases, to security measures people take in respect of their homes,\textsuperscript{135} and to state-level safeguards against terrorism.\textsuperscript{136}

The “risk” that is considered in such a risk society is statistical. The idea is to use statistics to predict future harms, and act pre-emptively to prevent those harms from coming to fruition.\textsuperscript{137} A key concept in this literature in the context of criminal law is “preventive justice,”\textsuperscript{138} which focuses on risk of harm,\textsuperscript{139} and management measures aimed at preventing that risk from materialising.\textsuperscript{140} This “actuarial”\textsuperscript{141} mode of justice employs a “jurisprudence of

\begin{itemize}
\item Richard V Ericson and Kevin D Haggerty, Policing the Risk Society (University of Toronto Press, 1997).
\item Carol S Steiker, “Foreword: The Limits of the Preventive State Supreme Court Review” (1998) 88:3 J Crim Law Criminol 771 at 773.
\item O’Malley, Risk, Uncertainty and Government, supra note 136 at 1.
\end{itemize}
risk"\textsuperscript{142} to justify the long-term incapacitation or risk neutralisation of offenders deemed to be high-risk or dangerous before they can do harm.\textsuperscript{143}

In any policy context, assessing risk and acting pre-emptively to prevent possible future harm is probabilistic rather than epistemically exact. Statistical statements tell us something about a population, and not necessarily things about any given individual within that population.\textsuperscript{144} For instance, consider two populations: a population of 1,000 men who smoke at least 25 cigarettes a day, and a population of 1,000 men who have never smoked. Assume that the groups are otherwise similar, such that other cancer risk factors are controlled for. We know that up to 90% of lung cancer cases are caused by smoking,\textsuperscript{145} and according to a long-running cohort study, men who smoked 25 or more cigarettes a day were more than 24 times more likely to die from lung cancer than men who had never smoked.\textsuperscript{146} Based on statistical data of this kind, we can state that the men in the smoking population are substantially more likely than men in the non-smoking cohort to die of lung cancer. What we mean by “more likely” is that we can expect a higher proportion of members of the smoking population to die of lung cancer than the non-smoking population.

However, the statistics cannot predict with any certainty whether any particular man picked at random from either the smoking or non-smoking cohort will go on to die of lung cancer. As the Asthma and Respiratory Foundation New Zealand puts it, it is not known why some smokers develop lung cancer while others do not.\textsuperscript{147} It is no contradiction to the statistics above to point to examples of healthy elderly long-time smokers (for whom a high risk of smoking-related ill health has not eventuated) or of young non-smokers with lung cancer (despite


\textsuperscript{144} Schauer, “The Ubiquity of Prevention”, supra note 145 at 11.


\textsuperscript{147} Lung Cancer Asthma and Respiratory Foundation NZ, online <https://www.asthmafoundation.org.nz/your-health/lung-cancer>.
the lack of statistical red flags indicating that they were at particular risk). After all, even though
as many as 90% of lung cancer cases are caused by smoking, at least 10% must be due to causes
other than smoking. 148

Consider how data like this is employed in the context of public health planning. 149 Because statistical statements tell us about a population, rather than about any particular individual within that population, there is a sense in which cancer prevention public health interventions based on risk calculations for smokers and non-smokers are almost certain to be either under- or over-inclusive, if not both. For the sake of argument, imagine a public health intervention that offered free stop-smoking support, which turned out to be extremely successful, such that overall smoking rates fell dramatically. We know statistically-speaking that not all of the smokers who successfully quit smoking due to this intervention would have actually gone on to develop lung cancer even if they had kept smoking – from the point of view of cancer prevention, the quit-smoking intervention has been over-inclusive. Furthermore, the intervention has also been under-inclusive with respect to cancer prevention: as it remains the case that some non-smokers will go on to develop lung cancer.

Of course, the kind of over- and under-inclusivity in this example is unlikely to strike many people as troubling, because most people do not regard smoking as a social good, and because smoking causes such a wide range of health problems that reducing rates of smoking strikes most people as worthwhile, even though cancer will not be eradicated. But in other contexts, under- or over-inclusivity, or feeding false positives and false negatives into harm prevention measures, may strike us as considerably more problematic. The criminal justice context is one such context. Here, questions about whether to err on the side of over-inclusivity, in the sense of intervening in response to statistical false positives, or on the side of under-inclusivity, in the sense of not intervening on the basis of false negatives, are weightier than in the above illustration. 150

148 Supra note 145.
At the centre of this weightiness are liberal concerns that by criminalising risk, rather than completed *harm*, the criminal law extends its reach too far, unduly restricting individual liberty.¹⁵¹ Throughout the history of liberal thought, writers have emphasised that the liberal default setting is freedom and autonomy: if the state wishes to place limits on that freedom, it bears a hefty burden of proof that such limits are necessary in order to protect others from harm. This burden is particularly heavy when the state wishes to limit freedom through the coercive might of the criminal justice system. Imprisoning a person is one of the most fundamental ways in which the state can limit that person’s liberty.¹⁵² Depriving an individual of liberty by criminalising and imprisoning him is one of the greatest powers the state can wield. Due process rights function as a safeguard for accused persons, helping to ensure that the state does not unduly or arbitrarily limit their liberty. The concern for critics is that a risk society places too great an emphasis on prevention, which comes at the expense of accused persons’ due process rights and foundational liberal interests in individual liberty and autonomy.¹⁵³ This concern is a theme in the influential Andrew Ashworth, Lucia Zedner and Patrick Tomlin edited collection, *Prevention and the Limits of the Criminal Law*.¹⁵⁴

Writers note that a tension exists in the criminal justice context between the desire to prevent future harm to potential victims and the commitment to protecting the due process rights and human rights of accused persons.¹⁵⁵ Suppose a particular population of offenders is found on an actuarial basis to pose a high risk of future serious and harmful offending. Frederick Schauer offers a provocative, if somewhat “caricatur[ish],” thought experiment:¹⁵⁶ “[t]here can be little doubt that universal incarceration of all males between the ages of fifteen and twenty-nine would

---

¹⁵¹ See also the high-level discussion of liberalism and the harm principle in chapter 6, section 6.6.
¹⁵⁶ Schauer, “The Ubiquity of Prevention”, *supra* note 145 at 10.
bring about a dramatic reduction in crime, and especially violent crime.” In the case of this extreme example, plainly it would be “politically, culturally, legally, economically, and, most importantly, morally unacceptable” to pursue such a preventive approach. But less extreme variations on the approach are still troubling.

Imagine that a single member of a more narrowly defined high-risk population is currently before the court being sentenced for a comparatively low-culpability offence. If the sentencing judge is primarily focused on retributive aims of punishment, and on ensuring the sentence they hand down is proportional to the offender’s actual crime, this would tend to suggest a short sentence. However, backward-looking retributive interests are not the only aims of punishment likely to factor in a judge’s sentencing decision. Forward-looking aims of punishment, such as interests in deterrence, incapacitation and rehabilitation are also likely to influence a judge’s sentencing decision. If in particular the sentencing judge is inclined to take a very proactive risk-minimisation or preventive justice approach in sentencing, this will argue for a long-term incapacitation and as high a sentence as possible.

Those who are critical of the emergence of the risk society of today regard as out of balance the current relative prioritisation of forward- and backward-looking aims of punishment. That is, they see a trend towards prioritising interests in incapacitation, deterrence and rehabilitation at the expense of retributive proportionality protections for offenders. To a certain extent, assessing risk and acting pre-emptively to prevent future harm means treating offenders not as individuals but as more or less undistinguished and interchangeable units within wider classes or populations. Statistics tell us about populations, rather than about particular individuals within those populations. Risk assessments in which individual offenders are treated not as individuals but as units presumed to embody the statistically understood qualities of the class to which they belong will yield both false positives and false negatives. That is, some people will be treated as high risk, and receive high incapacitative sentences, even though they would not in fact have gone on to cause the feared harm, and some people will be treated as

157 Ibid.
lower risk, and having received lower sentences will go on to cause serious harm while not incapacitated.

The concern in a risk society is that respect for offenders’ rights to be treated as individuals and punished in respect of their proven wrongdoing is overwhelmed by a focus on preventing potential future harms from eventuating. This risk control approach frames victim’s crime control interests as central, as it decentres offenders and positions them as “the abstract ‘other’ to be guarded against.” The prospect of missing an opportunity to intervene and prevent a future harm is regarded as much more alarming than the prospect of over-punishing an offender who would never have gone on to cause the feared harm: it is better to be “safe” from statistically “risky” offenders, than to be “sorry” when risky offenders are not prevented from going on to cause harm. That is, it is acceptable to unnecessarily – even arbitrarily – limit the liberty of some people in the interests of preventing possible future harms.

7.13 When Does the Criminalisation of Risk Contribute to Overbreadth?
The trend towards “preventive justice” and a “jurisprudence of risk” has clear implications for any discussion of overcriminalisation. According to Douglas Husak “crimes of risk prevention” comprise one of “the three categories of relatively new offense that have contributed most to the problem of overcriminalisation.” As I have noted earlier, Husak’s concern and the dominant concern in most overcriminalisation literature is with overbreadth rather than overdepth in the criminal law. As emphasised earlier, overbreadth is not the focus of this dissertation. If an offence is overcriminalisation by virtue of overbreadth, criminalising conduct that is outside the proper scope of the criminal law, that is a strong argument against criminalising it even once. It is an even stronger argument against multiply criminalising it via several overlapping provisions. For that reason, while the focus of this dissertation is overdepth in the criminal law, in the context of the non-fatal strangulation offence, it is important to consider possible arguments that the new offence may raise overbreadth issues by reasons of being an offence of risk prevention.

160 O’Malley, “Neo-Liberalism and Risk in Criminology”, supra note 132 at 59.
162 Chapter 2, section 2.11.
163 Chapter 2, section 2.9.
As discussed in chapter 2, questions about overbreadth are questions about the proper scope of the criminal law, and the sorts of behaviour that can properly be criminalised by the state. The paradigmatic within-scope criminal offence criminalises people for intentionally performing a completed harmful act, such as murder, assault, or theft. However, since long before the emergence of the risk society, the criminal law has also included offences that do not quite meet this paradigm, but that are well-established elements of the criminal law. Inchoate offences are prime examples of offences that are a step removed from the paradigm of intentional, completed harms. Inchoate, or non-consummate, offences proscribe “conduct that does not cause harm on each and every occasion on which it is performed.” Yet, inchoate offences such as attempt, solicitation and conspiracy, despite being “[c]learly... designed to reduce the risk of ultimate harms,” are so long-established as part of the “core” of the criminal law that they are not regarded as part of the shift to a risk society. Nor are inchoate offences generally thought to constitute overbreadth in the criminal law. Antony Duff has argued that a criminal legal system that “condemned and punished actually harm-causing conduct as wrong but was utterly silent on attempts to cause such harms, would speak with a strange moral voice.”

Eric Janus draws a distinction between what he calls offences of “routine” as opposed to “radical” prevention, which may help to account for inchoate offences not being regarded as part of overcriminalisation via overbreadth. Janus explains that unlike radical prevention, which

164 Note also that in Canada, the Supreme Court has held that the harm principle is not a fundamental principle of justice, such that the Charter of Rights and Freedoms does not require that criminal offences satisfy the harm principle: R v Malmo-Levine; R v Caine [2003] 3 RCS 571; also see Janine Benedet, “Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible ‘Correction’ of Children” (2004) 24:2d Supreme Court Law Review 217.


166 Husak, Overcriminalization, supra note 163 at 160.

167 Ibid, at 161.


involves the state intervening and curtailing a person’s liberty before he has caused any harm, and before his propensity or risk to offend has materialised, routine prevention “responds to actual or attempted harm” and responds after the fact to harm that has already been caused or attempted. Radical prevention offences are potentially outside of the criminal law’s proper scope, constituting overbreadth and overcriminalisation, whereas well-established prevention offences such as attempt are within scope, and do not constitute overbreadth (provided that they are not outside of scope for other reasons). Standard inchoate offences like attempt fit within this category. Radical prevention on the other hand does not require actual or even attempted harm. Instead, “it seeks to intervene where there is some sort of ‘propensity’ or risk of future harm” and does so by “substantially curtailing people’s liberty before harm results.” If traditional inchoate offences are a step removed from the criminal paradigm of intentional and completed harmful acts, offences of radical preventions stray even further, potentially violating the proper scope of the criminal law. Taken to its logical extreme, “radical prevention” could see a person criminalised only because he is deemed to be dangerous, posing a high statistical risk of causing a serious harm. That would mean criminalising him not just for an act he has not committed, but also for an intention he may well not yet have formed.

Antony Duff and Sandra Marshall suggest that if it strikes readers that endangerment offences are not justified by the harm principle because they include situations in which no harm is actually caused, and as such are outside of the criminal law’s proper scope, that impression is due to an unduly narrow understanding of the harm principle. The criminal law includes many offences of “abstract endangerment,” of which many road traffic offences, for instance, drunk driving and dangerous driving, are clear examples. Such offences need not cause actual tangible harm, but do endanger other road users. Writing separately, Duff specifies that concrete attacks (and attempted attacks) are indeed distinct from endangerment, but that endangerment – even

---

172 Ibid.
173 Ibid.
177 Duff, “Criminalizing Endangerment”, supra note 166 at 44.
“abstract” endangerment – is its own kind of wrong, the criminalisation of which is justifiable and within the criminal law’s proper scope rather than part of the problem of overbreadth in the criminal law.\(^{178}\)

Instances of endangerment in which a risk of harm fortunately does not materialise into actual harm are plentiful. However, the fact that a feared harm has not eventuated does not mean that the endangerment did not occur or was not criminally wrongful. For instance, a person who drives dangerously but luckily encounters no other cars or pedestrians on his route still drove dangerously. Had the driver been less fortunate and encountered other road users, he would have directly endangered those specific road users, while still abstractly endangering possible other road users. Note also that while an endangerment offence such as dangerous driving holds the dangerous but lucky driver criminally responsible for the wrong of his endangerment, the driver still also benefits considerably from his good moral luck:\(^{179}\) because his endangerment remained “abstract” and unrealised, he faces a dangerous driving charge, rather than, say, a manslaughter or dangerous driving causing death charge that could have applied had he struck and killed a person on a pedestrian crossing.

Duff and Marshall account for the wrongfulness of “abstract” endangerment by positing two distinct versions of the harm principle, which operate in parallel to justify criminalisation of harmful or endangering acts:\(^{180}\) the “harmful conduct principle” and the “harm prevention principle.” Under the harmful conduct principle, criminalisation of a type of conduct is justified if and only if the conduct is itself harmful to others,\(^{181}\) whereas the harm prevention principle justifies the criminalisation of a particular type of conduct if and only if “doing so will efficiently prevent harm to others.”\(^{182}\) The harm prevention principle is wider than the harmful conduct principle, because it can justifying criminalising conduct that is not itself harmful on the basis

\(^{178}\) Ibid, at 44–47 and 62.


\(^{181}\) Ibid, at 3.

\(^{182}\) Ibid.
that doing so will prevent future harms.\textsuperscript{183} On this basis, for Duff and Marshall, in at least some cases endangerment offences and offences of risk creation are justified instances of criminalisation rather than examples of offences that fall outside the proper scope of the criminal law, contributing to overbreadth and overcriminalisation.\textsuperscript{184} 

Yet, as noted by Husak, some offences of risk creation do contribute to overbreadth. Husak gives a hypothetical example of a criminal law that nearly everyone would agree is unjustified: a law making it a crime to drop out of high school before graduation.\textsuperscript{185} He explains that the criminalised conduct is not harmful per se – the mere act of dropping out of school need not harm anyone. However, statistically, students who fail to graduate high school go on to offend in the future at higher rates than those who graduate, so the offence could be understood as preventive in that sense.\textsuperscript{186} Husak asks what it is about the hypothetical offence that makes it “so clearly unjustifiable.”\textsuperscript{187} 

Duff offers two important contrasts within the category of endangerment offences that are instructive here. First, he contrasts “direct” and “indirect” endangerment or risk prevention offences;\textsuperscript{188} and second, he distinguishes “explicit” from “implicit” offences of risk prevention.\textsuperscript{189} His first distinction, between direct and indirect endangerment offences, relates to the causal relationship between endangering conduct and a possible future harm. Offences of direct risk prevention are those for which “the relevant harm would ensue from the criminalized conduct without any intervening wrongful human action,” whereas for offences of indirect risk prevention “the harm would ensue only given further, wrongful actions by the agent or by others.”\textsuperscript{190} 

As Husak explains: “[t]ossing bricks from the roof of a building onto a crowded street would be an example of direct endangerment, whereas selling a gun to a felon would be an example of indirect endangerment, as harm in the latter case would only ensue if the gun were

\begin{footnotesize}
\begin{enumerate}
\item[Ibid, at 3–4.]
\item[Ibid; Duff, “Criminalizing Endangerment”, supra note 166 at 62.]
\item[Husak, Overcriminalization, supra note 163 at 161.]
\item[Ibid.]
\item[Ibid.]
\item[Duff, “Criminalizing Endangerment”, supra note 166 at 62.]
\item[Ibid, at 59; also see: Husak, Overcriminalization, supra note 163 at 162–63.]
\item[Duff, “Criminalizing Endangerment”, supra note 166 at 62; Husak, Overcriminalization, supra note 163 at 162.]
\end{enumerate}
\end{footnotesize}
misused.”191 The distinction between direct and indirect endangerment chimes with Hart and Honoré’s ideas about the paradigm of causation: direct prevention embodies either the paradigm of causation, or a short, direct, clear causal chain that easily passes the “analogous to the paradigm” test.192 That is, the directness or indirectness of an offence of risk prevention embodies the causal relationship (or lack thereof) between criminalised behaviour and a feared harm.

Duff’s second distinction between explicit and implicit risk prevention offences refers to the statutory language in which an offence is drafted.193 Risk prevention offences are explicit “when their commission requires the actual creation of the relevant risk – a risk specified in the offence definition; they are implicit if their definition does not specify the relevant risk (the risk that grounds their criminalisation), so that they can be committed without creating the risk.”194 Duff gives dangerous driving and reckless endangerment as examples of explicit endangerment offences:195 the language of these standards-based offences explicitly requires that the accused’s driving was dangerous, and that the accused recklessly endangered. A rule-based offence, such as driving in excess of a 100 kilometre per hour speed limit, is an implicit endangerment offence: in theory, some very skilled drivers might safely drive at 120 kilometres per hour on a stretch of road that has a 100 kilometre per hour speed limit without creating the risk of harm that forms the policy basis for the speed limit.196

Duff’s two distinctions help to show what is “so clearly unjustifiable” about Husak’s above hypothetical criminalisation of early school leaving, and why that offence looks, in Janus’s terms,197 like “radical” rather than “routine” prevention, and constitutes overcriminalisation.198 First, take the distinction between direct and indirect risk prevention offences. The feared harm contemplated by the hypothetical is the harm that would flow from whatever offences members of the high school dropout population go on to commit in future. The offence in the hypothetical is clearly not an offence of direct risk creation: suppose that a

---

191 Husak, Overcriminalization, supra note 163 at 162.
192 See above, at sections 7.6 and 7.7.
194 Ibid, at 59; Husak, Overcriminalization, supra note 163 at 163.
196 Ibid.
197 See above, at footnotes 171 to 174 and accompanying text.
198 See above, at footnotes 185 to 187 and accompanying text.
high school dropout does go on to commit a theft offence; not having graduated high school cannot have been a direct cause of the harm of the theft in anything like the way that dropping a brick off a roof is the direct cause of the harm suffered by the unlucky pedestrian on whom it lands.

In fact, it is not clear whether dropping out of high school is even an indirect cause of possible future offending. The statistics showing that non-school leavers go on to offend at higher rates than graduates may only indicate a correlation, rather than a causal relationship. The presence of the correlation does not logically imply a causal relationship between early school leaving and future offending. Even supposing for the sake of argument that it were possible to establish, via social science research, a causal relationship between non-graduation and future offending, that causal relationship would take the shape of a much longer and more tangled causal chain than the one Husak describes between the act of selling a felon a gun and the felon going on to use that gun for harmful ends.

Consider, secondly, Husak’s distinction between explicit and implicit risk prevention offences. Even given the already extreme nature of the hypothetical, it is hard to imagine how the offence of dropping out of school early could be framed as an explicit risk creation offence. The statutory language required for that would require the offence to describe an actus reus involving not just the act of dropping out of school, but also make it an element of the offence that in so dropping out, the accused created a danger that she would go on to offend in future. Clearly, that is not how Husak frames the hypothetical. His imagined offence is triggered by the early drop out, just as a speeding offence is triggered by exceeding the speed limit. As such, the relationship between leaving school early and the feared harmful consequence – possible future offending – is, at most, implicit.

Husak’s hypothetical strikes us as absurd and as criminalising conduct that is clearly outside the criminal law’s proper scope. The hypothetical involves the criminalisation of a population – early high school leavers – who had not yet caused any harm on the basis of either a correlation between high school non-completion and future criminal offending, or if there is a causal relationship between the two, a relationship so attenuated as to not pass the “analogous to the paradigm” of causation test. The state would unjustifiably and arbitrarily deprive a population of people of their liberty. This is overbreadth, and overcriminalisation. It seems that
the more abstract a risk prevention offence is, the more indirectly and remotely causally connected the criminalised conduct is from the feared harm, and the less explicit the offence is about the offence’s relationship to the feared harm, the more likely it seems that a preventive offence may be unjustified and part of the problem of overcriminalisation.

7.14 Strangulation, Risk Prevention, and Overcriminalisation

As discussed in section 7.11 above, a central justificatory theme in arguments for a specific offence of non-fatal strangulation is that in an intimate partner violence context, strangulation is a red flag indicating a high risk for future fatality. This was certainly a focus when New Zealand’s proposed specific non-fatal strangulation offence was first proposed. In 2016, Minister of Justice at the time Amy Adams emphasised that strangulation “represents a significant risk factor for murder,” and stated that the new specific offence was “expected to shift justice sector response to strangulation towards a focus on the prevention of future serious harm.”

This means it is important here to address possible concerns that a strangulation offence could be an offence of “radical prevention,” such that it criminalises conduct outside of the criminal law’s proper scope and contributes to overcriminalisation by way of overbreadth. Such a concern might be framed as follows: if the sole or primary argument for criminalising non-fatal strangulation is that strangulation incidents are dangerous, and a red flag for a heightened statistical likelihood of future fatality, then criminalising non-fatal strangulation under a specific offence amounts to criminalising an offender on the basis of the risk that he might at some time in the future go on to kill his female intimate partner. He is criminalised for this risk of future fatal assault even though as yet he has neither fatally assaulted his victim, nor formed an intention to do so, and despite the possibility that he might never go on to do so. The concepts and criteria discussed in the previous section provide a framework within which to address these concerns.

7.15 Non-fatal Strangulation as a Completed Criminal Act

It is notable the degree to which influential advocates for specific non-fatal strangulation offences emphasise that although non-fatal strangulation is not a result crime, the act of non-
fatally strangling an intimate partner is a complete criminal act rather than an attempt, and that strangulation statutes should be drafted accordingly. Leading strangulation researchers and law reform advocates, and founders of the Training Institute of Strangulation Prevention, Casey Gwinn and Gael Strack and various collaborators strenuously emphasise that it is a mistake to understand “strangulation” as only those acts of strangulation that immediately cause death, such that when “if a victim survived, it must not have been strangulation; it must only have been ‘attempted strangulation.’”

Early medical research fed into this misunderstanding because of the circular ways in which data about strangulation injuries was collected and tested: the best medical evidence of strangulation, particularly concerning damage to the deep tissues of the neck and throat, is derived from post mortem examination of the body; so medical experts looked for evidence of strangulation injuries only in victims of fatal strangulation, not in victims who survived. As this early strangulation research continued, it inadvertently reinforced and perpetuated the same circular methods.

Strack and Gwinn note this early bias, and emphasise that, on the basis of current medical research, strangulation is the act of intentionally applying force to the neck, cutting off circulation, airflow or both, which can be either fatal or non-fatal. They further emphasise that “[w]hen unconsciousness, urination, defecation and/or petechiae is/are present, then near-fatal or near-lethal strangulation would be the appropriate term as the victim suffered a severe, life-threatening injury.” They firmly state that the perpetrator of a non-fatal strangulation “did not..."
‘attempt’ the assault. He completed it.”209 As such “use of the word ‘attempted’ should be viewed as incorrect and eliminated from the discussion,” with non-fatal strangulation prosecuted as the completed criminal act it is.210

In New Zealand, advocates of a new specific non-fatal strangulation offence have similarly made a point of framing the offence as a complete criminal act rather than an attempt. The Family Violence Death Review Committee defines “the grabbing, suppression, squeezing or crushing of the throat [as] an act of strangulation.”211 The Committee recommended the introduction of an offence of non-fatal strangulation (as opposed to, for instance, attempted homicide by means of strangulation) partially on the basis that framing the act of intentional strangulation as a completed offence removes both the need to prove a specific physical injury to the victim beyond the fact that she was strangled,212 and the need to prove intention to injure or kill, as would be required for more serious injuring offences or attempted murder.213 That is, while an act of strangulation that turned out not to be fatal could be framed as an attempted murder, the Committee preferred to frame the offence in terms of the completed act itself.

After the New Zealand Family Violence Death Review Committee recommended the creation of a specific offence, the lawyer, journalist and anti-domestic violence advocate Catriona MacLennon emphasised in a newspaper column that the proposed offence “would not be ‘attempted strangulation’ but rather ‘non-fatal strangulation’… because the assault is not an attempt: it is a complete offence.”214 Later, the Law Commission’s report called it a mistake to describe non-fatal strangulation as attempted strangulation: “it is more correct to describe any pressure applied to the throat or neck that impedes normal breathing or circulation of the blood

209 Ibid, at 82.
210 Ibid.
211 Family Violence Death Review Committee, Fourth Annual Report, supra note 35 at 98.
212 As discussed in sections 7.8 to 7.10, based on scientific evidence we can say that the act of strangling a person does itself harm the victim. The removal of proof of injury does not imply that the act of strangulation is not itself harmful, but rather that a conviction for strangulation does not depend on proof of specific injuries, for instance, bruises to the throat.
as strangulation.”

Minister of Justice at the time Amy Adams also described non-fatal strangulation as an “act” and an “attack.”

The distinction between framing strangulation as an attempt and as a completed offence is not merely semantic. As will be discussed in greater detail in chapter 8, constructing the offence as a completed act rather than an attempt means it is not necessary to prove an intention to kill or the cause of a specific physical injury beyond the fact of the strangulation itself. But understanding non-fatal acts of strangulation as completed criminal assaults that are inherently dangerous in a causal sense, and so intrinsically harmful also makes clear that the offence is not an offence of “radical prevention.”

Applying Duff’s distinction between endangerment offences (inchoate) and attacks (completed offences), non-fatal strangulation is an attack rather than an endangerment offence or other form of inchoate offence. Since it is an attack, not endangerment, the strangulation offence does not pre-emptively criminalise a person for an offence (such as murder or attempted murder) which he has not yet committed and may never go on to commit. It criminalises him for a serious assault that he has committed. The act of strangling a person is in its own terms a harmful form of assault.

7.16 Strangulation Sentencing and Risk

There are other strong indications that New Zealand’s proposed non-fatal strangulation offence is not an offence of radical risk prevention. One of these indications is the reasoning the Law Commission gives for the sentence range it recommends should apply to a non-fatal strangulation offence. A second indication is the bill’s wording and framing of the offence. This section of the chapter discusses these two indications in turn.

---

215 New Zealand Law Commission, Strangulation, supra note 37 at 8.
217 See sections 7.8 to 7.10 above.
218 See section 7.13 at footnotes 171 - 174 and accompanying text.
219 See section 7.13 at footnote 177 and accompanying text.
The Law Commission report recommended a 7-year maximum penalty for its proposed non-fatal strangulation offence.\textsuperscript{221} Although the Commission refers to strangulation’s status as a red flag for future harms in other parts of the report, its reasoning in support of a 7-year maximum penalty focuses entirely on the harm of the assault itself. The Commission begins its discussion of the appropriate maximum penalty by acknowledging that the offence will capture a “broad band of culpability,”\textsuperscript{222} covering strangulation assaults of a range of seriousness. It states that the maximum penalty needs to be appropriate for the worst class of case.\textsuperscript{223} The Commission reasons that the worst cases of strangulation that are not better covered by heightened result (for instance, injuring or wounding) or heightened intent (for instance, intent to injure or wound, or attempted murder) offences “would feature the hallmarks of coercive or controlling behaviour” and that “the terror that results from strangulation … is at the heart of this kind of criminal conduct.”\textsuperscript{224}

The report states that the terror involved in the worst cases of strangulation as a method of coercive control as “greater than the harm of a minor injury and at least equivalent to a serious physical injury.”\textsuperscript{225} As such, a seven-year maximum penalty means that strangulation’s seriousness, relative to other similar assault offences is:\textsuperscript{226}

- equivalent to “wounding with intent to injure” and “injuring with intent” (both carrying seven years’ imprisonment);
- less serious than “wounding with intent to cause grievous bodily harm” (14 years) and “injuring with intent to cause grievous bodily harm” (10 years); and
- more serious than “injuring with intent to injure” and “assault with a weapon” (both carrying five years).

Nowhere in the Commission’s reasoning for recommending a 7-year maximum penalty is any mention of strangulation as a red flag for future offending.

\textsuperscript{221} The Family and Whānau Violence Legislation Bill is drafted consistently with the Commission’s recommendation. Cl 93, inserting s 198A into the Crimes Act 1961, sets the maximum penalty for non-fatal strangulation at 7 years’ imprisonment.
\textsuperscript{222} New Zealand Law Commission, \textit{Strangulation}, supra note 37 at chap 5, para 41.
\textsuperscript{223} \textit{Ibid}, at chap 5, paras 41-42.
\textsuperscript{224} \textit{Ibid}, at chap 5, paras 41-44.
\textsuperscript{225} \textit{Ibid}, at chap 5, paras 44.
\textsuperscript{226} \textit{Ibid}, at chap 5, para 45.
The wording of the proposed offence itself as set out in the bill is a related indication that the offence criminalises the inherent harm of the strangulation assault itself, and is not an offence of radical prevention, criminalising the creation of remote risks that are correlated with, but not caused by, strangulation assaults.\textsuperscript{227} In analysing the proposed offence’s wording, it is useful to parse the offence using the process discussed in chapter 4;\textsuperscript{228} see Table 7.1 below:

<table>
<thead>
<tr>
<th>Non-Fatal Strangulation</th>
<th>Actus Reus</th>
<th>Mens Rea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct</strong></td>
<td>1. blocks nose, mouth or both and/or 2. applies pressure on or to throat, neck or both</td>
<td>1. Intention 2. Intention</td>
</tr>
<tr>
<td><strong>Consequences</strong></td>
<td>1. Impedes normal breathing, blood circulation or both</td>
<td>1. Intention or recklessness</td>
</tr>
</tbody>
</table>

Parsing the offence emphasises the point – no less important for its obviousness – that the offence entirely frames strangulation as a completed criminal act. The actus reus consequence is the impeding of normal breathing, blood circulation or both. Even a very brief, or relatively minor, interference with normal breathing or blood circulation will satisfy this element. The elements of the offence include no requirement that the interference actually led to further harmful consequences and injuries in addition to the harm of having one’s breathing impeded.\textsuperscript{229} This is deliberate: as discussed in the previous section, advocates of a strangulation offence emphasise that it should be understood as a completed act.\textsuperscript{230} A second important point is that the offence is not what Duff would call an offence of explicit risk prevention:\textsuperscript{231} its wording includes

\textsuperscript{227} See above, at footnote 44 and accompanying text.
\textsuperscript{228} See chapter 4, section 4.4.
\textsuperscript{229} As discussed in sections 7.8 to 7.10 above.
\textsuperscript{230} Section 7.15.
no explicit mention of risk, or dangerousness.\textsuperscript{232} The offence does not expressly refer to strangulation as a red flag for future fatality, in the statistical, and non-causal sense. Nor does it explicitly refer to the dangers of strangulation in the causal sense discussed in the first half of this chapter,\textsuperscript{233} for instance by including an element such as the “creating the danger of injury” or being “risking injury.”

To the extent then that the offence has a dimension of risk prevention, this is implicit rather than explicit.\textsuperscript{234} Offences that criminalise completed acts certainly can have implicit risk prevention dimensions. For instance, drunk driving or speeding offences are framed as completed acts: the act of driving above the speed limit, or having an excess blood or breath alcohol level.\textsuperscript{235} These are not offences of explicit risk prevention: neither contains express reference to dangerousness or risk. However, the policy implicitly behind the enforcement of speed limits is that driving too fast creates a greater risk of accidents, and high-speed accidents tend to cause more serious harms than lower-speed accidents. Analogously, although non-fatal strangulation is a completed act, a degree of risk prevention – in relation to strangulation’s inherent dangerousness – can fairly be read into the proposed non-fatal strangulation offence.

As illustrated in Table 7.1, the conduct actus reus elements are the application of force to and physical manipulation of the victim’s neck, throat, nose or mouth, or any combination thereof. The actus reus consequence is that this bodily manipulation impedes the victim’s normal breathing or circulation. We know from science that applying pressure to the neck or throat impedes circulation and blood flow.\textsuperscript{236} We also know from science that the resulting oxygen deprivation that is sure to follow interrupted respiration or circulation can quickly cause serious brain injuries and other bodily harms.\textsuperscript{237} This science helps us to establish that the links in the causal chain between the act of strangling a person and consequences such as unconsciousness, brain injuries and death, frequently satisfy Hart and Honoré’s “analogous to the paradigm” of

\textsuperscript{232} Section 7.13, at notes 189 - 194 and accompanying text. If it is an endangerment offence, it is an implicit rather than explicit offence of risk creation. The language of the statute refers to the act of non-fatally strangling a person, rather than specifying that a heightened risk of eventual homicide must be created.

\textsuperscript{233} Sections 7.6 to 7.10 above.

\textsuperscript{234} Duff, \textit{Answering for Crime}, supra note 232 at 166.

\textsuperscript{235} Duff and Marshall, ”\textit{Abstract Endangerment}”, supra note 176 at 9.

\textsuperscript{236} See section 7.8, at notes 64 - 65 above.

\textsuperscript{237} See sections 7.8 - 7.9 above.
causation test. We also know that strangulation’s inherent dangerousness, in this causal sense, has been a major driver of the introduction of the new offence in New Zealand.

However, it does not follow also that the offence criminalises strangulation in order to “radically prevent” future intimate partner homicides.238 This becomes clear when we consider again the example in Husak’s thought experiment of the offence of dropping out of school before graduation.239 Leaving school early is not in itself harmful, and is likely only correlated rather than causally linked with higher rates of criminal offending for early school leavers. The one point of similarity between Husak’s example and the non-fatal strangulation offence is that both are correlated with, rather than causes of, the feared future harm. However, that single point of commonality is eclipsed by more significant differences. Crucially, while leaving school early is not harmful in and of itself, assaulting a person by applying pressure to their throat or neck and impeding their respiration or circulation or both is inherently harmful. Strangulation is a red flag for lethality, but what justifies the criminalisation of this red flag is the inherent harmfulness of the conduct, as a completed act, each and every time an offender strangles a victim.

When the Law Commission, the Family Violence Death Review Committee, and the then Minister of Justice refer to strangulation being a red flag for future fatality, it is predominantly in the context of arguments that specifically labelling this high-risk behaviour as high-risk behaviour on an offender’s criminal record that allows more proactive responses by police, prosecutors, and judges, and also by medical professionals, social workers, and community groups. Such arguments take as read that the conduct in question is harmful, and must be criminalised; their focus is on practical advantages for actors within the criminal justice system and for agencies tasked with family violence prevention, of specifically labelling strangulation assaults.

For instance, a judge who reads an offender’s criminal record and sees that it includes several counts of common assault or male assaults female has little context about the nature of that conduct: the convictions could have been for very low-level touchings, or they could represent a series of more systematic coercive control assaults that might ideally have been charged under more aggravated assault offences, but for evidentiary reasons were

238 See above, at notes 171 - 173 and accompanying text.
239 See above, at notes 185 - 187 and accompanying text.
undercharged. However, if a similar offender appears before a judge on a strangulation charge or breach of protection order charge, and his list of assault convictions includes several male assaults female convictions, and a strangulation conviction, the judge has a great deal more useful contextual information about the dangerousness of the offender.

The Law Commission and the Family Violence Death Review Committee in noting that strangulation is “red-flag” for future offending also focus on the awareness-raising function of a specific offence. Police have said the new offence would help focus the attention of officers on currently under-recognised significance of strangulation as high risk factor for future fatality. Then-Minister of Justice Amy Adams also emphasised the offence’s usefulness as a means of increasing awareness so that members of the public and decision makers across the system will “know what a risk [strangulation] is.” The parents of Sophie Elliot, a 22-year-old woman who was murdered by her ex-boyfriend, said publicly that her ex-boyfriend strangled her ten days before he went on to kill her, but they had not realised at the time the grave significance of strangulation as a red flag. Lesley Elliot told the Justice and Electoral Committee as it reviewed the proposed offence: “that’s why we are in this position – because we didn’t recognise the signs.” Indeed, the Family Violence Death Review Committee notes that its in-depth reviews of family violence death events found that it was common for intimate partner violence lethality risk factors, including strangulation, not to be recognised or to be responded to inadequately by practitioners, agencies and multi-agency initiatives, or for friends, family

---

240 New Zealand Law Commission, Strangulation, supra note 37 at chap 8, paras 19-21.
242 Strangulation, supra note 37 at chap 8, paras 8-11; Family Violence Death Review Committee, Fourth Annual Report, supra note 35 at 101.
243 New Zealand Law Commission, Strangulation, supra note 37 at chap 8, para 9.
members and other informal sources of support to be aware of controlling behaviour but not to “name behaviours as abusive and understand their potential lethality.”

Thus, arguments that draw on the idea of strangulation as a red flag for future fatality wield this point not as a factor justifying the criminalisation of strangulation per se, but instead, as an argument for recognising and highlighting strangulation as the red flag that it is in order to facilitate early interventions aimed at preventing the abuse within already abusive intimate relationships from escalating to the point of more serious violence and homicide.

These functions of raising public and official awareness of strangulation as a lethality risk factor, and specifically marking strangulation convictions on an offender’s record in order that criminal justice responses and multi-agency initiatives may take proper note of a history of strangulation and intimate partner abuse, are not criminal justice “radical prevention” approaches in the sense of prematurely punishing abusers for the as yet unrealised risk that they may go on to kill their intimate partners. Explicitly labelling a strangulation assault as strangulation means making sure that that red flag’s redness is highlighted and clearly visible.

7.17 Summary
This chapter introduced my first case study: the proposed New Zealand specific non-fatal strangulation offence. The chapter set out the first of two key themes in arguments in favour of the new offence: that although strangulation is a form of assault, and so is already criminalised under general assault offences, it is a particularly dangerous form of assault, and a red flag or risk factor for future fatality within already violent relationships. The first half of this chapter considered strangulation’s dangerousness in the causal sense that applying pressure to someone’s neck and impeding circulation and breathing will cause the brain to be starved of oxygen, which in turn can cause a variety of harms to the brain and body. The first half of the chapter also presented the case that non-fatal strangulation is best conceptualised as a completed act, rather than an attempt or express endangerment offence. This is in part for pragmatic reasons relating to proof and prosecutorial ease that will be explored in greater detail in chapter 8. However, more fundamentally, just as non-result assault offences are completed criminal acts, and are harmful on their own terms, so too strangulation is a harmful act in its own right. The first half of the

---

248 Family Violence Death Review Committee, Fourth Annual Report, supra note 35 at 82.
chapter presented the proposed non-fatal strangulation offences as putting to rest overcriminalisation concerns based on this inherently harmful character of the act of strangulation itself.

The second half of the chapter considered strangulation as a risk factor for future homicide. This portion of the chapter considers these arguments in the context of wider overcriminalisation concerns that we live in a “risk society,” and that a prominent contributor to overcriminalisation is the criminalisation of conduct that is not itself harmful, but may be correlated or causally but extremely remotely related to a potential future harm. Using analytical frameworks suggested by Janus, Duff, Marshall and Husak, the chapter concluded that the advocates of the offence do not use its status as a risk factor to argue for its criminalisation, but rather to contextualise and motivate the wider policy project of recognising strangulation as a risk factor and opportunity to intervene and prevent violence from escalating and leading to death. Some of these may be criminal justice interventions, but others will be interventions by other sectors, such as public health officials, social workers, and community groups. This second half of the chapter makes clear that the offence does not give rise to overcriminalisation concerns on the basis that it constitutes “radical prevention.”

The next chapter considers the second theme in arguments in favour of a specific non-fatal strangulation offence: that for a number of practical and evidential reasons, strangulation is an unusually difficult mode of assault to prosecute under general assault offences.
Chapter 8: Non-Fatal Strangulation: Practical and Evidential Difficulties

Prosecuting Strangulation Assaults

8.1 Introduction

This chapter is the second of three chapters addressing the non-fatal strangulation case study. At first glance, the proposed offence of non-fatal strangulation seems to raise overcriminalisation concerns. However, chapter 7 argued that the offence will not in fact contribute to overcriminalisation because the act is inherently harmful.\(^1\) In addition, it does not contribute to overcriminalisation because to the degree that it criminalises the creation of risk, it does so in a way that meets moral criteria for criminalising risks.\(^2\) In this chapter, I turn to the second theme in arguments in favour of a specific non-fatal strangulation offence: arguments that strangulation is an unusually difficult mode of assault to prove and prosecute. That is, there are pragmatic and evidential difficulties with prosecuting strangulation under existing general assault offences. This second theme of difficulties proving and prosecuting strangulation interacts with the first theme, concerning the dangers and risks of strangulation, in such a way that each theme amplifies the other.

Within this second theme, there are two groups of pragmatic and evidential difficulties with prosecuting strangulation under the existing range of general assault offences. The first group of difficulties stems from the fact that the seriousness of strangulation is often misunderstood at an official and community level. This means that the inherent dangerousness and statistical riskiness of strangulation discussed in chapter 7 are not well understood in our culture, tending to be underestimated and overlooked by victims of strangulation, bystanders and community members, and officials such as police, the courts, and medical and social agencies. The second group of difficulties relates to practical difficulties of proof and evidence particular to strangulation as a mode of assault. I will begin with this first group of difficulties, before moving on to the second group.

A roadmap of how the chapter addresses these two subthemes is as follows. Sections 8.2 to 8.3 of this chapter address the first subtheme: the notion that victims and officials tend to underestimate the seriousness of strangulation. Another way of contextualising this first

\(^1\) Chapter 7, sections 7.8 – 7.10.
\(^2\) Chapter 7, sections 7.14 – 7.16.
subtheme is to observe that the evidence and arguments contained in chapter 7 are not common knowledge either for members of the public, or in many cases for official actors. This low level of awareness of the gravity of strangulation is reflected in rates of reporting to police, and low prosecution rates. The second subtheme – observations about the particular difficulties of proof and evidence associated with strangulation as compared with other forms of assault of comparable dangerousness and riskiness – is presented in section 8.4.

Sections 8.5 to 8.7 then set out the ways in a specific non-fatal strangulation offence would address the two subthemes.\(^3\) Section 8.5 considers arguments that enactment of a specific non-fatal strangulation offence will have an awareness-raising function, highlighting the risks and dangers of strangulation canvassed in chapter 7, and bringing these to the attention of the public and potential victims, as well as to the attention of official actors to take strangulation incidents seriously, even when there are particular evidential difficulties associated with prosecuting it. Section 8.5 also notes that a new specific offence would also circumvent current difficulties in prosecuting strangulation incidents at an appropriately serious charging level because the new offence will not require proof of heightened intent or actual injury. Framing the specific offence in such a way that it does not require proof of heightened intent or actual causation of injury does address particular difficulties in proving strangulation injuries. However, it is not a panacea. Although securing a conviction for non-fatal strangulation under the new offence will not require proof of actual injury, from a pragmatic point of view, it does require the finder of fact to determine beyond reasonable doubt that a strangulation assault did occur.

Section 8.5.1 sets out and considers the problems that can arise in credibility contests between a woman complainant and a man she says has abused her but who denies it. The section sets out various ways in which women may be less likely to be believed in “he said she said” credibility contests. This means that even under a specific non-fatal strangulation offence that does not require proof of strangulation injury, it will often remain pragmatically useful to be able to present evidence of strangulation injuries in order to corroborate a complainant’s testimony. Sections 8.6 and 8.7 look at practical implementation methods that could supplement a new specific non-fatal strangulation offence, by improving the collection of corroborating evidence to

---

\(^3\) Sections 8.5 - 8.7.
support non-fatal strangulation charges. First, there is considerable scope for improving the quality of police and medical procedures when interacting with potential strangulation victims. Section 8.6 presents ways in which police and medical staff training and procedures could be improved to facilitate the timely collection of interview and diagnostic evidence from strangulation victims. In addition to producing better evidence for prosecution purposes, this would also facilitate better medical treatment and support services for strangulation victims. Section 8.7 gives an overview of specialised photographic and medical imaging techniques that can be used to produce evidence of strangulation events and injuries that could not be captured using ordinary photography techniques.

8.2 Subtheme 1: Victims and Officials Underestimate the Seriousness of Strangulation

Despite the seriousness of strangulation as an inherently dangerous act and a red flag for future intimate partner violence and homicide, this dangerousness and riskiness is not well understood by victims of intimate partner violence, or in many cases by police and other officials. This lack of understanding manifests in low reporting rates and under-prosecution of strangulation assault.

A large proportion of all forms of intimate partner violence goes unreported. But even given this already low reporting rate for intimate partner violence generally, the underreporting pattern is even more pronounced with respect to strangulation assaults. A factor that contributes to this underreporting is that victims not uncommonly minimise strangulation incidents after they have occurred, and frame them as “too insignificant” to report. There is a complex interplay between the ways, discussed in chapter 7, in which the trauma of strangulation is distinctively severe, and the ways in which women who have been strangled commonly downplay or minimise strangulation assaults after they have occurred. Sylvia Vella et al attribute this

---

minimisation of strangulation assaults by victims to “[w]omen … hav[ing] internalized societal mimimization of strangulation.”

Vella et al argue that previous research into domestic violence, with the exception of Thomas, Joshi and Sorenson’s study, has “not addressed the psychological complexities of strangulation survivors’ lived experiences, especially from a feminist perspective.” Further research would be needed to examine the exact psychological and systemic and societal relationship between the ways in which the trauma of strangulation is distinctively severe, and its frequent minimisation by survivors. However, in the wider context of intimate partner violence more generally, research indicates that abuse victims can experience something like the Stockholm syndrome, according to which victims do not perceive or are reluctant to admit that abuse has occurred, and feel reluctant to report their abusers or label themselves as victims.

It is also known that at both the societal and personal level, there are significant barriers to leaving abusive domestic relationships, and incentives to try to make a violent relationship work. For instance, a woman who experienced a strangulation assault as terrifying may nonetheless minimise it after the fact if she: loves her abuser; blames herself for the violence; fears her that abusive partner may seriously hurt or kill her or her children if she takes the step of

---

9 Joshi, Thomas & Sorenson, supra note 6; Kristie A Thomas, Manisha Joshi & Susan B Sorenson, “‘Do You Know What It Feels Like to Drown?’ Strangulation as Coercive Control in Intimate Relationships” (2014) 38:1 Psychol Women Q 124.
10 Vella et al, supra note 8 at 171.
11 Ibid.
leaving;\textsuperscript{16} lacks the economic resources to leave;\textsuperscript{17} or expects that no one else is likely to believe that she experienced violence or that it was that serious.\textsuperscript{18}

Reasons such as these may contribute to women’s minimisation of the severity or frequency of violence they experience.\textsuperscript{19} According to Anderson and Saunders, minimisation can be a psychological coping method, allowing a battered woman to reconcile her feelings of love for an abuser, or her sense that she is not able to escape, with the pain of the abuse that she endures.\textsuperscript{20} Survivors of strangulation assaults may at times engage in a kind of conscious or unconscious rationalisation, during which they reframe and downplay the severity of the fear they experienced during the assault.\textsuperscript{21}

Anderson quotes a strangulation survivor as saying “he didn’t really choke me, he just had me in a headlock and I couldn’t breathe.”\textsuperscript{22} Joshi et al quote a survivor’s explanation of her assault as follows:\textsuperscript{23}

He choked me, I’m not going to defend that… he choked me until I passed out… but the reality is that when he choked me he only did it once… I’m not the victim of somebody that just obsessively chokes me… I’m with somebody that choked me just once… I didn’t have to go to the hospital.

This latter woman’s words illustrate the complex ways in which a survivor may both acknowledge aspects of the seriousness of a strangulation assault while simultaneously downplaying that seriousness. The woman acknowledges she was “choked,” notes that this is not something she defends, and states that she was strangled to unconsciousness, which she implicitly recognises as serious. But she also minimises the seriousness of the assault: she was


\textsuperscript{18} Alison J Towns & Peter J Adams, “‘I Didn’t Know Whether I Was Right or Wrong or Just Bewildered’: Ambiguity, Responsibility, and Silencing Women’s Talk of Men’s Domestic Violence” (2016) 22:4 Violence Against Women 496 at 498.


\textsuperscript{20} Anderson & Saunders, supra note 19 at 175.

\textsuperscript{21} Joshi, Thomas & Sorenson, supra note 6 at 10.


\textsuperscript{23} Joshi, Thomas & Sorenson, supra note 6 at 10–11.
strangled “just once” rather than “obsessively;” she was not “with somebody” or “the victim of somebody” who had strangled her on more than one occasion; and she “didn’t have to go to the hospital.” It may seem like a “paradox” or inconsistency to state that strangulation is both distinctively severe, but also commonly minimised by survivors. However, “appraisal distortion” of this kind is not unique to strangulation, but is more widely associated with intimate partner and family violence, and particularly with coercive control.

Sociologist Eva Lundgren offers an account of why intimate partner violence victims so frequently minimise the violence they experience. Lundgren describes men’s violence against women in intimate relationships as a dynamic process according to which violence gradually becomes normalised within a relationship. As an abuser pushes his victim’s boundaries, over time those boundaries shift and acts of violence gradually take on different meanings for the victim and the abuser from those that they might have for an outsider. Accordingly, if within a violent relationship a victim’s boundaries have become eroded to such a degree that severe violence and threats, including strangulation, feel normal, the victim may not be able to appreciate the real risk of her situation. As the FVDRC has noted, “[n]ormalising or minimising family violence fails people who are at risk of being killed.”

Minimisation by victims of strangulation incidents can in turn be compounded by the reactions of police and other professionals at both the reporting and charging stages. For instance, consider a scenario in which a man has assaulted his girlfriend in a variety of ways, including a strangulation assault. If the woman decides to take the step of reporting the abuse to police, she may be inclined to minimise or omit to mention the strangulation incident even as she reports other acts of intimate partner violence to police. If police and prosecutors are not tuned in to strangulation as dangerous, a red flag for escalating violence and fatality, and as widespread,
and serious, they will be much less likely to ask her follow up questions about strangulation incidents she has mentioned in passing, or to ask questions to solicit information about strangulation assaults she has not mentioned. If police and prosecutors do not understand the dangerousness of strangulation or that it is a lethality risk factor, and they are not well trained to identify and assess victims of strangulation, these failures will compound already low reporting rates for strangulation.\footnote{Gael B Strack, George E McClane & Dean Hawley, “A Review of 300 Attempted Strangulation Cases: Part I: Criminal Legal Issues” (2001) 21:3 J Emerg Med 303.}

Beyond questions of reporting and detection rates, police and prosecutors’ understanding of strangulation as a dangerous assault and lethality risk factor have further implications for rates of charging and prosecution. At present, even in instances in which victim unambiguously report strangulation assaults, those assaults tend to be undercharged and under-prosecuted. The Law Commission report contains a survey of cases in which strangulation assaults in a family violence context were prosecuted.\footnote{New Zealand Law Commission, Strangulation: The Case for a New Offence (R 138, Wellington, NZ, 2016) at Appendix C.} The Commission found that in such cases, strangulation was frequently charged at a low level as “male assaults female.” Cases in which more serious charges were laid were the exception, and always involved other violence or evidence of injury.\footnote{Ibid at 18.}

For example, the defendant in Grant was charged with “causing grievous bodily harm … with intent to cause grievous bodily harm”, carrying a maximum penalty of 14 years’ imprisonment. In that case, the defendant put his girlfriend in choker holds, forced her head under bath water, bit her, gouged her eyes and stabbed her with a comb. At the other end of the spectrum, the defendant in Areaiti, who was charged with “male assaults female”, threw a bottle at the victim before grabbing her by the throat so she struggled for breath and thought she would die. Similarly, in Rikihana, the defendant pushed the victim onto a chair and strangled her, but there was no other violence, and the ultimate charge was “male assaults female”.

\section*{8.3 Labels and Conceptions of Strangulation: Implications for Reporting Rates and Police Detection}

One way in which abused women may downplay strangulation assaults, or may be misunderstood by police, prosecutors and defence lawyers as downplaying those assaults, is by...
describing having been “choked” rather than “strangled.” Domestic violence prevention advocates emphasise that “choking” and “strangulation” are distinct terms, describing different mechanisms of throat blockage, with diverging sets of cultural connotations. Choking refers to an internal obstruction of the airway by a foreign object, such as a piece of food, or in the case of small children, small objects like buttons, hard candies or small plastic toys; whereas strangulation refers to external pressure to the neck or throat impeding airflow or blood flow. Indeed, dictionary definitions confirm the distinct core emphasis of each term.

These core emphases have further implications regarding an abuser’s perceived culpability: “choke” carries connotations of an accidental airway blockage, erasing or removing emphasis from a perpetrator, whereas “strangle” conveys a life threatening or deadly hostile assault by a violent perpetrator. Karen Busby, writing of a high profile case in which a husband strangled his wife to unconsciousness and commenced sexual penetration while she was unconscious, notes that judges dealing with the case “almost invariably” used the word “choking” and journalists used “erotic asphyxiation.” Busby writes that “[b]oth of these usages minimize the potential lethality of the defendant’s strangulation of the complainant.” These connotations seem to be reflected in the repeated practice in the United States media of dubbing

34 See Chapter 7, at section 7.5, footnote 49.
39 Supra note 36.
41 Ibid.
serial killers who have used strangulation as part of their modus operandi with epithets of the form: “the [place name or victim-type] strangler.” In such cases, the media seems to have selected the word “strangler,” (as opposed to possible alternatives like “choker,” or “throttler”) for its visceral power and the gravity it connotes.

Domestic violence prevention groups recommend that media reports about domestic violence should use the term strangulation rather than choking in order to avoid downplaying the seriousness of strangulation assaults. At the same time, they also note that medical professionals, police and prosecutors should be aware that women frequently refer to having been “choked” rather than using the medically correct term “strangled.” This means that effective screening of women who may have experienced strangulation will require police and prosecutors to follow up on mentions of “choking,” not just “strangulation,” and to ask in descriptive terms whether an abuser put his hands or an object around her neck.

Writing in the context of battered women who kill their abusers in self-defence, Elizabeth Sheehy has noted that different linguistic usages across various social groups can lead to police, prosecutors and defence lawyers misunderstanding some women’s accounts of the abuse that preceded their acts of self-defence. Sheehy cites Anne McGillivray and Brenda Comanskey’s Australian study, which found that Aboriginal women who had experienced intimate partner violence frequently used the term “fighting” to describe physical abuse they had experienced, whereas women who were not Aboriginal rarely used the term in this way. Police, lawyers and

---


43 Jane Doe Inc, supra note 36.

44 Turkel, supra note 35 at 81; Douglas & Fitzgerald, supra note 35 at 232; Joshi, Thomas & Sorenson, supra note 6 at 800; McClane, Strack & Hawley, supra note 35 at 311.


jurors commonly understood the word “fighting” differently to the way in which Aboriginal women used it, and were likely to understand it as implying mutual violence, and mutual responsibility. When an Aboriginal woman who has experienced battering and has gone on to resort to “violent self-help” describes the abuse that preceded her act of self-defence as “fighting,” she is likely to be understood by police, prosecutors and defence lawyers, and jurors, as a mutually or primarily accountable instigator, rather than a battered person acting in self-defence. The risk of this kind of miscommunication is intensified in communications in which there is an “illusion of communication,” that is, where the parties to the communication appear to understand one another, but are in fact speaking at cross purposes because they each understand key terms in different ways. According to McGillivray and Comanskey’s study, battered Aboriginal women were much more likely than non-Aboriginal women to be misunderstood in this way, and thus were able to access the legal defence of self defence at substantially lower rates than non-Aboriginal women.

In the current context, an analogous miscommunication danger could stem from different linguistic communities’ uses of the terms “choke” and “strangle.” If police are unaware that for many women “choke” functions as a synonym for “strangle,” and are unaware that women may be inclined to minimise or omit to mention strangulation incidents, then even when women do report strangulation incidents, police may fail to recognise the seriousness of non-fatal strangulation events being described to them. Furthermore, police may fail to the kinds of questions that could encourage assault victims to report strangulation incidents they have not already mentioned.

On this basis, non-fatal strangulation prosecution experts Gael Strack and George McClane suggest that an important step in reconceptualising strangulation to improve both reporting rates and police detection of strangulation is simply for police and officials to consistently use the medically correct term: strangulation. In light of Sheehy’s argument

48 In the Canadian case of R v Lavallee (1990) 55 CCC (3d) 97 (SCC), Justice Wilson used the term “violent self-help” to describe the act of killing an abusive intimate partner in self-defence.
49 McGillivray & Comanskey, supra note 47 at 66; Sheehy, supra note 46 at 195.
51 McGillivray & Comanskey, supra note 47 at 65–66.
52 Strack & McClane, supra note 29 at 6.
53 Ibid.
regarding differing linguistic usages by officials and other populations, in order to minimise miscommunication between these groups at the reporting and detection stage, it is important that officials should also be aware of other linguistic usages likely to be employed by victims and perpetrators of strangulation.

8.4 Subtheme 2: Problems of Proof and Evidence

According to the first theme then, strangulation is more inherently dangerous, and more of a lethality risk factor, than is commonly understood. These misunderstandings of the seriousness of strangulation as a mode of assault contribute to low reporting rates and under-prosecution of strangulation events. But even with a successful, widespread re-education effort focusing on victims, the general public, and police, prosecutors and other officials regarding the seriousness of strangulation, a separate set of practical difficulties with proof would still need to be addressed. These difficulties stem from a series of factual peculiarities about strangulation that make it more complicated and difficult to prosecute and prove than is the case for other forms of assault.

These practical evidential difficulties with proving a strangulation assault has occurred, or proving that the particular incident of strangulation was dangerous despite the fact that it was non-fatal, mean that prosecutors may pragmatically decide either not to charge the strangulation assault at all, on the basis that it may not be possible to prove beyond reasonable doubt, or may decide to charge it under a low-level offence that does not accurately reflect the inherent dangerousness of the assault or the fact that strangulation incidents are a significant risk factor for future offending. In practice, where strangulation incidents are charged in jurisdictions like New Zealand that do not have specific strangulation offences, they are commonly charged with lower level assault offences, like common assault or male assaults female. Commentators have noted that this is similar to the level of charge typical for “a slap in the face where only redness was present”, even though as we have seen above it is much more inherently dangerous than a slap, and is a risk factor for future fatality. The next sections of this chapter address this subtheme of the problems of proof and evidence that make strangulation more complicated and difficult to prove than other forms of assault.

55 Strack, McClane & Hawley, supra note 31 at 308; New Zealand Law Commission, supra note 32 at 24.
A key practical difficulty in prosecuting strangulation assaults is that strangulation frequently does not leave visible external injuries that can be documented and used in evidence in a criminal trial. Many victims of strangulation have no visible injuries, and when bruising or swelling is present, it often does not appear until days after the assault. Furthermore, bruising and other marks to the skin may be less visible on victims with darker skin tones. Accurately capturing visible but subtle injuries, such as redness on the neck, or self-inflicted defensive fingernail scratches to the neck, in a photograph can be difficult, and success or relative success in photographing strangulation marks and bruising requires a photographer with specialised training and expertise.

Where an expert forensic photographer is not available, police are more likely to forego photographing subtler strangulation marks, or to produce photographs that turn out to be unusable as evidence in court due to their poor quality. This poses difficulties for charging a

---


58 Faugno et al, supra note 45 at 314.


60 Strack, McClane & Hawley, supra note 31 at 306.


62 Strack, McClane & Hawley, supra note 31 at 305–306; Paluch, supra note 57 at 11.

strangulation incident under an offence more serious than would be suitable for a slap, or for proving all the necessary elements of an offence that might better reflect the inherent dangerousness of strangulation, and its status as a risk factor for future fatality, such as attempted murder or a serious assault offence. While the complainant’s own testimony is a source of evidence regarding the assault, as will be discussed in greater detail below, in cases where no additional evidence corroborates a complainant’s account, and the accused offers a conflicting account, convictions can be difficult to secure.

Charges that describe more serious forms of interpersonal violence (for instance, wounding with intent, and injuring with intent) tend to require proof that the assault caused the victim some degree of physical harm. Because non-fatal strangulation often does not leave an obvious or serious mark on a victim, or a mark that is recordable as a photograph of sufficient quality that it can be used as evidence, prosecutors are less likely to charge such an offence. Lower level offences like common assault are much more realistically provable as they do not require proof of injury.

Similarly, more serious assault charges such as wounding or injuring with intent, and attempted murder also require a heightened standard of mens rea (intention to cause grievous bodily harm, injure, or kill, or reckless disregard for the safety of others). It is more difficult to prove these kinds of heightened intents than to prove simply the intention to apply

---

64 Family Violence Death Review Committee, supra note 5 at 99.
65 See section 8.5.1 below.
66 Crimes Act 1961, s 188.
67 Crimes Act 1961, s 189.
68 Crimes Act 1961, s 188 (wounding with intent).
69 Crimes Act 1961, s 189 (injuring with intent).
70 Crimes Act 1961, ss 72 (attempts); 167 and 168 (murder); and 173 (attempted murder).
71 Crimes Act 1961, s 188(1) (wounding, maiming, disfiguring or causing grievous bodily harm with intent to cause grievous bodily harm. Maximum penalty 14 years imprisonment) and s 189(1) (injuring with intent to cause grievous bodily harm. Maximum penalty of 10 years imprisonment).
72 Crimes Act 1961, s 189(2) (injuring with intent. Maximum penalty: 5 years imprisonment).
73 Crimes Act 1961, ss 72 (attempts); 167 and 168 (murder); and 173 (attempted murder). While recklessness is sufficient for a murder conviction, an attempted murder conviction requires subjective intention rather than recklessness.
74 Crimes Act 1961, s 188(2) (wounding, maiming, disfiguring or causing grievous bodily harm with reckless disregard for the safety of others. Maximum penalty: 7 years imprisonment), and s 189(2) (injuring with reckless disregard for the safety of others. Maximum penalty: 5 years imprisonment); and s 189(2) (injuring with reckless disregard for the safety of others. Maximum penalty: 5 years’ imprisonment).
force to the body of another required for common assault. In the context of strangulation, offenders might commonly describe their subjective intentions in strangling a victim, even in cases where they admit to that act, as an intention to frighten and intimidate rather than an intention to injure or kill.

8.5 How Enactment of a Specific Offence Addresses the Two Themes

Responding to the themes described above forms the foundation for the recommendation by the Family Violence Death Review Committee and the Law Commission that a specific non-fatal strangulation offence should be enacted. The same themes inform New Zealand’s previous Minister of Justice’s decision to include the new specific offence in the bill currently before the House, and were major talking points for most people and organisations who made submissions on the bill to the Justice and Electoral Select Commission. That is, all of these actors contend that the current inadequacies in recognising and prosecuting non-fatal strangulation assaults are best addressed by the enactment of a specific non-fatal strangulation offence.

First, advocates of a new specific strangulation offence stress that the new offence would highlight strangulation as a red flag for future harm and fatality, and would raise awareness of the seriousness of strangulation. The Family Violence Death Review Committee writes of the present tendency of victims and practitioners alike to minimise non-fatal strangulation assaults, such that frequently, these assaults, which should be understood as lethality red flags become missed opportunities to intervene before death. The committee writes of the importance of naming strangulation: “[n]aming it would encourage community agencies, police and health

---

75 Crimes Act 1961, s 196 (common assault. Maximum penalty: 1 year imprisonment); and s 194 (male assaults female, and assault on a child. Maximum penalty: 2 years imprisonment).
76 Family Violence Death Review Committee, supra note 5.
77 New Zealand Law Commission, supra note 32. Similar themes were also present in the views of the Law Commission’s consultees (at 53).
80 Submissions to the Justice and Electoral Select Committee regarding the Family and Whānau Violence Legislation Bill 2017, many of which address the question of a specific non-fatal strangulation offence, can be accessed at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_72556/tab/submissionsandadvice
81 Family Violence Death Review Committee, supra note 5 at 101.
professionals to identify and respond appropriately.”82 A practical way in which a specific offence would aid the state response to strangulation assaults is that a strangulation conviction would be recorded on an offender’s criminal record not simply as a generic assault conviction, but specifically as strangulation. Strangulation convictions would be expressly and clearly indicated to future sentencing judges, police and other social agencies, allowing them to more proactively respond to strangulation assaults as the red flag for intimate partner fatality that it is. That is, a specific offence may be a criminal justice solution, but it can be used as an important trigger for inter-agency, “wrap around” responses to women already experiencing intimate partner violence, and who are at a heightened risk of escalating violence and death.

Thus, awareness raising around strangulation operates at several levels. First, raising general public awareness of strangulation as dangerous and a lethality risk factor can help to raise reporting rates of non-fatal strangulation assaults. Secondly, awareness raising at the institutional level is equally crucial in order for police, prosecutors, judges and medical professionals to take strangulation seriously when it is reported.83 These points about awareness raising clearly go to arguments based on the inherent dangerousness of strangulation discussed in chapter 7.84

A second way in which proponents of the new offence argue that it would address current difficulties with proving and prosecuting strangulation assaults is that the incoming strangulation offence would have different offence elements than the general assault offences with comparable maximum penalties. The strangulation offence will require neither: proof of causation of injury, unlike injuring and wounding offences; nor proof of intention to injure or kill, unlike heightened intent assault offences. Instead, the act of intentionally applying pressure to the neck or throat, or blocking the nose and mouth, it itself the completed act. The only intention the crown must prove is intention or recklessness as to impeding another person’s normal breathing or blood circulation.

82 Ibid.
84 See chapter 7, sections 7.8 – 7.11.
Framing the new offence in this way substantially addresses subtheme 2: if causation of injury is not an element of the strangulation offence, then the fact that strangulation frequently does not leave visible marks or injuries ceases to be a substantial barrier to prosecution and conviction.

8.5.1 A Complication: Uncorroborated Complainant Testimony and Questions of Credibility

Although New Zealand’s proposed non-fatal strangulation offence will not require proof of injury or heightened intent, securing a conviction will of course require proof beyond reasonable doubt that the accused strangled the complainant. That is, although no physical evidence is legally necessary in order to prove that the accused intentionally applied pressure to the neck of the complainant, physical evidence will be pragmatically helpful to prosecutors in proving that the accused strangled the complainant. Rosemary Hunter has observed that “corroboration is notoriously hard to find in cases of privatized harms to women” such as sexual assault and intimate partner violence. Without corroboration in the form of physical evidence, or other witnesses, the primary evidence of the assault will be the complainant’s own testimony. If the accused offers a competing account of the same events, for instance, denies having strangled the complainant, or says that she consented to the strangulation, the fact finder will be faced with a credibility contest between the accused abuser and complainant’s conflicting accounts. As such, the respective credibility of the witnesses becomes crucial to the fact finder’s decision about whether the offence has been proved beyond reasonable doubt.

Female complainants are at disadvantages in at least three respects in “he said she said” contests of this kind. First, victims of intimate partner violence who make an initial complaint to police are more likely than other crime victims to recant or refuse to cooperate with police and

prosecutors. These high rates of recantation are thought to stem from similar causes to the low reporting rates of intimate partner violence. That is, factors such as fear of retaliation by an abuser, economic dependence on the abuser, and feelings of loyalty to and love for an abusive partner. Without a complainant prepared to testify, police and prosecutors generally regard the case as “unprosecutable” or “unwinnable.” As such, victim recantation frequently marks the end of the case.

In cases where complainants do not recant, they are still at a second disadvantage. The respective burdens of proof in a “he said she said” contest are asymmetrical. The complainant is a prosecution witness, and the prosecution must prove all elements of the charged offence beyond reasonable doubt, whereas the defence need only raise a reasonable doubt with one element of the prosecution’s case. Because of these burdens of proof, in a he said she said contest, the complainant is effectively held to a higher credibility threshold than the accused. In the Supreme Court of Canada case of W(D), Cory J for the majority set out a three-part test for how to determine the presence or absence of reasonable doubt in credibility contests between a complainant and defendant.

---

95 W(D) v R [1991] 1 SCR 742.
96 W(D) v R [1991] 1 SCR 742, at 758.
First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

This means that the accused will receive the benefit of any doubts as to either his own credibility, or the credibility of the complainant.\(^\text{97}\) Christine Boyle writes that “\(W(D)\) could even be understood as requiring an acquittal in any case where there is a conflict of testimony and no corroboration.”\(^\text{98}\) \(R v W(D)\) was a case about sexual assault rather than intimate partner violence.

However, the issue of credibility contests between complainants and accused persons is similar in both contexts: both are gendered violence offences that frequently take place in private, without third party witnesses.

There is a further respect in which “he said she said” credibility contests frequently disadvantage female complainants. Due to a number of societal biases and stereotypes, women are often assumed to be less credible than men.\(^\text{99}\) Regardless of the content of their narrative, or the particular context in which they speak, female witnesses’ testimony is disproportionally devalued\(^\text{100}\) and mistrusted.\(^\text{101}\) Leigh Goodmark suggests that this is due to a “prevailing consensus of how a credible witness sounds: ‘like a man.’”\(^\text{102}\)

---


\(^\text{101}\) For examples of how these credibility contests often play out in a sexual assault context, see: Rebecca Scott, Heather Douglas & Caitlin Goss, Prosecution of Rape and Sexual Assault in Queensland: Report on a Pilot Study (2017) at 10–11.

accorded less credibility because of the ways in which their affect, speaking style and appearance differ from those of the ideal (male) witness.

In the context of intimate partner violence criminal trials, a range of myths and stereotypes about intimate partner violence and how an “ideal victim” looks, sounds and behaves can all affect female complainants’ perceived credibility. Christine Boyle calls gendered violence an area “rife with the possibility of stereotypical thinking.”

Evan Stark writes of the “reluctance to give [female] victims full credibility as witnesses to their own experience.”

Judges and juries may be predisposed to perceive female complainants as paranoid, hysterical or susceptible to exaggeration or making malicious false claims of abuse.

Sameena Mulla describes a widespread tendency to regard DNA and forensic evidence in sexual assault prosecutions as “hand of god” evidence, pointing authoritatively to the offender, and trustable in a way that a woman’s testimony of her own experiences is not.

In cases in which a fact finder hears a complainant narrative of abuse that diverges dramatically from their own lived experiences, or “belief in a just world,” they may be

---

104 Jess Meares, Dangerous Women and Reasonable Men: Gender and Eyewitness Testimony at the Turn of the Twentieth Century. (Master’s Thesis, University of Canterbury, 2016) [unpublished].
108 Boyle, supra note 98 at 291.
112 Hunter, supra note 86 at 163; Ann Jones, Next Time, She’ll be Dead: Battering and How to Stop it, revised edition ed (Boston: Beacon Press, 2000) at 32–33; Goodmark, supra note 102 at 168; Mack, supra note 99 at 334.
113 Sameena Mulla, The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention (New York University Press, 2014) at 38.
114 De Sanctis, supra note 105 at 367, at note 44.
inclined to fall back on stereotypes, and disbelieve the complainant. A Maryland woman’s account of acting as a prosecution witness at her abusive husband’s trial for threatening her with a gun illustrates the way in which a complainant’s truthful narrative may strike a fact finder as un-credible if the narrative describes experiences that are vastly different from the fact finder’s own:

The thing that has never left my mind from that point to now is what the judge said to me.... [H]e looked at me and said, ‘I don’t believe anything you’re saying.’ He said ‘The reason I don’t believe it is because I don’t believe anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can’t believe that it happened to you.’” … When I left the courtroom that day, I felt very defeated, very defenseless, and very powerless and very hopeless, because not only had I gone through an experience which I found to be very overwhelming, very trying and almost cost me my life, but to sit up in court and make myself open up and recount all my feelings and fear and then have it thrown back in my face as being totally untrue just because this big man would not allow anyone to do this to him, placed me in a state of shock that probably hasn’t left me yet.

Notably, the negative effects of such biases do not strike all women evenly, but rather affect women in an intersectional manner. For instance, racialised women are frequently perceived as being less credible witnesses than white women.

Combined, these factors mean that although New Zealand’s proposed non-fatal strangulation offence will not require physical evidence of injuries or visible marks caused by the strangulation assault, the absence of this kind of physical evidence could pose practical difficulties in the prosecution of non-fatal strangulation assaults.

117 See chapter 6, section 6.2.
8.6 Addressing the Complication: Improved and Specialised Documentation Techniques: Complainant as a Source of Evidence

Fortunately, the difficulties in observing and documenting the injuries and physical signs of strangulation discussed in section 8.4 are not absolute. Nor are the difficulties unique to non-fatal strangulation as a mode of intimate partner assault. If the enactment of a specific non-fatal strangulation offence is accompanied by specialised training for police and medical professionals, then better and more complete corroborating evidence can be preserved for prosecution purposes. Improved training can aid improved data and evidence collection both in terms of relying upon the complainant as a source of evidence, and in terms of sourcing forensic evidence that stands independently of a complainant’s testimony.

First, the introduction of the new offence can be used to help to structurally refocus police and prosecutorial attention on strangulation, so that police ask more questions about strangulation, look for subtler kinds of evidence, and avoid drawing mistaken inferences from the lack of certain types of evidence to the conclusion that the strangulation incident was not serious. We have seen that the seriousness of strangulation is currently frequently misunderstood. One way in which this misunderstanding manifests is that many people, including police and medical practitioners, are not familiar with the full range of signs and symptoms associated with strangulation. (A fuller list of signs and symptoms of strangulation is set out in Table 8.1 below). If police look out only for bruising on the neck, for instance, they may miss other indications that a victim has been strangled, such as a loss of bladder control, nausea, or ringing in her ears. Police often document fewer signs of strangulation than are actually present because they may not know the questions they should ask. This means important evidence is missed. Even more importantly, it means police miss an important opportunity to encourage women who have been strangled but do not appear to be injured to go

120 McKay, supra note 54.
121 Ibid.
to an emergency room to be seen by a doctor, to ensure that they are not suffering from an unseen injury.  

Table 8.1: Signs and Symptoms of Strangulation

<table>
<thead>
<tr>
<th>Breathing changes, difficulty breathing, shortness of breath</th>
<th>Difficulty in swallowing or a “thick” feeling in the throat (swelling of the tongue)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neck or throat pain</td>
<td>Raspy or hoarse voice</td>
</tr>
<tr>
<td>Cough</td>
<td>Bruising or swelling inside the lips</td>
</tr>
<tr>
<td>Victim thought she would die</td>
<td>Loss of consciousness or near loss of consciousness</td>
</tr>
<tr>
<td>Reported loss of control of bladder or bowel at time of the assault, or loss of bladder control immediately following the assault, or weeks or months later</td>
<td>Cognitive changes including amnesia or memory loss, confusion, difficulty with word finding, restlessness or agitation</td>
</tr>
<tr>
<td>Nausea and vomiting</td>
<td>Loss of sensation, extremity weakness</td>
</tr>
<tr>
<td>Tiny red spots (petechiae, caused by bleeding from capillaries) on the eyeball, face and neck, including under the eyelids and around the eyes, on the scalp and earlobes.</td>
<td>Conjunctival haemorrhage (eyes are blood red due to burst blood vessels in the eye)</td>
</tr>
<tr>
<td>Tinnitus (ringing in the ears)</td>
<td>Vision changes</td>
</tr>
<tr>
<td>Headaches</td>
<td>Facial drooping, droopy eyelid</td>
</tr>
<tr>
<td>Scratch marks or bruising in the jaw line, clavicles and around the neck (check behind ears)</td>
<td>Redness, abrasions, bruising on chin from lowering chin to protect neck</td>
</tr>
</tbody>
</table>

---

123 Morag McLean, The Identification, Care and Advocacy of Strangulation Victims (Edmonton, AB: Victorian Order of Nurses for Canada, 2009) at 6; Douglas & Fitzgerald, supra note 35 at 233; Training Institute on Strangulation Prevention, Signs and Symptoms of Strangulation.
125 Ibid.
Kelsey McKay, a prosecutor in Texas specialising in domestic violence prosecutions, writes that in her experience strangulation victims do not connect all of their symptoms with their assaults.\textsuperscript{126} For instance, some victims prior to being expressly questioned about involuntary urination had attributed this symptom to a possible urinary tract infection or sexually transmitted infection. Others experienced nausea but instead of wondering whether it was connected to their strangulation assaults suspected they had fallen pregnant or were having a spontaneous adverse reaction to medication they had long taken without incident. In some cases, even when these women later sought medical attention for these symptoms, their doctors did not know that they had been strangled, and had not thought to ask about a history of strangulation.\textsuperscript{127} Thus, targeted training for police and medical responders is key to identifying signs and symptoms of strangulation in victims, and so that they can identify and make the causal connection between those symptoms and strangulation assaults.

Police and medical professionals can document signs and symptoms of strangulation in a range of ways. In addition to photographing visible injuries such as bruises, petechiae and red eyes, injuries can also be recorded on body maps.\textsuperscript{128} In cases in which a victim’s voice is hoarse or raspy, tape or video recordings may be taken of her voice.\textsuperscript{129} Furthermore, detailed victim interviews can capture a fuller account of more experiential symptoms, such as tinnitus, or headache.\textsuperscript{130} Complainants reporting any form of intimate partner violence should be questioned according to “The Danger Assessment,” which includes the question: “have you been choked or strangled?”\textsuperscript{131} Those who answer yes, or who independently disclose strangulation, should then be questioned according to “The Five Strangulation Questions” tool, which is designed to assess whether a victim has symptoms of concern such that they should be referred to a higher level of care.\textsuperscript{132} According to the tool, patients who answer yes to any of the questions should be given

\begin{footnotes}
\item[126] McKay, \textit{supra} note 54.
\item[127] \textit{Ibid}.
\item[130] Taliaferro et al, \textit{supra} note 61 at 227–28; Paluch, \textit{supra} note 57 at 19.
\item[131] Jacquelyn Campbell, \textit{The Danger Assessment} (1985).
\item[132] See McLean, \textit{supra} note 123 at 6.
\end{footnotes}
information about the seriousness of strangulation and offered follow up health assistance.\textsuperscript{133} If the patient declines assistance at the time, she should be informed of the importance of seeking follow up attention should her symptoms worsen, and informed that particular warning signs are: difficulty breathing; increased neck or throat pain; difficulty swallowing; nausea or vomiting; vision changes; change in level of consciousness; difficulty speaking; and weakness.\textsuperscript{134} The five questions are:\textsuperscript{135}

1. **Are you having difficulty breathing?** - Evaluates the victim’s condition and whether she is in need of medical attention
   **Did you have any difficulty breathing?** – Establishes if the victim was strangled to the point of extreme shortness of breath. The victim may still be at risk of delayed airway compromise.

2. **Do you have a cough or changes in your voice?** – There may be hidden damage do the structures and soft tissue of the neck, including fracture of the hyoid bone, damage to the vocal cords, edema (swelling caused by fluid), or bleeding from the carotid artery or jugular vein.

3. **Did you lose or nearly lose consciousness (did you black out)?** – Loss of consciousness indicates the blood and oxygen supply to the brain was compromised. The victim is at high risk of brain damage, including memory loss, agitation, restlessness, aggression, and psychosis. It is important to note that due to anoxia or the chaos of the assault, some victims may not remember actually losing consciousness; they may report nearly losing consciousness.

4. **Did you lose control of bowel or bladder (did you pee or poop)?** – An objective sign of loss of consciousness and asphyxiation. It is legally important to document this. Victims are often upset to learn involuntary bowel and bladder is due to the strangulation.

5. **Did you think you were going to die?** – Evaluates where the victim reached in the stream of consciousness and the extent of the strangulation.

The fifth question assesses the patient’s recollection of her stream of consciousness during the assault. McClane et al’s study of 300 non-fatal strangulation assault survivors found that among those who had been strangled to unconsciousness or near unconsciousness, many reported that they believed during the assault that they would die.\textsuperscript{136} The survivors

\textsuperscript{133} For instance, diagnostic testing of the kind discussed below in section 8.7, at footnotes 140 to 144 and associated text.
\textsuperscript{134} McLean, *supra* note 123 at 9.
\textsuperscript{135} *Ibid* at 8.
\textsuperscript{136} McClane, Strack & Hawley, *supra* note 35 at 312–13.
characteristically and consistently described their last few moments of alertness as having four distinct stages: denial, realisation, primal (mammalian instincts and vigorous struggle to preserve airway and life); and finally resignation (for instance, the thought, “so this is it – this is how I die”). Thus, asking a non-fatal strangulation survivor for a detailed account of her interior monologue during the assault can give indications of how advanced the strangulation was.

Detailed victim interviews should also cover: the duration of the strangulation; the degree of pressure (on a scale of one to ten); whether the assailant used one hand (and if so, the left or right hand) or two hands, or used a forearm, knee, foot or ligature; whether there was concurrent smothering or suffocation; whether the assailant shook the victim by her neck; whether he suspended her by her neck; whether there was concurrent punching or use of a weapon; whether the victim was pushed against a wall or held against the floor; and whether the accused made verbal death threats during the assault.

Detailed interviews of this kind serve dual purposes: helping to ensure that strangulation victims receive appropriate medical care, and capturing detailed evidence of the strangulation at a time close to the assault itself.

8.7 Improved and Specialised Documentation Techniques: Advanced Photographic and Imaging Techniques

In addition to the evidence that detailed complainant interviews can unearth, new photographic and medical imaging technologies may also allow evidence-quality images to be captured of subtle injuries that could not be captured using standard photography techniques. Strangulation and forensic experts note that while strangulation may appear not to leave visible injuries, with proper training and access to specialised tools, injuries to the neck that are not visible to the naked eye can be detected and recorded. For instance, Magnetic Resonance Imaging (“MRI”) is sufficiently sensitive that it can be used to detect and document deep, internal soft tissue injuries to the neck that may not be detected by a physical examination. Line et al

137 Ibid.
138 McLean, supra note 123 at 11.
recommended the routine Computed Tomography ("CT") scanning of strangulation survivors with anything more than very minor bruising to the neck in order to detect or rule out injury to the bones in the neck.\textsuperscript{141} McClane et al list a range of other available diagnostic imaging procedures.\textsuperscript{142}

The focus of these procedures is primarily patient care rather than the gathering of legal evidence. However, in addition to facilitating proper medical treatment, medical imaging detecting symptoms such as swelling to the internal structures of the neck, or aspiration of vomit, could also be used as evidence in future prosecutions. This means that raising awareness of the seriousness and prevalence of strangulation among medical professionals and the general public could lead to an increase in the numbers of strangulation victims who seek and receive medical attention following such assaults.\textsuperscript{143} This could lead not only to better medical outcomes for strangulation survivors, but also to the collection of evidence to aid in prosecutions.\textsuperscript{144}

Outside of the medical context, from a more strictly evidential point of view, with the right expertise and equipment some injuries that are either not visible to the human eye, or are just barely visible, can be photographed to a sufficiently high standard that photographs produced can be used as evidence in court. Such photographs can be produced using specialised equipment and techniques, such as cross-polarised lenses\textsuperscript{145} or alternative light source aided photography within the visible light spectrum,\textsuperscript{146} and ultraviolet\textsuperscript{147} and infrared ranges.\textsuperscript{148}

\textsuperscript{142} Line, Stanley Jr & Choi, supra note 61; Christe et al, supra note 140 at 232.
\textsuperscript{144} Strack & Hyman, supra note 119 at 50.
\textsuperscript{146} Holbrook & Jackson, supra note 56 at 141–42; also see Sturgeon, supra note 61 at 23; Roxane M Limmen et al, “Enhancing the Visibility of Injuries with Narrow-Banded Beams of Light within the Visible Light Spectrum” (2013) 58:2 J Forensic Sci 518.
These specialised photographic techniques could be useful in the prosecution of strangulation assaults. In order to make use of such techniques, it will be important to accompany the new non-fatal strangulation offence with specialised forensic photography training and equipment for police, and/or access to specialist forensic photographers able to use some or all of these techniques. In some cases, subtle strangulation injuries that cannot be captured using standard photography techniques may be captured by specialised medical imaging techniques and other diagnostic tests. In some such cases, these medical imaging techniques may allow such injuries to be recorded to a sufficiently high standard that they can be produced in court as evidence.

**8.8 Summary**

This chapter set out the second of two themes of arguments regarding the benefits of a non-fatal strangulation offence for New Zealand: that although strangulation is already criminalised under general assault provisions, it is unusually difficult mode of assault to prove and prosecute. Sections 8.2 to 8.3 set out the reasons for the current difficulties in detecting, investigating, prosecuting and securing convictions for strangulation assaults.

Sections 8.5 to 8.7 set out various ways in which the introduction of a specific non-fatal strangulation offence will address the pragmatic and evidential difficulties in prosecuting strangulation assaults under the current range of offences. Section 8.5 argued that the specific offence would highlight the dangerousness and riskiness of non-fatal strangulation, encouraging victims to seek medical assistance following strangulation assaults and to report such assaults to police, and encouraging police, medical professionals and other officials to treat strangulation as the serious public health and criminal justice concern it is. The fact that the new offence will not require proof of injury or intent to cause injury also considerably lessens the impact of the tendency of strangulation assaults not to leave visible or easily photographed injuries.

---


Section 8.5.1 somewhat complicated the points made in 8.5: even when it is not strictly necessary, corroborating evidence is always pragmatically useful to prosecutors. This is particularly so in the context of intimate partner violence prosecutions, both for reasons tied to the prosecution burden of proof, and due to common biases according to which women’s testimony is less likely to be regarded as credible than men’s testimony. For this reason, in a strangulation case in which a defendant contradicts a complainant’s testimony such that the finder of fact must decide a “he said she said” credibility contest, photographic or other corroborating evidence showing the injuries caused by a strangulation assault may be pragmatically crucial to the success of the prosecution.

Section 8.6 addressed this complication, noting that if the new offence is accompanied by specialised training for police and medical practitioners, they will be able to more systematically detect and record photographic, medically imaged, and interview based evidence to support complainant-based testimonial evidence of strangulation assaults. While intimate partner violence is a difficult class of crime to prosecute, the new strangulation offence would be a positive response to current difficulties in prosecuting this particularly dangerous mode of abuse.
Chapter 9: Non-Fatal Strangulation: Is it Descriptive Overlap and will it Contribute to Overcriminalisation?

9.1 Introduction

This is the final of three chapters addressing the non-fatal strangulation offence case study. Chapter 7 discussed the first theme that runs through arguments in favour of a specific non-fatal strangulation offence: that strangulation is a particular dangerous form of assault, in that it can cause serious harms and death; and that strangulation is a red flag for future intimate partner homicide. Chapter 8 discussed the second theme common to most arguments for the specific offence: that strangulation is a particularly difficult form of assault to prove and prosecute under general assault offences. The chapter set out ways in which the new offence would address this concern. Having set out and analysed these main arguments in favour of a specific non-fatal strangulation offence, this chapter turns to matters of overlap and overcriminalisation. The chapter begins from the premise that the second theme of difficulties proving and prosecuting strangulation interacts with the first theme, concerning the dangers and risks of strangulation, in such a way that each theme amplifies the other: because strangulation is so dangerous, and so highly correlated with future fatality, it is imperative that it be effectively criminalised.

Having in the previous two chapters laid out the context and arguments for a specific non-fatal strangulation offence, this chapter turns directly to this dissertation’s central question of when descriptively overlapping criminal offences constitute overdepth in the criminal law and are part of the problem of overcriminalisation. The chapter’s early sections consider whether New Zealand’s proposed non-fatal strangulation offence will descriptively overlap with existing assault offences. Section 9.2 discusses the “basic unit” of behaviour involved in a strangulation assault, and considers various ways in which this basic unit could be described. Section 9.3 differentiates two dimensions of descriptive overlap, explaining that question of whether offences descriptively overlap has both an absolute or ontological answer in the specific sense of there being a truth of the matter of which we may not be aware, and also a pragmatic, evidential answer. The section discusses the ontological dimension of whether a potential description of a unit of behaviour in fact describes the unit of behaviour. The section then considers the epistemological matter of whether we can know that a particular unit of behaviour is reflected in a particular description.
Section 9.4 considers a second dimension of descriptive overlap: even if a legal description in fact refers to a particular unit of behaviour, it is a separate question as to whether it will be pragmatically and evidentially possible to convince a fact finder beyond reasonable doubt that the description applies to a particular unit of behaviour. Section 9.5 analyses both the ontological and the pragmatic, evidential dimensions of the descriptive overlap between the proposed non-fatal strangulation offence and the offences of common assault and male assaults female. Section 9.6 analyses both dimensions of descriptive overlap between the proposed non-fatal strangulation offence and other assault and injuring offences with heightened intention and consequence elements.

In section 9.7, I revisit the Law Commission report which recommended the introduction of the non-fatal strangulation offence. I note in the section that although the Commission does not use the word “overcriminalisation,” the reasons it gives for its initial trepidation about introducing a specific, overlapping offence mirror closely the problems associated with overcriminalisation discussed in chapter 3. Despite its initial scepticism and concerns that a new strangulation offence that descriptively overlaps with general assault offences could give rise to problems associated with overcriminalisation, the Commission recommended the introduction of a specific non-fatal strangulation offence. Though it did not use the language of overcriminalisation, the Commission’s report indicates that it does not consider the kind of descriptive overlap that the new strangulation offence will represent will exacerbate the problem of overcriminalisation. The rest of the chapter examines whether this conclusion is correct, and what the case study of non-fatal strangulation can tell us about when overlapping criminal offences do and do not constitute part of overcriminalisation.

Sections 9.9 to 9.14 draw on the chapter 5 discussion of categories of descriptive overlap that, all else being equal, seem unlikely to give rise to problems with overcriminalisation,¹ or contrastingly, on their face are warning signs for potential overcriminalisation issues.² Sections 9.9 to 9.12 deal in relatively brief terms with four of these categories that are not directly decisive on the question of whether the strangulation offence is part of the problem of overcriminalisation. Section 9.13 presents in detail the argument that though non-fatal strangulation will descriptively overlap with existing assault offences, the new offence is

---

¹ See chapter 5, at 5.2 – 5.5.
² See chapter 5, at sections 5.6 and 5.7.
justified by pragmatic and evidential difficulties in effectively prosecuting strangulation assaults under the existing set of offences. The section argues that on this basis, the new offence will not constitute overdepth, and will not contribute to overcriminalisation.

Section 9.14 considers the final chapter 5 category of types of descriptive overlap that may not give rise to the problems associated with overcriminalisation. The section notes the usefulness of specifically labelling strangulation assaults as such on an offender’s criminal record, so that the red flag for future homicide can be recognised as such.

9.2 Non-Fatal Strangulation and Descriptive Overlap

As we have seen in chapters 7 and 8, New Zealand’s incoming specific non-fatal strangulation offence aims to address two thematically grouped sets of ways in which existing general assault offences inadequately address non-fatal strangulation assaults. These are the arguments that advocates of new offence have advanced in its support. Having laid out that important context, I turn now to applying the conceptual tools established in chapters 2 to 6 to this case study, in order to find what the case study can reveal about overlap and overcriminalisation.

As I established in chapters 4 and 5, in assessing whether any potential overlap between a specific non-fatal strangulation offence and more general assault offences is part of the problem of overcriminalisation, it is important to deal with descriptive questions about whether the offences will overlap, separately from normative questions about whether any such descriptive overlap is problematic and part of the problem of overcriminalisation. This section explains, using the language established in Chapter 4, that a non-fatal strangulation offence does descriptively overlap with existing general assault offences. The rest of the chapter then turns to the question of whether or not this descriptive overlap is, in normative terms, part of the problem of overcriminalisation. Another way to frame that question is to ask how the arguments in favour of a new offence explored above tally with overcriminalisation concerns.

In chapter 4, I discussed the descriptive overlap between common assault and several victim-specific assault offences using an example in which I compared four hypothetical video recordings of similar but not identical assaults.3 In the first video, an adult man slaps another adult man; video 2 shows a man slapping a female child; video 3 shows a man slapping an adult

3 Chapter 4, section 4.5.
woman, and video 4 shows a man slapping a police officer. Table 4.6 in chapter 4 breaks down for each video which of the available common assault and victim-specific assault offences describe the units of behaviour depicted in each video. To say of video 2 that it can be described by three offences – common assault, assault on a child, and male assaults female – means that the three offences offer overlapping descriptions of the unit of behaviour in the video. The point illustrated in the chapter 4 discussion, and in table 4.6, is that sometimes the same unit of behaviour can be described by several offences; when that happens, we can say that those offences descriptively overlap with one another.

In the context of assessing whether New Zealand’s proposed new non-fatal strangulation offence will descriptively overlap with existing general assault offences, the process is similar to the one followed in chapter 4. Suppose we take as the “basic unit” of behaviour a scenario in which a man places two hands around a woman’s throat and applies pressure, causing the woman to be unable to breathe. Imagine we have a video of this basic unit of behaviour. This video shows a man place his hands around a woman’s throat and appear to apply pressure. It also shows the woman struggling to dislodge his hands, and her face contorting and turning red as she appears to struggle to breathe. We could describe the basic unit of behaviour depicted in the video in a number of ways. We could say “person A intentionally applied pressure to the body of person B without B’s consent,” which would be common assault.\(^4\) We could also say, “man A intentionally applied pressure to the body of woman B without her consent,” which would be male assaults female.\(^5\) We could also describe the interaction like this: “A intentionally applied pressure to B’s throat, knowing that this was likely to impede her breathing or blood flow to her brain,” which would be the proposed new offence of non-fatal strangulation.

Given further contextual information further overlapping descriptions may also become available in addition to the three offences just discussed. For instance, if in a second video a man applies pressure to a woman’s throat as in the first video, but while he does this, repeatedly shouts “I’m killing you. This is it,” we might describe the interaction as an offence of heightened intent, like assault with intent to injure, or an offence of heightened intent and heightened

\(^4\) Crimes Act 1961, s 196 Common assault (1-year maximum).
\(^5\) Crimes Act 1961, s 194(b) Male assaults female (2-year maximum).
consequences such as injuring or wounding.\(^6\) We might even describe the conduct in the video as attempted murder.\(^7\) In order to decide between this range of possible descriptions, we need to draw some inferences about the actual state of mind of the man in the video. We know he uttered the threatening words, but that is not necessarily the same thing as saying he formed a particular intention to injure or kill. Suppose after watching the video, we describe it as follows: “that is a video of a man trying to kill a woman by strangling her.” Here we have done more than just report that the man in the video applied pressure to a woman’s throat with his hands, appearing to impede her breathing, and uttered certain words. By definition, one cannot unintentionally, accidentally or by mistake “try” to do a particular thing. Thus, by saying the video depicts a man trying to kill a woman by strangling her, we have implicitly formed the further judgment that his words “I’m killing you. This is it,” were a literal and truthful expression, and accurate indication, of his actual intention to kill B.

Yet, depending on our information, we might reach a different conclusion about what the words “I’m killing you. This is it” can tell us about the man’s mental state. If we have information suggesting that despite the verbal threat, A did not really intend to kill or even to injure B, and his real intention was to threaten her, intimidate her and credibly communicate to her that he could easily kill her at will,\(^8\) then we might decide A’s intention was not to cause B any physical harm, but simply to apply physical pressure to her\(^9\) and to threaten her.\(^10\)

Consider now a third version of the video. In this video, we see a man strangling a woman, and shouting that he is killing her. We see her struggling to breathe and we see her lose consciousness. Suppose we also have medical evidence to supplement the video which establishes that in the weeks since the assault the woman has had a sore throat, raspy voice and cough, and has experienced headaches, incontinence, dizziness, short-term memory problems and weakness on the left side of her body. Here, as with the prior two videos, it remains open to

---

\(^6\) Crimes Act 1961, s 193 Assault with intent to injure (3-year maximum, no consequence requirement); s 189(2) injuring with intent to injure (5-year maximum); s 188(2) wounding with intent to injure (7-year maximum); s 189(1) wounding with intent to cause grievous bodily harm (14 years);
\(^7\) Crimes Act 1961, s 173 Attempted murder (14-year maximum).
\(^8\) See discussion of strangulation as a tool of coercive control in chapter 7, section 7.9 at notes 101-103 and associated text.
\(^9\) Crimes Act 1961, s 196 Common assault (1-year maximum); s 194(b) male assaults female (2-year maximum).
\(^10\) Crimes Act 1961, s 301(1)(a) Threatening to kill or do grievous bodily harm (7-year maximum).
us to describe the video as depicting a common assault, an assault of a woman by a man, or a non-fatal strangulation. But we might also describe it as an assault offence with heightened consequence elements, such as injuring or causing grievous bodily harm, and with heightened intent elements, such as intent to injure, to cause grievous bodily harm or to kill, and we might also describe it partially via a threatening offence.

Our determination about precisely which offences in the assault and injuring offence hierarchy describe the unit of behaviour in the video will depend on what we conclude about A’s mental state as evidenced by the video, and about the extent of B’s injuries and the causal links between A’s assaultive actions and B’s injuries. For instance, suppose in relation to this third video we think that the offender did not intend to cause lasting physical harm to the victim beyond a temporary uncomfortable sensation of “air hunger” during the assault itself,\(^1\) and that instead his purpose was to threaten and intimidate her, credibly communicating to her that he could seriously injure or kill her any time he wants to. In these circumstances, we would not describe him as intending to injure or cause grievous bodily harm, but we could say that he assaulted her with reckless disregard for her safety,\(^2\) and we could say that he threatened to kill her.\(^3\) We would call his mental state reckless disregard for her safety because we know, based on the medical evidence discussed in chapter 7, that it is dangerous to strangle someone because it can easily cause physical injury and death. Furthermore, we are comfortable calling his mental state reckless disregard rather than a genuine but unreasonable belief that it is not dangerous to strangle someone because if we believe that his intention was to credibly communicate to his victim that he could kill her by strangling her if he chose to, in order for his non-fatal strangulation to communicate that threat credibly, he must have understood that strangulation is dangerous.

Descriptions of the basic unit of behaviour depicted in the videos could also be even more creative. Texas domestic violence prosecutor Kelsey McKay describes prosecuting a man for strangling his wife at a time before strangulation was a felony in the state.\(^4\) McKay charged

\(^1\) See chapter 7, section 7.9, at note 105 and associated text.
\(^2\) Crimes Act 1961, s 189(2) Injuring with intent to injure or with reckless disregard for the safety of others (5-year maximum).
\(^3\) Crimes Act 1961, s 306(1)(a) Threatening to kill or do grievous bodily harm (7-year maximum).
the defendant with aggravated assault, which was a felony, rather than common assault, which was not a felony. This meant describing the basic unit of charged behaviour as: “person A applied pressure to the body of person B without her consent and using a deadly weapon,” understanding the defendant’s hands as the deadly weapon.\textsuperscript{15}

This discussion in this section illustrates that, if enacted, New Zealand’s proposed new strangulation offence will descriptively overlap with a number of existing assault offences.

\textbf{9.3 Descriptions of Units of Behavior that are Ontologically True}

It is useful here to differentiate two dimensions to the descriptive overlap between offences. The question of whether offences descriptively overlap has both an ontological answer, and also a pragmatic, evidential answer. The first sense refers to there being some truth of the matter, to which we may or may not have epistemological access, about whether a potential description in fact really describes a particular unit of behaviour.

For instance, imagine that man A strangles woman B. There will be a fact of the matter with respect to what processes and causal chains the strangulation incident initiates in her body. There will be a fact as to whether she has bruising on the skin of her neck and throat and whether she has petechiae in her eyes.\textsuperscript{16} There will also be a fact of the matter as to whether the strangulation assault caused bruising or swelling to the internal structures of B’s neck.\textsuperscript{17} It will either be true or not true that being strangled caused the B to aspirate on her own vomit, and if it is true, there will be a fact of the matter as to whether she goes on to develop pneumonia or pulmonary oedema.\textsuperscript{18} There will similarly be a fact of the matter as to the amount of oxygen deprivation her brain sustained during the assault, and a fact of the matter about the number and location of brain cells killed as a consequence of the oxygen deprivation, and about the ways in which that brain damage may or may not affect her cognitive functioning or other physical processes.\textsuperscript{19} There will be a fact of the matter as to whether the force of applying pressure to her

\textsuperscript{15} For discussion of this prosecution strategy and the outcome in this case, see section 9.6 below.
\textsuperscript{16} Supra chapter 8, section 8.7, at Table 8.1.
\textsuperscript{17} See chapter 7, section 7.8, at footnotes 76 to 78.
\textsuperscript{18} See chapter 7, section 7.8, at footnotes 79 and 80.
\textsuperscript{19} Chapter 7, section 7.10.
throat caused tiny abrasions to the interior wall of her carotid artery of the kind that could eventually cause her to suffer a stroke.\textsuperscript{20}

Some of these facts of the matter are facts that we can know, and others are much less accessible to us. We can see the external skin on the victim’s neck and can see her eyes. This means we can know for sure whether her neck is (visibly) bruised, and whether she has red dots on her eyeballs. In logical terms, the question of whether the strangulation event was the cause of these physical effects is a matter of inductive rather than deductive reasoning, but unless there is some reason to think that these physical signs were caused by something other than the strangulation event, we can infer with a high degree of confidence that the strangulation incident caused the injuries. Other facts of the matter that are not observable with the naked eye, may nonetheless be epistemically accessible given the help of certain technological aids. For instance, even though the naked eye cannot detect whether the deep structures of the throat are bruised or swollen,\textsuperscript{21} it is possible to view those structures and detect bruising and swelling using Magnetic Resonance Imaging (“MRI”)\textsuperscript{22} or Computed Tomography (“CT”) scans.\textsuperscript{23}

However, other facts of the matter about a strangulation assault and its physical consequences for a victim are simply beyond our epistemological access given current technology. For instance, it is currently impossible for us to know how many, and which, brain cells were damaged by a particular strangulation event. There is some fact of the matter that

\textsuperscript{20} See chapter 7, section 7.8, at footnotes 81 – 86 and associated text.
\textsuperscript{21} That is, the naked eye cannot detect internal bruising of the intact neck of a living victim. Dissection at autopsy is a different matter. See discussion in chapter 7, section 7.9 at notes 91 – 96 and associated text.
exists, unobserved by us, but we can never know for sure what that fact of the matter is. We may observe over time that B is having short-term memory problems, and draw inferences from those observations that she likely suffered some brain damage as a result of the strangulation. After B’s death, if we do an autopsy, we may learn more about sites of damage in her brain. But even then, we will not understand the whole truth of what damage to her brain was caused by that particular strangulation event on that particular day.

There will also be a fact of the matter as to what A’s actual mental state was when he strangled B. Of course, in all criminal prosecutions, the only person with first-hand knowledge of A’s actual mental state during the offending is A himself. The criminal law has developed various evidential standards that govern the kinds of inferences the law can reasonably draw in assessing an offender’s mens rea. We rely on evidence from the offender, victim and other witnesses in order to assess the offender’s mental state to the best of our knowledge. The point in the context of this argument is simply that, although this kind of evidence may allow us to reach a confident conclusion that, for instance, the offender intended to at least injure the victim when he strangled her, we still do not know with complete certainty what the defendant intended.

What this means is that in respect of a particular strangulation event there is a sense in which it will be true or not true that, for instance, the offence of causing grievous bodily harm with intent to cause grievous bodily harm correctly describes a particular defendant’s particular unit of behaviour. What determines whether that offence correctly describes the unit of behaviour is the truth regarding the offender’s mental state at the time of the strangulation, and the objective truth regarding the particular injuries to the victim’s body that the strangulation assault caused.

Suppose we assume for the sake of argument that the offender did intend during the assault to inflict very serious injury on the victim. Assume also that, though no scans have detected it, the assault caused: bruising to the victim’s deep throat structures; oxygen deprivation to her brain, resulting in the damage of some number, n, of brain cells; and an as yet undetected tiny tear in the interior wall of the victim’s carotid artery of the kind that may go on to cause her to suffer a stroke in the future. Theoretically speaking, those kinds of physical harms at least meet the legal definition of injuring, and possibly also meet the definition of grievous bodily

---

24 See chapter 7, section 7.10.
harm. However, because most of the injuries have not been detected by a scan or medical examination, they are unknown to us. This means, although it may be true that the description “assaulted with intent to cause grievous bodily harm and caused injury” accurately describes a particular unit of assaultive behaviour, we may not know with complete certainty that the description applies.

9.4 Descriptions of Units of Behavior that are Pragmatically and Evidentially Provable

Related to but separate from the question of whether we can know that a particular description in fact maps onto a unit of behaviour, is the question of whether we can prove that a particular description in fact describes a unit of behaviour. In a criminal law context, this evidential question is of course crucial. When prosecutors make charging decisions, they do not engage in a unilaterally authoritative taxonomical act. A prosecutor who charges a defendant does not have the final say on whether that description of the defendant’s unit of behaviour will be legally endorsed. Instead, that depends on either the defendant’s choice to plead guilty, or a judge or jury’s decision to find the defendant guilty or not guilty at trial. A guilty verdict implies that, based on the evidence, the fact finder agrees beyond reasonable doubt with the legal description of the defendant’s unit of behaviour proposed by the prosecutor. A not-guilty verdict implies that, based on the evidence, the fact finder cannot agree beyond reasonable doubt that the prosecutor’s proposed legal description of the defendant’s behaviour is a correct description.

For instance, in the example discussed above in section 9.3, the strangulation assault caused the following injuries to the victim: bruised internal throat structures; torn interior lining of carotid artery; oxygen deprivation to the brain and n brain cells killed. But in the example, none of these injuries had been detected or documented by medical professionals or police. The victim suffered no external bruising, and so despite having actually suffered serious injuries, this is not known by prosecutors, and certainly not something about which they are in a position to provide evidence and prove beyond reasonable doubt to a fact finder. In such a thought experiment, we have assumed the perspective of an omniscient observer: from this vantage point, we know the defendant intended serious harm, and in fact caused it. But we also know that there is insufficient evidence to prove to non-omniscient fact finders what we know to be the case.

25 See chapter 5, section 5.2 at notes 8 – 15 and associated text, for the discussion of injuring and wounding in R v Waters [1979] 1 NZLR 375 (CA).
That is, though the offence of injuring with intent to cause grievous bodily harm truthfully describes the unit of behaviour, it is not a description that is pragmatically or evidentially provable in these circumstances. The question of whether offences descriptively overlap has both an ontological answer and also a pragmatic, evidential answer. In this example, the answers to the two questions are different.

9.5 Descriptive Overlap between Non-Fatal Strangulation, Common Assault and Male Assaults Female

Here, I return to the question of which offences the proposed new offence of non-fatal strangulation will descriptively overlap with. Most straightforwardly, the new offence will descriptively overlap with common assault and male assault female. Male assaults female also happens to be the offence with which strangulation in the context of intimate partner violence is currently most commonly charged in practice. I call the descriptive overlap between these three offences “straightforward” because all three offences describe the unit of behaviour without reference to heightened intent or to particular consequences beyond the fact of the assault itself.

In the ontological and epistemic terms discussed above in section 9.3, when I say the three offences descriptively overlap with one another, I mean that we can describe a unit of behaviour – a man intentionally applying force to a woman’s throat and impeding her breathing or circulation or both – in the language of any of the three offences. Furthermore, for all three offences, we can describe the unit of behaviour in this way without needing to have specific knowledge that the defendant had a particular intention or that a specific kind of physical consequence resulted beyond the fact of the assault itself.

In the pragmatic and evidential terms of section 9.4, saying that the three offences descriptively overlap means that the successful prosecution of any of the three offences can be achieved even without producing evidence of specific injuries beyond the fact of the strangulation assault itself. The successful prosecution of common assault or male assaults female does not require proof of heightened intent. These offences simply require that the application of force was intentional. The strangulation offence will require proof of a slightly

---

26 Crimes Act 1961, s 196 Common assault (1-year maximum); s 194(b) male assaults female (2-year maximum).
27 Chapter 8, section 8.2 at notes 32 and 33 and associated text.
more involved mental element, but as I will explain, in practice, the main requirement for prosecutors will be similar to male assaults female and common assault: to establish that the assault was intentional. Specifically, the new strangulation offence will require proof that: the application of force to the neck or throat was intentional; and the defendant either intended or was reckless as to the consequence of impeding breathing, circulation or both.

The strangulation offence includes slightly more detailed intention requirements than male assaults female and common assault. However, in practice in most cases where a person intentionally applies pressure to the neck or throat of another person and impedes their breathing, it will be reasonable to infer from that act that the person knew that pressure to one’s throat can cause an at least uncomfortable feeling of not being able to breathe, and that by applying pressure to the neck or throat, the defendant was at least reckless as to that possible consequence. I will explain why this is so in the remainder of this section.

In section 7.6 of the previous chapter, I discussed HLA Hart and Tony Honoré’s common sense account of causation, and explained how their paradigm case of causation is the manipulation of an object with one’s hands that brings about a change in the object. An example of this paradigm is snapping a twig in half. Another example, very close to this paradigm, is exerting pressure on a person’s throat, causing structures like their windpipe, arteries or veins to be constricted. In section 7.7, I noted that we draw on a variety of evidence and background knowledge when we assess causal claims, and determine whether they seem analogous to Hart and Honoré’s paradigm of causation. Sometimes, to assess a causal claim we need the help of sophisticated expert evidence. For instance, if I know that A strangled B, and that 3 years later B had a stroke, I will need a good deal of medical and contextual evidence before I can say with any confidence whether the strangulation incident 3 years ago was the cause of her stroke. However, sometimes we do not need specialist expert evidence to help us assess causal chains. If I drop my coffee cup on the ground and it breaks, based on my everyday experiences and what I remember from high school physics class I will be confident in saying that that the cause of the mug breaking was me dropping it and it striking a hard surface.

29 See chapter 7, section 7.16, table 7.1, which parses the proposed new offence, breaking it down into its conduct, circumstance and consequence components.
30 Chapter 7, section 7.8, at footnotes 65 – 67 and associated text.
In a slightly different context to Hart and Honoré’s idea of assessing causal chains, the mental elements of the proposed new strangulation offence draw on ideas about causation and the kind of background knowledge we need in order to assess causal chains. The mental element of the proposed strangulation offence requires, in addition to the assault being intentional, that the defendant intended to impede the victim’s breathing, circulation or both, or was reckless as to that possible consequence. Although it is not an express element of the offence, in order for the defendant to have intended or been reckless as to that consequence, implicitly, he needs to have known that strangulation could have the effect of impeding the victim’s breathing, circulation or both. While these mental elements sound considerably more complex than a simple requirement that the strangulation assault was intentional, in pragmatic terms, it is unlikely that proof of the new offence will require any more specialised evidence than proof that the assault was intentional.

Revisiting my section 7.7 observations about different kinds of common sense and expert background knowledge, in pragmatic terms the question is: what is needed to prove that a person who strangled another person knew that exerting pressure on another person’s neck or throat could cause their breathing, circulation or both to be impeded? and if a person intentionally applies pressure to the person’s neck or throat, knowing that this can impede their breathing, circulation or both, are there any circumstances in which we could say the person was not at least reckless as to the possibility of bringing about those consequences?

Everyone has a throat and a neck, and everyone breathes. Most people have had the experience of choking on a sip of water or a crumb from a sandwich and know the alarming, painful and uncomfortable feeling of struggling for breath. Most people have felt the discomfort of a too-tight neck on a sweater or some minor constriction of the neck that has made breathing less comfortable than normal. The joking, exasperated gesture of miming strangling someone in frustration or annoyance, or the gesture of pretending to strangle oneself to indicate the metaphorical notion of “choking,” meaning to freeze, fumble or make a mistake in a high-pressure situation, are widely recognisable.\(^\text{31}\) It is hard to imagine a criminally responsible adult

who has intentionally assaulted another person by applying pressure to their throat or neck and impeded their breathing being able to offer a credible account of not knowing that pressure to the throat or neck can impede breathing or circulation. Of course, a person charged with a strangulation assault does not bear a burden of giving a credible account of not knowing that strangulation can impede breathing or circulation. But nonetheless, it is hard to imagine what basis for reasonable doubt as to this knowledge standard a fact finder could have.

Similarly, if a person intentionally applied pressure to another person’s neck or throat, knowing that applying pressure to the neck or throat can impede breathing, circulation or both, then by definition that person has been at least reckless as to whether or not he impedes breathing or circulation: he knows there is at least a risk that he will impede his victim’s breathing or circulation or both by applying pressure to her throat or neck, but he does it anyway. As such, though the mental elements of the proposed new non-fatal strangulation offence are more complex than those of common assault and male assaults female, in practice they are likely be almost as simple to prove. In practical evidential terms, charging a strangulation offence under the new strangulation offence will not require substantially different evidence than charging it as male assaults female or common assault. As such, the descriptive overlap between the three offences is straightforward.

9.6 Descriptive Overlap between Non-Fatal Strangulation and Assault Offences with Heightened Intent and Consequence Elements

In this section, I turn to the question of whether the proposed non-fatal strangulation offence will descriptively overlap with assault offences that sit higher than common assault and male assaults female in the tiered hierarchy of assault and injuring offences; that is, assault offences with heightened intention and consequence elements. As in the previous section, this descriptive question has both an ontological dimension, to which we may or may not have epistemic access, and a pragmatic, evidential aspect.

As discussed above in section 9.3, in order to determine whether a particular unit of behaviour is described by both the proposed non-fatal strangulation offence, and an assault offence with heightened consequence and intention elements such as injuring with intent to cause grievous bodily harm, we will need to know some details about the unit of behaviour in question.
Specifically, we will need to know the intention of the defendant, the physical injuries the complainant suffered, and the causal relationship between the assault and the injuries.

At an ontological level, each of the two offences will either describe the unit of behaviour or it will not. If at this ontological level, the characteristics of the unit of behaviour are such that both offences do describe the behaviour, then the offences descriptively overlap with respect to the behaviour in question. In some cases, we will have epistemic access to this information, in which case, we can say we know that the offences descriptively overlap. But in other cases, we may not have epistemic access to the information, in which case it will remain ontologically true that the offences offer overlapping descriptions of the behaviour in question, but we will not know this is the case.

Next is the pragmatic, evidential dimension of the question whether the two offences both describe the unit of behaviour in question. Another way of putting this is to ask, in practical terms, what kind of evidence would need to be provided in order to prosecute a strangulation assault as, for instance, assault with intent to injure, injuring with intent, or attempted murder, and what evidence would be needed to ground a prosecution under the new non-fatal strangulation offence. As we saw in the previous section, the evidence necessary to prosecute the unit of behaviour under the proposed new non-fatal strangulation offence will be evidence establishing that the strangulation assault occurred, and that it was intentional.

Contrastingly, in order to prosecute the same unit of behaviour as injuring with intent to cause grievous bodily harm, evidence will need to be produced not only to show that the assault occurred and it was intentional, but also that: the defendant intended to cause the victim grievous bodily harm; the victim suffered particular kinds of injuries; the cause of the injuries was the assault. Suppose that an offender intended to cause his victim an injury properly described as grievous bodily harm, and that his act of strangling her in fact injures her by causing bruising to internal structures of her throat. If the victim was not medically examined following the assault, or if she was examined but the internal bruising was not detected, and no other injuries have been detected and documented, then there will be insufficient evidence to prove to a fact finder beyond reasonable doubt that the strangulation assault had the consequence of causing injury. That is, in pragmatic or evidential terms, it will not be practicable to prosecute injuring with
intent to cause grievous bodily harm, but it will be much easier to prosecute and prove non-fatal strangulation.

In descriptive terms, based on the analysis in section 9.5 we can say that the proposed non-fatal strangulation offence will very straightforwardly overlap with common assault and male assaults female. The overlap is straightforward because for any strangulation assault that will be prosecutable under the new offence could also have been prosecuted instead under male assaults female or common assault. The new offence will also overlap with other offences in the assault and injuring hierarchy, but precisely which heightened intent and heightened consequence assault offences apply to any particular strangulation incident will depend on the specific details of the incident, and the available evidence.

9.7 Law Commission Trepidation about Overlapping Offences

Proponents of a non-fatal strangulation offence for New Zealand do not analyse descriptive questions of overlap in the explicit manner I have just set out. Yet it is clear in the Law Commission report, for instance, that the Commission does understand the proposed offence as one that would descriptively overlap with existing general assault offences. The Commission states that it approached its consideration of a possible non-fatal strangulation offence from a position of scepticism, and that it needed to be persuaded of the necessity of such an offence, given a general starting presumption against “specific offences that can be adequately covered by other generic offences.” The reasons it gives for this trepidation about overlapping offences parallel some of those at the heart of overcriminalisation concerns explored in chapter 3 of this dissertation, for instance, that descriptive overlap could result in inconsistent charging practice.

Indeed, in its 2009 review of crimes against the person, the Commission recommended the repeal of two victim-specific assault offences that overlapped with common assault: male assaults female and assault on a child. The basis for this was that the main argument in favour

33 New Zealand Law Commission, Strangulation, supra note 32 at 7.
34 New Zealand Law Commission, Crimes Against the Person, supra note 32 at chap 3.
35 Crimes Act 1961, s 196 (1-year maximum penalty).
36 Crimes Act 1961, s 194(b) (2-year maximum penalty).
37 Crimes Act 1961, s 194(a) (2-year maximum penalty).
of the creation or retention of victim-specific offences was of fair labelling, but that this argument was outweighed by disadvantages associated with victim-specific offences: inconsistent charging discretion; the arbitrariness of singling out some aggravating factors over others; and the “risk of ad hoc specific offences being randomly inserted on to the statute book, every time an issue arises that causes political or public concern.”

The Commission also noted that the intended fair labelling benefits of the offences of male assaults female and assault on a child were being undermined in practice. These victim-specific offences only operate at the bottom end of the spectrum of seriousness for assaults against those classes of victims, overlapping with common assault. The specific offences of male assaults female and assault on a child are subject to maximum penalties of 2 years, whereas common assault has a 1-year maximum. This means low-level assaults on these special classes of victims can receive higher sentences charged under the victim-specific offences than if they were charged as common assault. However, more serious assaults against these victim classes that had involved either heightened intent, or injuries, would need to be charged at a higher level, both in order to access appropriate maximum penalties, and in order to fairly label those heightened intent and injuring aspects of the behaviour in question.

The Commission did not explicitly refer to overcriminalisation in its report. However, its list of the “manifest disadvantages” associated with specific offences that overlap with existing general offences is similar to the list of problems associated with overcriminalisation set out in chapter 3. Based on these “manifest disadvantages,” the Commission makes clear that its starting point in its strangulation review was that it needed to be convinced a specific overlapping offence was justified and necessary, and that the policy objectives of the new offence could not be achieved equally well by other mechanisms. The Commission also notes that though its targeted consultation process saw broad support for the introduction of a specific non-fatal strangulation offence, “a couple” of the consultees similarly expressed an initial scepticism.

---

38 New Zealand Law Commission, Crimes Against the Person, supra note 32 at chap 3, para 3.
41 Supra notes 36 and 37.
42 Supra note 35.
“because, as a matter of principle, they preferred generic offences, but they conceded there was a case for a separate offence in this instance.”44 The Commission’s reasoning process followed a similar trajectory to that of those couple of initially sceptical consultees: initially sceptical and needing to be persuaded, but eventually indeed persuaded, that a new strangulation offence would best address the current problems in under-prosecution of intimate partner violence strangulation assaults.

The question that arises from the Law Commission and from those consultees who were initially sceptical of a specific strangulation offence, only to be won over to the merits of the offence is, why did this particular example of a specific, overlapping offence strike the Commission and consultees as justified? That is, what is it about an overlapping non-fatal strangulation offence that allows it to avoid the problems associated with overcriminalisation? Despite its initial scepticism and concerns that a new strangulation offence that descriptively overlaps with general assault offences could give rise to problems associated with overcriminalisation, the Commission recommended the introduction of a specific non-fatal strangulation offence. Though it did not use the language of overcriminalisation, the Commission’s report indicates that it does not consider the kind of descriptive overlap that the new strangulation offence will represent will exacerbate the problem of overcriminalisation.

9.8 When is Descriptive Overlap Part of the Problem of Overcriminalisation?

So far, this dissertation chapter has focused on the descriptive question of whether New Zealand’s proposed non-fatal strangulation offence will overlap with existing general assault offences.45 The discussion has carefully left aside evaluations of whether some descriptions of the behaviour are “better” than others, and whether the descriptive overlap that will exist between the new offence and existing offences in the hierarchy of general assault and injuring offences will contribute to the problem of overcriminalisation. The Law Commission report implicitly suggests that the proposed new non-fatal strangulation offence will not contribute to the problems of overcriminalisation. In the rest of this chapter, I test that implication, turning to the normative assessment of whether, and why or why not, the descriptive overlap that will exist

---

44 New Zealand Law Commission, Strangulation, supra note 32 at 6.
45 See sections 9.2 to 9.6 above.
between the new proposed non-fatal strangulation offence and existing general assault and injuring offences will contribute to overcriminalisation.

The latter half of the chapter draws on the chapter 5 discussion of categories of descriptive overlap that, all else being equal, seem unlikely to give rise to problems with overcriminalisation, or contrastingly, on their face raise “red flags” regarding potential overcriminalisation issues. For several of these categories of problematic and unproblematic overlap, reasonably brief analysis is all that is required to establish that the categories are not directly decisive with respect to the question of whether the incoming strangulation offence will contribute to the problem of overcriminalisation. However, it is useful to briefly set out why this is so. For this reason, the next four short sections address: first, two categories of unproblematic overlap; followed by two categories of problematic overlap which the new non-fatal strangulation offence will not fall into.

The sections following these combine this chapter’s section 9.3 and 9.4 discussion of the ontological and pragmatic dimensions of descriptive overlap with chapter 5’s categories of descriptively overlapping offences that are justified for pragmatic or evidential, or for fair labelling, reasons, such that the proposed new non-fatal strangulation offence is not the kind of depth in the criminal law that will contribute to the problem of overcriminalisation.

Through this analysis, the chapter examines what the case study of non-fatal strangulation can tell us about when descriptively overlapping criminal offences do and do not contribute to overcriminalisation

9.9 Inapplicable Unproblematic Overlap Categories: Lesser-Included Offences

The first category of “benign” overlap discussed in chapter 5 is the overlap between offences that are part of the same tiered hierarchy of offences, such that some are lesser-included versions of others. As I noted in section 5.2, a commonplace form of overlap in the criminal law is between offences that are part of a tiered hierarchy of related offences. Usefully in this context, the tiered hierarchy of offences I broke down in table 5.1 in the section was the tiered hierarchy of assault offences with which New Zealand’s proposed new non-fatal strangulation offence will

---

46 See chapter 5, at 5.2 – 5.5.
47 See chapter 5, at sections 5.6 and 5.7.
48 See chapter 5, at sections 5.4 and 5.5.
descriptively overlap. The section 5.2 discussion noted that a common structure for a set of related offences dealing with behaviour arranged along a scale regarded as being from least to most serious is that offences at the lower end of the seriousness scale may constitute the basic “building block” of the offence, and more serious offences can be formulated with the basic building block offence as a starting point, to which other specific elements and aggravating factors are added.

In the hierarchy of related offences set out in table 5.1, the basic offence building block was common assault: intentionally applying force to the body of another. More serious cousins of common assault generally begin with the elements of common assault as a base, also adding further elements. For instance, assault is a lesser included offence of injuring with intent to cause grievous bodily harm: the elements of the latter are the elements of common assault, plus the consequence of causing injuries, and the intention to cause grievous bodily harm. This kind of descriptive overlap is simply built into the way in which tiered offence hierarchies are designed, and while it is descriptive overlap, it seems like so taxonomically reasonable a form of overlap as to be clearly unproblematic.

However, in the case of non-fatal strangulation’s descriptive overlap with other general assault offences, if this descriptive overlap is unproblematic, it does not appear to stem from ideas related to lesser-included offences or tiered offence hierarchies. Although common assault, and in most circumstances male assaults female are effectively lesser-included versions of non-fatal strangulation, non-fatal strangulation will not be a lesser-included version of any of the more serious assault offences. That is, although common assault is a building block for non-fatal strangulation, non-fatal strangulation is not a building block for another offence. At present, though it has been proposed, the non-fatal strangulation offence does not yet exist in New Zealand, and the tiered hierarchy of assault and injuring offences exists comfortably without it. If non-fatal strangulation is not overlap, it is not because it is benign by virtue of being a lesser-included offence within a tiered hierarchy.

9.10 Inapplicable Unproblematic Overlap Categories: Offences Filling Within- Scope Gaps

Another chapter 5 category of descriptive overlap that is not part of the problem of overcriminalisation that can be dispensed with quickly in the context of the non-fatal strangulation case study is the category of offences that fill or address descriptive and within-
scope gaps in the criminal law.\textsuperscript{49} When a particular type of conduct (or unit of behaviour) is not criminalised by existing offences, and then a new offence is created to criminalise that conduct, the new offence fills a \textit{descriptive} gap in the law. When that descriptive gap concerns conduct that is within the proper scope of the criminal law, it is also a within-scope gap. The first thing to make clear here is that offences that fill descriptive gaps are in fact not descriptive overlap at all. Rather than overlapping with existing offences, they fill gaps between those offences. A New Zealand example of gap filling of this kind is that when the marital rape exemption was removed from the Crimes Act 1961 in 1985, that simply filled a (descriptive and within-scope) gap. Before the change, rape committed within the context of marriage was not criminalised, after the change, rape within marriage was indeed a criminal act.\textsuperscript{50}

A non-fatal strangulation offence clearly does not involve this kind of descriptive gap filling. Under the marital rape exemption, a husband’s rape of his wife was simply not a crime. Strangulation on the other hand is quite clearly already a criminal matter. Strangulation is one way of assaulting another person, and so strangulation assaults can at least in theory be charged under the existing range of general assault offences. If the proposed new non-fatal strangulation offence is not part of the problem of overcriminalisation, it is \textit{not} because it falls into either the category of lesser-included offences that are simply built into the structure of the assault and injuring offences hierarchy. Nor is it because the new offence will criminalise anything that is not already criminalised.

\textbf{9.11 Inapplicable Problematic Overlap Categories: Crimes du Jour}

We saw in chapter 5 that a category of descriptively overlapping offences that is frequently cited as having the potential for being overcriminalisation issues are offences referred to as “crimes du jour,” “crimes of the month,” or “designer offences.”\textsuperscript{51} This category refers to offences created in response to political pressures and incentives to pass new legislation in the face of high profile crimes, perceived crime control crises and “moral panics.” These incentives apply even when the conduct in question is already adequately criminalised by existing criminal legislation. As discussed in chapter 5, and noted in chapter 7’s introduction to this case study,\textsuperscript{52} “moral panic” is

\begin{footnotes}
\item[49] See chapter 5, section 5.3.
\item[50] See chapter 11, section 11.5.
\item[51] Chapter 5, section 5.6.
\item[52] Chapter 7, section 7.1.
\end{footnotes}
a freighted term and its use in a particular context may be controversial: what looks to one person like moral panic might strike someone else as a welcome and justified response to a pressing problem.

Indeed, the Law Commission’s description of its initial scepticism with respect to specific overlapping offences referred to a 2008 report in which it had written of its suspicion of victim-specific overlapping offences. The Commission’s 2008 report links victim-specific offences that overlap with generic offences with a number of possible negative consequences, such as: inconsistent charging decisions; arbitrarily singling out some aggravating factors over others, and the “risk of ad hoc specific offences being randomly inserted on to the statute book, every time an issue arises that causes political or public concern.”53 That is, the Commission’s trepidation about specific, overlapping offences is in part due to a wariness of crimes du jour enacted in response to moral panics.

However, it is hard to imagine a credible case being made that the concern about the prevalence of domestic violence generally, and non-fatal strangulation in particular, is a moral panic. The harms of intimate partner and family violence are particularly gendered harms: intimate partner violence, particularly the most harmful and serious forms of intimate partner violence, is highly gendered.54 As discussed in chapter 6, the criminal law has a history of dealing poorly with harms suffered predominantly by women.55 More specifically, as set out at the beginning of this case study in chapter 7, intimate partner violence and family violence are problems that have only relatively recently come to be understood as public problems, rather than private familial matters that are outside of the proper reach of public scrutiny, much less, police interference and criminalisation.56 Though the criminal law and public attitudes regarding family violence have changed significantly in the years since the 1970s and 1980s, intimate partner violence and family violence remain serious problems in New Zealand and worldwide. The historical context against which the Family Violence Death Review Committee and Law Commission recommended the introduction of a specific non-fatal strangulation offence was a long common law history of not criminalising violence within the home, and a more recent

54 Chapter 7, section 7.1, at note 2.
55 Chapter 6, section 6.3.
56 Chapter 7, at section 7.2.
history in the last fifty years of the gradual changes in the law’s responsiveness to violence against women and girls.

The process by which the non-fatal strangulation offence was proposed and came to be included in the Family and Whānau Violence Legislation Bill that is currently progressing through the House was anything but a knee-jerk reaction. The proposed offence was premised on expert, in-depth reports from the Family Violence Death Review Committee and the Law Commission. Once introduced, the Bill has also enjoyed cross-party and public support,\(^{57}\) despite a change of government since the select committee report, the Bill has been picked up by the new government. As has been illustrated in chapters 7 and 8 of this dissertation, the arguments that advocates have advanced in favour of the new offence are evidence-based, and have focused on the seriousness of strangulation and on difficulties prosecuting the conduct under general assault offences. Not only will the proposed new non-fatal strangulation offence not be a crime du jour, the process by which it has been introduced exemplifies the kind of analysis and evidence that should ideally accompany the consideration of a potentially overlapping offence.

It is not a necessary condition that an offence must be a crime du jour in order to contribute to overcriminalisation, so the fact that the proposed non-fatal strangulation is not a knee-jerk or unreflectingly populist response to a moral panic does not inoculate it from overcriminalisation concerns. However, it is certainly the case the proposed new non-fatal strangulation offence does not raise this particular overcriminalisation red flag.

9.12 Inapplicable Problematic Overlap Categories: Very General Overlapping Offences

A second chapter 5 category of types of overlap that likely to be problematic is that of “very general overlapping offences.”\(^{58}\) This category refers to very broad offences that overlap with a number of more specific offences, effectively mopping up any small descriptive and within-scope gaps between those more standard offences. As a simple matter of logic, this category can be dispensed with swiftly: simply put, the proposed non-fatal strangulation offence is a relatively specific offence, rather than an over-broad “catch all.” As such, the proposed offence does not

\(^{57}\) See chapter 7, at section 7.3 for an outline of the current progress of the Family and Whānau Violence Legislation Bill through the New Zealand Parliament at the time of submitting this dissertation.

\(^{58}\) Chapter 5, section 5.7.
raise concerns on the basis that it is some kind of “mail fraud” catch all for intimate partner violence.

9.13 Unproblematic Overlap: Depth that is Justified by Pragmatic or Evidential Reasons

In the previous four sections, I have explained that if the proposed new non-fatal strangulation offence is not part of overcriminalisation, the explanation for this can be neither that it is part of a tiered hierarchy of lesser-included offences, nor that it fills an descriptive and within-scope gap in the criminal law. The sections have also established that in the event that the new non-fatal strangulation offence does raise problems related to overcriminalisation, this is not because the new offence is a crime du jour, nor because it is an over-general catch all offence. Having ruled out the possibility that these criteria are decisive in the case of the non-fatal strangulation offence, I turn now to two final categories of descriptive overlap from chapter 5: instances of depth in the criminal law that are justified by sound or reasonable grounds such that they do not constitute overdepth and overcriminalisation. These include pragmatic or evidential justifications for areas of depth, and justifications based on specifically labelling particular types of offending. In examining these categories, and applying them to the case study, I also revisit the two dimensions of descriptive overlap discussed earlier in this chapter.⁵⁹

In chapter 5, I described a category of descriptively overlapping offences that, all else being equal, will not raise problems associated with overcriminalisation: depth for which there is sound and reasonable justification, because for pragmatic or evidential reasons. These pragmatic or evidential reasons include that the existing offence or offences already criminalise a particular kind of conduct do not operate effectively in practice.

As chapter 5 noted, this case study is an example of a proposed new overlapping offence that would address a pragmatic and evidential difficulties with criminalising non-fatal strangulation assaults under general assault offences.⁶⁰ As discussed in chapter 8, due to several practical and evidential difficulties that are particular to the context of strangulation assaults, it is difficult to effectively deal with such assaults under the existing set of general assault offences. First, the particular dangers and risks associated with strangulation are not well understood by

---

⁵⁹ Supra sections 9.3 - 9.4.
⁶⁰ See chapter 5, at section 5.4.
officials, or by the general public.\textsuperscript{61} This leads victims of strangulation to underestimate the seriousness of strangulation assaults they have experienced, and contributes to the low reporting rates of such assaults. It also leads to officials such as police and medical professionals missing opportunities to detect and follow up on strangulation assaults, at the level of patient care, victim support, other wraparound support interventions, and for potential prosecution purposes.

Secondly, strangulation assaults are prone to a several strangulation-specific problems of proof and evidence.\textsuperscript{62} Strangulation often does not leave visible external marks, or leaves subtle marks that are difficult to photograph and document. Furthermore, some of the very serious injuries that strangulation assaults can cause, such as cumulative forms of brain damage,\textsuperscript{63} or long-term susceptibility to stroke,\textsuperscript{64} involve long, complex causal chains that look different and more attenuated than Hart and Honoré’s paradigm of causation discussed in chapter 7.\textsuperscript{65} It is impossible to know, much less to prove, that a strangulation victim’s decline in cognitive function years after a strangulation assault, or series of assaults, was \textit{caused} by the assault.

These factors combine to make it difficult to prosecute non-fatal strangulation assaults at the appropriate level of culpability because it is difficult or impossible to prove a heightened consequence, such as injury or wounding. It may also be difficult to prove that a defendant had an elevated level of intention. Clearly, non-fatal strangulation is already a criminal matter; but as I explained in chapters 7 and 8, the practical business of detecting, investigating, charging and convicting men who terrify, injure and harm their intimate partners by strangling them operates in a flawed and incomplete way under the current set of general assault offences. Though it is legally possible to charge strangulation under existing general assault provisions, because it is so misunderstood and minimised, underreported, under-detected, and under-charged, and so difficult to obtain physical evidence proving that a strangulation assault occurred and caused injury, strangulation is in de facto terms under-criminalised under the existing matrix of general interpersonal violence offences.

As discussed in chapter 8, arguments in favour of a specific offence of non-fatal strangulation address these practical difficulties in effectively enforcing the criminalisation of

\textsuperscript{61} See chapter 8, section 8.2.
\textsuperscript{62} Chapter 8, section 8.4.
\textsuperscript{63} See chapter 7, at section 7.10.
\textsuperscript{64} See chapter 7, section 7.8, at notes 81 – 86 and associated text.
\textsuperscript{65} See chapter 7, at section 7.6.
strangulation assaults under general assault offences. As discussed in chapter 8, because the new offence will not legally require proof of intention to injure, or of injuries caused by the assault, it will avoid many of the difficulties associated with prosecuting strangulation.\(^6\) If the new offence is accompanied by resourcing, training and equipment for police to gather better photographic evidence of strangulation injuries, and to conduct detailed interviewing, this will also aid police in assembling a robust portfolio of evidence to support prosecutions under the new offence. Furthermore, the additional attention brought to strangulation by the new offence as dangerous and a lethality risk factor may help to encourage improvements in reporting rates. Another way of thinking about pragmatic and evidential justifications for a specific, overlapping non-fatal strangulation offence is suggested by the concepts developed in sections 9.3 and 9.4 of this chapter. We have seen that the proposed new offence will descriptively overlap with existing general assault offences including, given the right circumstances, assault offences with heightened intention and consequence elements. Yet, we have seen that certain kinds of injuries and harms that can be caused by strangulation assaults are extremely difficult, or impossible, to detect, much less to document and prove to a criminal judicial standard.

For instance, if A strangles B, and the pressure that A exerts on B’s throat causes small ruptures to the inner wall of her carotid artery that could go on to cause a stroke, but have not yet caused a stroke, then B has certainly suffered at least an injury in legal terms. However she will not know this, and it is unlikely even an extremely diligent doctor could detect it. This means a prosecutor could not produce evidence sufficient to satisfy a fact finder beyond reasonable doubt that the strangulation assault caused the victim this injury. In the terms discussed in section 9.3, it is ontologically or objectively true that A injured B, and the legal description “A injured B” is similarly ontologically and objectively true. But as discussed in 9.4, though that legal description is true, it will not pragmatically or evidentially provable. In other words, the conduct is criminalised because an offence exists that truthfully describes the conduct, but for practical and evidential reasons, it is not provable in practice that the legal description in fact describes the unit of behaviour.

In chapter 5, I proposed that if a new specific offence is designed to address practical evidential difficulties in prosecuting and effectively criminalising a certain type of behaviour,

that is a factor in favour of it not being part of overcriminalisation. In the case of the proposed non-fatal strangulation offence, though it will descriptively overlap with existing assault offences, there is a compelling and convincing argument that the new offence is justified on pragmatic and evidential grounds. Far from constituting redundant clutter or overdepth, the proposed new offence addresses a very real deficit and need.

9.14 Unproblematic Overlap: Depth that is Justified by Fair Labelling Interests

The final chapter 5 category of descriptively overlapping criminal offences that all else being equal are unlikely to constitute overcriminalisation are offences that are justified by a strong fair labelling interest.67

Fair labelling arguments operate differently to pragmatic or evidential justifications.68 They can apply even when conduct is already criminalised in a way that is effectively enforceable in practice. Rather, fair labelling justification for a new overlapping offence applies in respect of conduct that is criminalised under an existing general offence that in some respect poorly labels the nature of the offending. The interest in centrally labelling a particular, unique harm by means of a specific offence is a consideration that will be revisiting in the sexual violence case study chapters. However, though strangulation has particular harms, dangers and risks, it is not necessary to rely on labelling arguments to demonstrate that the proposed new offence will not contribute to overcriminalisation.

It is true that the new non-fatal strangulation offence ideally will have an awareness raising function. Some consultees in the Law Commission’s targeted consultation process “stressed that the labelling effect of a specific offence would help to increase understanding of this particular problem.”69 Indeed, the process of enacting the new offence, particularly if the new offence is accompanied by targeted strangulation awareness training for police, medical staff and other responders, will help to address the problem discussed in chapter 8 that the strangulation’s seriousness is widely misunderstood and underestimated, and as a result is underreported, under-detected, and undercharged.70 However, the Law Commission’s choice of words in calling this a “labelling effect” is misleading. These interests in awareness raising do

67 See chapter 5, at section 5.5.
68 Supra, section 9.13.
70 Chapter 8, section 8.2.
not operate chiefly at a labelling level, so much as at the pragmatic level of attempting to improve reporting, detection, prosecution and conviction rates. These are pragmatic matters rather than matters of labelling.

There is one respect in which the new offence more directly raises labelling issues: advocates propose that the under the new offence, non-fatal strangulation assaults will be specifically labelled on an offender’s criminal record as strangulation assaults, rather than more general assault offences. As we have seen in this case study, strangulation assaults are dangerous in the sense that they can cause very serious injuries and death, and are a red flag for future fatality. By labelling strangulation assaults, rather than for instance male assaults female or common assault, these red flags in an offender’s criminal record can stand out from more general assaults that are not so highly correlated with future fatality. Allowing these red flags to be seen on an offender’s criminal record is important not only in respect of prosecuting and sentencing him for this particular assault, but also will have an important impact if he goes on to offend in future against this or other intimate partners. If a sentencing judge, reviewing an offender’s criminal record, sees that he has a history of serious intimate partner convictions, this will clearly signal to the judge that this offender is at a higher than average statistical risk of going on to eventually seriously injure or kill his intimate partner. Similarly, the specific label can be used to trigger proactive interventions outside of the criminal justice context, by other government and social agencies. This kind of clear labelling provides information that can aid government actors in not missing opportunities to intervene and prevent intimate partner violence homicides.

Interestingly, this labelling argument is essentially founded in pragmatism, and in facilitating criminal justice and other interventions to prevent future intimate partner homicides rather than in arguments regarding the importance of specifically labelling a moral harm that is distinct from the harms in a more general offence.

9.15 Conclusions

Non-fatal strangulation is the clearer of the two case studies discussed in this thesis as an illustration of potential overlap: as a specific mode of assault, the specific strangulation offence is a clear example of descriptive overlap. As discussed in this and the previous two chapters, New Zealand’s proposed new non-fatal strangulation offence will descriptively overlap with existing general assault offences, because the bodily movements and basic unit of behaviour
involved in a strangulation assault could be described using the language of general assault offences, or the language of the proposed new specific offence.

However, as discussed in this chapter, the descriptive overlap that will exist between the new offence and other general assault offences will not give rise to problems associated with overcriminalisation. This is because although strangulation is certainly already criminalised, in practice, due to underreporting under-detection, and under-prosecution, as well as problems of proof and evidence, this dangerous, harmful form of assault that is highly correlated with future fatality is undercriminalised by the existing range of general assault offences. The new offence will address the pragmatic and evidential difficulties that apply to the prosecution of strangulation assaults under the existing matrix of general assault offences. Normatively speaking, the enactment of the new offence will be justified, and though it will descriptively overlap with existing assault offences, this will not represent the kind of depth in the criminal law that is concerning from an overcriminalisation point of view.
Chapter 10: Descriptive Overlap between Sexual Assault and Assault Generally

10.1 Introduction

This and the next two chapters cover the second of this dissertation’s two case studies illustrating various dimensions of the relationship between overlapping criminal offences addressing gendered harms and problems of overcriminalisation. The case study is the offence of sexual violence that is variously labelled in different jurisdictions as rape or sexual assault.\(^1\) Several factors contribute to the aptness of sexual violence offences as a gendered violence case study illustrating overlap and questions of overcriminalisation. First, rape or sexual assault is one of the clearest and most frequently cited examples of gendered criminal harms.\(^2\) It has been called “the archetypal gendered crime.”\(^3\) Rape is a gendered harm in the statistical sense I explained in the chapter 6:\(^4\) victims of sexual assault are overwhelmingly women and girls, and perpetrators are even more overwhelmingly men.\(^5\) A woman is much more likely to be raped at some time in her life than is a man.\(^6\) Furthermore, rape is a gendered harm in the intersectional sense discussed in chapter 6:\(^7\) Indigenous and racialised women,\(^8\) socially and economically disadvantaged women,\(^9\)

---

1 As will be explored in this chapter in section 10.3 at footnotes 28 – 34 and accompanying text there is considerable debate about which of these terms is preferable. I do not assume a particular view on this question, and use the terms interchangeably.
4 See chapter 6, section 6.2.
7 See chapter 6, section 6.2, at notes 3 – 9 and accompanying text.
transgender women and gender non-binary people, lesbians, women with disabilities, and women who have previously suffered sexual victimisation are more likely to be sexually assaulted than women who do not share these characteristics. Because rape is so widely recognised as a gendered harm, it illustrates issues that arise when specific offences, targeting gendered harms, are enacted, and potentially overlap with other generally applicable criminal offences.

Secondly, this case study is an example of overlap that has been part of the criminal law for centuries: versions of the offence of rape were present in the earliest criminal codes. As such, rape or sexual assault is clearly not a “crime du jour.” Rather, rape or sexual assault is a clear, longstanding example of a specific subject area (sexual violence) which is criminalised by existing generally applicable law (the matrix of general assault offences), but the nature of which is regarded as sufficiently morally distinct from other kinds of offending captured by the existing general provision as to require that it be separately and specifically criminalised. That is, at a descriptive level, offences of rape or sexual assault overlap with general assault offences – both involve intentional, non-consensual applications of force to another person’s body. This means it would be possible to design a system of criminal statutes that does not criminalise sexual assault


11 National Coalition of Anti-Violence Programs, Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the United States in 2010 (New York, 2011) at 23.


under its own specific offence, but rather treats it as a subset of assault generally, criminalising it under general assault provisions.\textsuperscript{14}

However, as will be discussed more in section 10.3 and in chapter 11, this is not how criminal codes are usually designed. The criminalisation of rape as its own specific category of offending is far from new – versions of the offence of rape have been present in the earliest criminal codes, and throughout the history of the common law.\textsuperscript{15} Indeed, rape is an offence now generally regarded as part of the “core” of the criminal law.\textsuperscript{16} I use the term “core” in the sense used by Douglas Husak, who suggests that the metaphor of a core of the criminal law implies that there is also a periphery.\textsuperscript{17} Husak suggests that crimes “outside the core” contribute to the problem of overcriminalisation and proposes several possible ways to distinguish core crimes from those at the periphery.\textsuperscript{18}

Because sexual assault offences are so long established, it might not be immediately apparent to readers how this case study is relevant to an overlap analysis. As will be discussed in section 10.3, the overcriminalisation literature almost never mentions sexual assault legislation as an area of problematic overlap or overdepth in the criminal law. But, there is an important

\textsuperscript{14} Note however that as will be discussed further in this introduction and in the body of chapters 11 and 12, the notion that sexual assault or rape are crimes against the person and are related to interpersonal violence and battery is a relatively recent historical development. For much of its history the offence of rape was understood instead as an offence against male property in women’s bodies. That is, the notion that sexual assault overlaps with general assault offences depends on this modern framing of the central harms and wrongs of sexual assault.

\textsuperscript{15} See chapter 11, sections 11.2 and 11.3.


\textsuperscript{18} Douglas N Husak, Overcriminalization: The Limits of the Criminal Law (Oxford University Press, 2008) at 84; also see: William J Stuntz, “The Pathological Politics of Criminal Law” (2001) 100:3 Mich L Rev 505 at 512. By implication, according to Husak’s categorisation, calling sexual assault a core offence means that it does not constitute overbreadth in the criminal law, though it is possible it could contribute to overcriminalisation via overdepth of the criminal law if it is criminalised many times over by overlapping offences.
descriptive sense in which offences of sexual violence do overlap with general assault offences: sexual assault involves at least the non-consensual application of force to the body of another, which is the definition of assault. Sexual offences as a case study thus demonstrate the ways in which overlap can be present in areas of the criminal law where we may not be predisposed to notice it. Examining such non-obvious and long-standing examples of overlap helps us to understand what forms of overlap are normatively troubling in the sense of being part of the overcriminalisation problem.

This sexual violence case study illustrates clearly a theme that is particularly relevant to questions of policy and legislative design to address problems of gendered violence. This is the notion that there is no single “correct” way to configure a criminal code, and that choices about how to arrange a criminal code at a particular historical moment are indeed choices. While rape is an ancient offence, different jurisdictions vary in how they define and configure their rape and sexual assault offences, and their sets of evidential and procedural rules regarding rape prosecutions. As will be discussed in section 10.3, various jurisdictions arrange their sexual assault offences differently, and different arrangements of offences draw on different underlying ways of understanding the harms of rape.

In the context of criminal justice responses to gendered violence, this policy choice emphasis is important. As discussed in chapter 6, gendered violence is a pressing social problem in many countries worldwide. In descriptive terms, sexual assault offences overlap with general assault offences. Part of the normative calculus of deciding whether it is useful or necessary to criminalise sexual assault and rape separately from general assault offences is a policy matter. For instance, while it is open to a jurisdiction to decide to criminalise rape under general assault provisions, given the gendered nature of the harmful conduct involved in rape, most jurisdictions make the choice to criminalise rape in its own specific terms. Because rape is such a long-established offence, this “choice” to specifically criminalise it may seem like a foregone conclusion, whereas it is a more explicitly live issue in the strangulation case study discussed in chapters 7 to 9.

So far, this introduction has set out why this second case study is a clear example of the criminalisation of gendered harm using a specific offence that descriptively overlaps with other more general offences. Here, I complicate that picture somewhat by noting that the first case
study, non-fatal strangulation, is in two respects the clearer of the two overlap case studies discussed in this thesis: first, strangulation is an unambiguous example of apparent descriptive overlap between a specific offence and existing more general offences; secondly, the inherent dangers, harms and risks of strangulation as a particular mode of assault are also clear. By contrast, for reasons I will explain in the rest of this introduction, the sexual violence case study is a less clear-cut, messier and intermediate example of overlap. As I will explain, the fact that sexual violence is a messier example of overlap does not detract from its usefulness as a case study. On the contrary, this messiness of the example itself raises and illustrates distinct questions and concerns about overlap and overcriminalisation from those discussed in chapter 9.

The reason this case study has a messy quality, compared with the strangulation case study, is that despite the care taken in chapters 4 and 5 to separate descriptive questions about what is overlap from normative questions about when descriptive overlap contributes to the problem of overcriminalisation, in the context of sexual violence it turns out not to be possible to entirely disentangle descriptive overlap questions from normative questions. That is, determining whether sexual violence offence descriptively overlap with other general offences itself depends in part on normative determinations about precisely what are the central wrongs of sexual violence. The descriptive question is: do offences of rape or sexual assault descriptively overlap with other general offences? and more specifically, do offences of rape or sexual assault descriptively overlap with general assault offences? The normative question is: to the extent that sexual assault offences descriptively overlap with general assault offences, does that constitute part of the problem of overcriminalisation?

In the case of sexual violence, framing the initial descriptive question itself rests on a key normative presumption that if sexual violence offences overlap with other offences, those will be offences of physical assault rather than, for instance, property offences. Because liberal and feminist understandings of the harms of rape are prevalent today, when we ask whether sexual assault offences overlap with other general offences, the obvious candidates are general assault offences. However, as will be illustrated in chapter 11, if an overlap analysis were to have been

19 As is discussed further in this case study, the notion that the group of general offences with which sexual assault potentially overlaps in facts presumes a liberal theory of the central harm of sexual violence: see chapter 12, sections 12.2 – 12.6, and 12.14. Under historical property conventions of rape, the general offences with which the offence could potentially overlap were property offences, such as theft or criminal trespass: see chapter 11, section 11.3 and chapter 12, section 12.14.
conducted 300 years ago by a person who understood sexual violence as an offence against male property interests, then any descriptive overlap detected under those circumstances would have been with general property offences.

This circularity and the interconnectedness of descriptive overlap questions and normative overcriminalisation questions is particularly pronounced in the sexual violence case study. However, more broadly speaking, a risk with the project of this dissertation is in defining in a circular way the relationship between descriptive overlap and overlap that is normatively part of overcriminalisation. There is a risk of defining descriptive overlap in such a way that once it is determined in normative terms that an example of descriptive overlap is not part of overcriminalisation, it appears that it was never really descriptive overlap in the first place. For instance, in relation to the previous case study, one can imagine the objection that, since the proposed new non-fatal strangulation offence has a different mental element than heightened assault offences causing injury or intending to cause injury, in that respect the offences do not descriptively overlap at all. The slipperiness of this second case study illustrates why it can be difficult to keep separate descriptive and normative questions about overlap and overcriminalisation. This case study illustrates that it is not always possible to conduct an overlap analysis with a complete separation of descriptive and normative questions, but that it is also important to be conscious of the differences between those questions in order to avoid oscillating back and forth between normative and descriptive questions without noticing the elision of distinct considerations. Though offences of sexual violence are a messier example of descriptive overlap than non-fatal strangulation, they are equally as useful a case study as the first case study.

A roadmap for this chapter is as follows. Section 10.2 sets out the case for there being descriptive overlap between sexual assault and general assault provisions (assuming the prevailing contemporary view that these are the category of offences with which sexual assault would overlap, rather than other types of offence such as trespass or theft). Section 10.3 notes that the particular arrangement of a jurisdiction’s code at any particular time is a contingent matter that reflects myriad policy choices, and considers an example of a way in which the jurisdictions that form the focus of this dissertation differ in their criminalisation of rape or sexual assault. The section notes that while these jurisdictions differ in their approaches to criminalisation of sexual violence, they are similar in one key respect: all criminalise sexual
violence under specific sexual violence offences rather than simply under general assault provisions. Section 10.4 notes that the overcriminalisation literature almost never mentions the overlap between sexual assault and general assault offences. The section then describes the arguments of a handful of commentators who have made the case that sexual assault would be better addressed not by a specific offence, but as a subset of assault more generally.

The next sections adopt a similar structure to that used in chapter 9, and make use of the chapter 5 categories of types of descriptive overlap that frequently are associated with overcriminalisation, and overlap types that are unlikely to be associated with overcriminalisation. Section 10.5 discusses two categories of overlap that are frequently problematic and associated with overcriminalisation: crimes du jour, and overbroad, “catch all” offences. The section concludes that neither category is directly relevant to this case study. Section 10.6 then assesses two further chapter 5 categories of descriptive overlap that are frequently not problematic, and not part of overcriminalisation: tiered hierarchies of lesser-included offences; and overlapping offences that are justified by sound and reasonable practical or evidential reasons. The section reaches the conclusion that the descriptive overlap between sexual assault and general assault offences does not fall into either of these categories.

Section 10.7 then sets out the category that seems potentially to be more relevant to this case study: descriptive overlap that is justified on the basis of persuasive fair labelling reasons. The section clarifies that although where there is a within-scope gap in criminalisation, there will be a fair-labelling deficit, the converse is not necessarily true. That is, it is possible for a fair labelling interest to go unaddressed by the criminal law even when the conduct in question is criminalised, and there is no within-scope gap in criminalisation. Section 10.8 notes that in order to assess whether the descriptive overlap between general assault offences and sexual violence offences established in section 10.2 is justified by fair labelling interests, it is necessary to address the question of exactly what is the central harm of the offence of rape or sexual assault. Chapter 11 and the first half of chapter 12 address this question, canvassing different historical and contemporary theories and understandings of the central harm of sexual assault and rape.
10.2 Descriptive Overlap between Assault and Sexual Assault

Applying the concepts from chapter 4, there is a descriptive sense in which general assault offences and sexual assault overlap.\textsuperscript{20} Consider for instance a scenario in which an adult man holds down an adult woman and forcibly penetrates her vagina with his penis while she says “no.”\textsuperscript{21} If we take this interaction as a “basic unit” of behaviour,\textsuperscript{22} we could describe it in legal language in several possible ways. We could say, “person A directly applied force to the body of person B without person B’s consent.” We could also say, “person A used an object to forcibly penetrate a body part of person B without that person’s consent”; “person A used a body part to forcibly penetrate a body part of person B without that person’s consent”; or “person A forcibly penetrated with his penis the vagina of person B without her consent”; or “a man (A) forcibly penetrated with his penis the vagina of a woman (B) without her consent”. If we think we can “properly” describe the basic unit of behaviour in all of these ways, then those legal descriptions overlap.\textsuperscript{23} As we saw in chapter 4, the further question of whether one of these descriptions of the behaviour is better or more accurately captures the essence of the conduct is necessarily

\textsuperscript{20} Alice Ristroph, “Criminal Law in the Shadow of Violence” (2010–2011) 62 Ala L Rev 571 at 577
\textsuperscript{21} In this example, the woman physically resists, her resistance is overcome by force, and she utters verbal protest throughout. These precise characteristics are not necessary for an event to constitute sexual assault or rape. Rather, the example is constructed to uncontroversially satisfy the most stringent legal definition of rape or sexual assault in most jurisdictions.
\textsuperscript{22} As discussed in Chapter 4, particularly in section 4.2, a “basic unit” here means the unit that makes the best conceptual sense to treat the piece of behaviour as a complete and distinct piece of behaviour, such that dividing it further would result in incomplete “fragments” of behaviour, and ceasing subdividing would leave several pieces of behaviour “clumped” together. Deciding which units of behaviour are “basic” is of course not a purely descriptive exercise, as normative considerations may shape one’s impression of whether a clump of behaviour is integrally related to each other, or should be divided further.

However, the idea here is that if over the course of a relatively short space of time, a man holds down a woman for the purpose of penetrating her vagina with his penis, and his restraint of her facilitates that penetration, and her lack of consent as demonstrated in part by her verbally saying “no” accompanies these events, and her experience of the interaction is that the restraint and the penetration are part of the same “chunk” of experience. For the purposes of argument here, I assume this set of behaviour involved in this relatively clear-cut set of facts can be treated as a “basic unit” of behaviour.

\textsuperscript{23} As in chapter 4, at section 4.2, “properly” is used here in a non-normative sense. That is, these legal descriptions “properly” describe the behaviour in question if they are grammatically and idiomatically correct descriptions of the behaviour.
evaluative. So, at a descriptive level, rape or sexual assault offences and general assault offences overlap.

It would certainly be possible to design a system of criminal statutes that criminalised assaults generally, and sexual assaults are understood as a subset of assaults generally. However, that is not the way in which criminal codes in common law jurisdictions tend to be arranged: as will be discussed in greater detail in the following section, while jurisdictions vary in the ways they arrange their sexual assault and assault offences, the common element among most jurisdictions is that sexual assault is specifically criminalised separately from general assault offences.


In comparing the approaches taken in various jurisdictions to criminalising conduct that we refer to as rape or sexual assault, it is important to keep in mind that there is no single “correct” way to arrange a criminal code. Criminal legislation is not a natural kind but a human artefact that operates within a culture and a legal system. Any particular configuration of offences will reflect a number of policy choices. These are choices that could have been made differently. This is the case for criminal offences concerning any subject matter, even offences that seem unambiguously to be very well designed, where we might think that legislators have made the best possible choice about how to arrange a particular set of offences – after all, a choice could have been made instead to design them in some other, less good way. This does not mean that different possible arrangements of criminal offences are incommensurable. Rather, they can be assessed as better or worse, but this assessment will be made with respect to goals, values and criteria.

This contingent choice dimension is true in relation to any instance of criminalisation. As seen in the previous case study for instance, some jurisdictions already have specific non-fatal

---

24 See the discussion of the various criteria we might employ to declare dental floss “better” or “worse” than climbing rope in chapter 4, section 4.5 following table 4.6.
25 Also see, Christine Boyle, “Sexual Assault and the Feminist Judge” (1985) 1 Can J Women & L 93 at 98.
27 See examples from various jurisdictions in section 10.3 below.
strangulation offences, whereas although a specific offence has been proposed in New Zealand, it has not yet been enacted. The potential to configure criminal codes in different ways is also illustrated by the various ways in which contemporary common law jurisdictions configure their rape or sexual assault and general assault offences. For reasons of space, I do not give an in-depth survey of the differences between various jurisdictions’ sexual violence offences. However, it is useful to consider one example of a choice that different jurisdictions have taken differently in the framing of their sexual violence offences: the choice of whether to employ the label “rape” or instead use another formulation such as “sexual assault.”

When jurisdictions criminalise sexual violence separately from non-sexual violence, they must make choices about the language used to describe and label sexual violence. There is a deep literature debating whether sexual offences are best understood as primarily offences of violence,28 of sex,29 or as offences with a “dual character” so that the violent and sexual aspects of the offending are each important dimensions of the wrongfulness and harmfulness of the offending.30 Various jurisdictions have reached different conclusions on the question, often after careful deliberation and recommendations by law commissions,31 activists, theorists and other

interested parties. For instance, since 1983 reforms, the word “rape” has not appeared in Canadian law, having been replaced by sexual assault, on the basis that this wording emphasises that sexual assault is a crime of aggression.\textsuperscript{32} Contrastingly, other jurisdictions such as England and Wales and New Zealand have retained the term,\textsuperscript{33} on the basis that the moral force of the word is important in labelling the full harm of the offence.\textsuperscript{34}

The use, or not, of the word “rape” is just one of many significant differences in the ways the jurisdictions conceptualise, subdivide, label and penalise specific sexual violence offences. These different choices draw on different ways of understanding the harms of rape, and different policy choices and priorities that different jurisdictions have made at different times. Seeing these differences brings into relief the fact that even though a jurisdiction’s criminal code is arranged in a certain way at a certain time, with different choices, it could be otherwise. Likewise, any law reform measure should be understood as a choice or set of choices in the context of a specific place and time. A law reform solution could be a good solution for a particular time, without necessarily being the best approach for all time. This is pertinent in the context of gendered violence, because as discussed in chapter 6, gendered harm is at this time a pressing social issue in many jurisdictions.\textsuperscript{35} When considering whether the introduction or retention of specific, overlapping criminal offences aimed at forms of gendered violence is part of the problem of overcriminalisation, this context is crucial.

However, despite myriad differences, one commonality amongst common law jurisdictions, and certainly amongst the jurisdictions that are the focus of this dissertation, is that


\textsuperscript{33} Crimes Act 1961, s 128(2) (New Zealand); Sexual Offences Act 2003, s 1 (England and Wales).


sexual assault and general assault offences are separate offences. As will be discussed in chapter 11, since the earliest criminal codes, rape has been a specific offence.

10.4 Sexual Assault and the Overcriminalisation Literature

In light of the observation in the previous sections that sexual assault offences descriptively overlap with general assault offences, it is striking to note that the overcriminalisation literature omits any mention of sexual assault offence as an area of overlap, or overdepth. Rape law is a central area of interest for feminist scholars and law reform activists. Feminist writers have drawn attention to the rape myths and stereotypes that permeate our culture and the many ways the legal system reflects, embodies and reinforces these myths and stereotypes. Examples of this writing include calls for better enforcement of existing rape offences; changes to evidential rules in rape prosecutions; and more sensitive treatment of rape survivors by the criminal justice system to avoid re-traumatising them.

Much rarer is the argument that sexual assault and general assault offences overlap, and that the harms of sexual assault are not fundamentally different from those of assault construed more generally such that sexual assault offences would be better addressed under general assault provisions. Philosopher Michael Davis argues that “[r]ape should be treated as a variety of

---

ordinary (simple or aggravated) battery because that is what rape is." Criminologists Martin Schwartz and Todd Clear similarly state that rapes “should be treated as assaults,” and regard “[t]he sexual aspects of the assault [as] relevant only to the amount of injury suffered by the victim.” In an opinion column, novelist Margaret Drabble described rape as simply an assault on the person, and resisted the “notion that rape is a special case,” arguing that rape is no more traumatic than non-sexual assaults like having one’s “teeth knocked out.” Criminal law academic Donald Dripps believes that physical injury is the principal harm suffered by victims of rape. While not personally subscribing to this view, legal philosopher Jeffrie Murphy says he can imagine:

someone ... who has perhaps internalized the sixties view that our society has overmoralized sexuality and sexual activity, arguing [that p]erhaps it is wrong to regard rape as anything more than an assault or an unlawful touching and perhaps the gravity of rape, as with other assaults, should be assessed roughly in terms of the actual physical injury inflicted. [Such that] the mere fact that sex, or sexual penetration is involved [is] irrelevant as an aggravating factor.

The handful of writers who argue that sexual assault or rape should be treated as a battery understand themselves to be in the minority, and acknowledge criminalising rape as a battery rather than a separate offence would be an enormous change from the current approach of criminalising sexual and non-sexual assaults separately. Schwartz and Clear’s proposal is “to eliminate sexual assault laws altogether, and to subsume the content of these laws into already existing law.” Under their proposal, “the sexual nature of the assault might not even be mentioned, except as it is relevant to a description of the offense or to document aggravating or

---

46 Davis, “What Does Rape Deserve?”, supra note 2; Schwartz and Clear, “Toward a New Law on Rape”, supra note 42; Schwartz and Clear, “Feminism and Rape Law Reform”, supra note 42.
47 Schwartz and Clear, “Feminism and Rape Law Reform”, supra note 42 at 318.
mitigating characteristics at sentencing.”48 Davis argues that “as long as we distinguish rape from ordinary battery” we cannot analyse a sexual assault encounter holistically.49 By distinguishing rape from ordinary battery, the lack of consent to penetration is centred as the crucial element of the offence, and “[p]enetration, not the surrounding battery, remains the focus of proof.”50

Notably, even writers like Davis, and Schwartz and Clear do not frame their arguments in overcriminalisation terms. Their reasons for wanting to criminalise rape under general assault offences do not tap into the overcriminalisation worries discussed in chapter 3, such as, for instance, concerns that prosecutors could take advantage of the presence of overlapping offences to “charge stack” and encourage guilty pleas.51 Instead, writers who would criminalise rape under general assault provisions criticise what they see as an overly delicate attitude to the harms of sexual assault, which they argue are in fact not inherently different from or worse than the harms of other non-sexual offences. For instance, Schwartz and Clear see “no reason to separate a woman’s sexual integrity from her general physical integrity”52 or accord the “vagina... a special status” as compared to the “rest” of a woman’s body.53 They also argue that in addition to the “ideological correctness” of criminalising rape and sexual assault under general battering and assault offences, this approach would lead to the more effective prosecution and punishment of sexual assaults.54 Similarly, Davis argues pragmatically that understanding and prosecuting rape as battery, and punishing it no more severely than general assaults that cause comparable levels of physical harm, would lead to “relatively [more] certain punishment of rapists.”55 For reasons of space, I do not analyse these arguments in detail. What is important to note is that whether or not one is persuaded by the specifics of Davis and Schwartz and Clear’s arguments for criminalising rape under general assault and battery offences, these arguments not founded in overcriminalisation concerns.

48 Ibid.
49 Davis, “What Does Rape Deserve?”, supra note 2 at 104.
50 Ibid.
51 On the contrary, some writers have noted that “in rape law, flexibility almost inevitably means underenforcement and non compliance”: Victor Tadros, “Rape Without Consent” (2006) 26:3 Oxf J Leg Stud 515 at 515; quoting: Schulhofer, Unwanted Sex, supra note 38 at 90.
52 Schwartz and Clear, “Feminism and Rape Law Reform”, supra note 42 at 320.
53 Schwartz and Clear, “Toward a New Law on Rape”, supra note 42 at 134.
Arguments such as Davis’ that rape descriptively overlaps with assault, and thus should be criminalised only under general assault offences rather than under specific sexual assault offences, are a decidedly minority perspective. As I discussed in section 10.3 above, jurisdictions tend to criminalise rape or sexual assault under its own offence or offences, distinctly criminalised from non-sexual modes of assault. Few commentators suggest that rape or sexual assault overlap in a normative sense with general assault offences.\(^{56}\) Even those commentators who stress an interpretation of rape as a matter of violence rather than sex,\(^ {57}\) do not argue that rape or sexual assault should be entirely collapsed into general assault categories. The emphasis is not to phase out rape or sexual assault as specific offences, but rather to better enforce them.

Recall the previous case study, in which the New Zealand Law Commission prefaced its recommendation of the introduction of a specific non-fatal strangulation offence that would overlap with general assault offences by highlighting its general trepidation about descriptively overlapping offences.\(^ {58}\) The fact that the overcriminalisation literature has not commented on the descriptive overlap between sexual assault and general assault offences intensifies the usefulness of sexual violence as a case study. If the majority of jurisdictions and commentators are correct in their intuition that rape or sexual assault is normatively distinct from non-sexual forms of assault, so that criminalising both in parallel is not descriptive overlap that is normatively troubling and part of overcriminalisation, and does not contribute to the problem of overcriminalisation, the illuminating questions for the purposes of this dissertation are: why is this form of descriptive overlap either not troubling from the point of view of overcriminalisation? and possibly, is the apparent descriptive overlap between sexual assault and general assault offences really overlap at all?

10.5 Inapplicable Categories of Problematic Overlap

As with the first case study, a useful framework in assessing whether the descriptive overlap between sexual assault and general assault constitutes part of the problem of overcriminalisation is to refer to the categories of generally unproblematic and frequently problematic descriptive overlap that were established in chapter 5. My analysis in this section begins with the categories

---

\(^{56}\) Alan Wertheimer is an example of a writer who expressly rejects the notion of rape as a subcategory of assault: Alan Wertheimer, “Consent and Sexual Relations”, in Alan Soble, ed, The Philosophy of Sex: Contemporary Readings (Rowman & Littlefield, 2002) 341 at 33.

\(^{57}\) See discussion above at footnotes 28 - 34 and accompanying text.

\(^{58}\) See chapter 9, at section 9.7.
of problematic overlap that frequently contributes to overcriminalisation, before considering in the next section categories of overlap that are generally not thought to be part of overcriminalisation. As section 10.7 will explain, the category of justification that appears to be the most pertinent to the question of why descriptive overlap between sexual assault and general assault offences is not critiqued as a source of overcriminalisation is the category of fair labelling justifications.

A key class of descriptive overlap that the overcriminalisation literature frequently cites as problematic and part of overcriminalisation are “crimes du jour”: new, specific offences that are enacted in the face of high profile crimes. As discussed in chapter 5, a frequent criticism of such offences in the overcriminalisation literature is that crimes du jour are drafted with insufficient attention paid to the existing offences, penalties, already defined terms. Paul Robinson and Michael Cahill have noted that this inattention to the content and structure of existing offences generates inconsistencies of style, format, definition and penalty. Offences of this kind, for instance carjacking, cyberbullying and “coward’s punch” assaults are often passed rapidly in reaction to a perceived crisis. A concern is often raised that this rapidity of legislative action can come at the cost of careful policy consideration of whether the offence is necessary, or well designed. However, rape or sexual assault is clearly a historically established offence rather than a crime du jour. While scholars, activists and law reformers have criticised the design of rape and sexual assault offences on a number of grounds, these criticisms do not usually suggest that any flaws in the offences’ design or operation are due to hasty drafting or moral panic. Contrasting, with offences such as carjacking, cyberbullying, and coward’s punch

59 See chapter 5, section 5.6.
61 Ibid.
62 See chapter 5, section 5.6, at notes 51 – 87 and associated text.
63 Ibid, at note 87 – 88 and accompanying text.
offences, the problem is not solely that the specific new offence overlaps with other more general offences, but also that the specific offences are poorly designed and not fit for purpose, at least in part due to the rushed manner in which they were enacted.

A second class of descriptive overlap that tends to be problematic is overly broad “catch all” offences that overlap with a wide range of other offences. As I discussed in chapter 5, certain very broad and ambiguous fraud offences that overlap with many more specific offences have been criticised as contributing to the problem of overdepth in the criminal law, and the problems of overcriminalisation. But again, rape or sexual assault offences do not fall within such a class. Rape is not an open ended, catch all offence – rather, in a legislative sense, if not in a practical application, its elements are clearly defined and narrower than the more general category of assault.

Thus, part of the reason that the overcriminalisation literature has not previously considered the descriptive overlap between sexual assault and general assault offences may well be that it does not fit within the typical picture of overlap that is part of overcriminalisation: it is neither an overbroad catch-all offence, nor a hastily enacted crime du jour. Nor does the descriptive overlap between the two sets of offences in practice lead to the rule of law dangers associated with overcriminalisation. One such concern is that where a number of overlapping offences exist covering the same conduct, there is uncertainty for those bound by the law about which offences they are likely to be subject to in practice. A related concern is that the existence of overlapping offences accords prosecutors discretion to choose which offences to charge. Another possible concern can be that a specific offence that overlaps with a general offence may be largely symbolic, with that symbolism consisting in its enactment, rather than in actual prosecutions in practice. Some specific offences succumb to this pitfall because the specific offence is more difficult to prove than the general offence, and so prosecutors develop a pragmatic aversion to charging the specific offence, despite its symbolism, instead charging the more easily proved general offence.

---

65 Chapter 5, section 5.7.
66 Chapter 3, sections 3.6 – 3.10.
67 Chapter 3, section 3.7.
68 Chapter 3, sections 3.8 and 3.9.
69 United States specific hate crime legislation is a good example of this. Specific hate crime offences require proof of a bias motive, whereas the general offences with which they overlap do not require proof.
While much has been written about problematic exercises of prosecutorial discretion in relation to sexual offences, it has not been on the theme of unfair uncertainty for people who could be charged with sexual offences or general assault offences with which they overlap. Rather, if anyone is treated unfairly in the typical rape prosecution, it is the victim herself rather than the accused. Writers have noted that for a variety of reasons, including prosecutorial choices, sexual assault is under-prosecuted at higher rates than other kinds of offences against the person. Furthermore, in instances where prosecutors make pragmatic decisions about which overlapping or parallel offence with which to charge a sexual assault, this choice is generally exercised in the offender’s favour. For instance, Susan Estrich writing of the aftermath of her own violent stranger rape describes police being pleased to learn that in addition to raping her, her assailant had taken some money, as “that made it armed robbery. Much better than a rape.”

Her implication is that they were more eager to investigate the incident knowing that it could be charged in respect of the robbery either instead of, or in addition to, charging the rape.

10.6 Inapplicable Categories of Unproblematic Overlap

Two of the chapter 5 categories of unproblematic descriptive overlap are also not relevant in the case of this sexual violence case study. The first of these categories that is not relevant to this case study is that of descriptively overlapping offences in which one is a lesser-included version of another, such that the offences are part of the same tiered hierarchy of offences. In New Zealand and England and Wales common assault is not a lesser-included offence of rape or sexual assault; instead, rape and sexual assault are part of a separate hierarchy from general assault offences. In New Zealand, offences of sexual violence are located in a separate part of the

---


71 Estrich, “Rape”, supra note 34 at 1088.

72 See discussion in Chapter 5, section 5.2.
Crimes Act 1961 from general assault offences, and British sexual offences are housed in a separate Act from general assault offences. So, in these jurisdictions, the lesser-included offences explanation for overlap does not apply at all.

However, even in Canada where, for historical and structural reasons, common assault actually is a lesser-included offence of sexual assault, it would seem question begging to suggest that the reason the overlap between the offences does not seem to be problematic is that in Canada assault is a lesser included offence of sexual assault. The fact that Canada’s approach is different to that taken in England and Wales and New Zealand emphasises that it is not a matter of logical necessity that assault be framed as a lesser-included offence of sexual assault. As will be discussed further in section 10.3, the Canadian choice to situate sexual assault offences in the same part of the Act as general assault offences was a conscious choice, intended to signal that offences of sexual violence are offences that are more about violence than they are about sex. So much of the question of whether descriptive overlap between sexual assault offences and general assault offences is part of the problem of overcriminalisation turns on questions about the harms implicated by each set of offences. As such, it would be circular to decide that since common assault is an included offence of sexual assault, the overlap is by definition unproblematic.

A further category discussed in chapter 5 also seems not to be relevant to why the descriptive overlap between assault and sexual assault is generally not suspected of contributing to overcriminalisation. This is the category of descriptively overlapping offences that are not part of overcriminalisation because they are justified on pragmatic or evidential grounds, in the sense of providing a pragmatically easier path to conviction by avoiding practical difficulties present in the other offences with which it descriptively overlaps. The non-fatal strangulation assault case study is an example in which descriptive overlap seems to be justified and not part of overcriminalisation in part because the specific offence would address practical and evidential difficulties in criminalising and effectively prosecuting strangulation assaults under general assault offences. Of course, that a particular offence is more or less difficult to prosecute and

---

75 See Chapter 5, section 5.4.
76 Chapter 9, section 9.13.
prove in court is not an end in itself. For instance, an offence criminalising conduct that is not within the proper scope of the criminal law — that is, an offence contributing to overbreadth in the criminal law — will be no better for being easy and efficient to prove in court. On the contrary, an overbreadth offence that is also very easy to prove will be even more unjust in practice, as it will criminalise conduct that it should not, and allow convictions of people that should not be criminalised. That is, ease of application of an unfair law only increases the likelihood that it will in fact be unfairly applied.

If a specific new offence that descriptively overlaps with existing more general offences will be easier to prove in court, that is a positive only to the extent that this furthers other substantive ends. In the case of the non-fatal strangulation offence, as discussed in chapter 7, strangulation is a particularly dangerous form of assault, and a red flag for future intimate partner violence fatalities. As discussed in chapter 8, it is also particularly difficult to prosecute under general assault offences. If it is worth criminalising a harmful form of assault like strangulation, it is worth doing so effectively. Given the seriousness of the conduct, there is a strong justice argument for enacting the specific strangulation offence in order to address the pragmatic difficulties in enforcing the criminalisation of strangulation assaults under general assault offences.

This category of unproblematic overlap is not directly relevant to the sexual violence case study however. The reason for specific sexual assault provisions is not that it is prohibitively difficult to prosecute rapes under general assault offences. Indeed, the quotation from Estrich in the previous section acknowledges that an offence like armed robbery is more straightforward to prosecute than rape, while still carrying a high penalty.\textsuperscript{77} This is because the prosecution of rape or sexual assault offences is subject to more pragmatic difficulties rather than fewer, than are general assault offences. For instance, deep literatures note the particular issues that arise in rape or sexual assault prosecutions regarding questions of consent, as well as issues relating to the prevalence of rape myths and stereotypes about for instance how a rape victim will behave and who is a credible victim.

\textsuperscript{77} Supra section 10.5, at note 71.
10.7 Unproblematic Overlap: Depth that is Justified on Fair Labelling Grounds

The chapter 5 category of unproblematic descriptive overlap that is potentially the most relevant to the sexual violence case study are offences that are justified on the basis of fair labelling interests. Fair labelling arguments for a new offence may exist even when the behaviour that will be captured by the new offence is already criminalised.

Where a within-scope gap exists in the criminal law, and there are compelling arguments for filling that gap, there will likely also be an argument for labelling the currently uncriminalised conduct. In chapter 5, as an example of a within-scope gap in the criminal law, I discussed the gap that existed when a spousal rape exemption applied. As will be discussed in greater detail in chapter 11, the exemption meant that it was not legally possible for a man to rape his wife. Before the exemption was repealed, sexual assaults by husbands of their wives were not criminalised. Conduct that was within the law’s proper scope was nonetheless not illegal. When the spousal rape exemption was in force, there was no criminal offence in force that criminalised and labelled the harm of rape within marriage. Not only was there no legal label for “spousal rape,” as Martha Ertman has pointed out, in legal terms it was an oxymoron because by definition a man could not rape his wife. That is, there was a descriptive (and within-scope) gap in the law. When various jurisdictions began to remove their spousal rape exemptions, and rape within marriage became a criminal offence, this filled the within-scope gap in criminalisation. Additionally, with the within-scope gap filled, there was now a legal label and name for the harm caused by the sexual assault of a wife by a husband. Spousal rape was no longer an oxymoron.

However, the fact that a within-scope gap in criminalisation entails a lack of labelling for that conduct does not imply the converse: it is possible for the criminal law to fail to sufficiently label a harm caused by a particular kind of wrongful behaviour without it being the case that the behaviour is not criminalised. Put another way, the presence of a compelling fair-labelling argument for a particular offence does not necessarily imply that the offence will fill a

---

78 Chapter 5, section 5.5.
81 On the power of naming gendered harms in law, see chapter 6, at section 6.3.
descriptive gap in the criminal law. As discussed in chapter 5, when there is no descriptive gap in the criminal law, a labelling deficit can still occur if the general offences under which a particular unit of behaviour is criminalised do a poor job of labelling the nature of the offending involved in that unit of behaviour. That is, if a unit of behaviour is criminalised by an offence, but the offence does not capture or reflect the central harm of the unit of behaviour, or the reason it is important to criminalise that unit of behaviour, then there is a fair labelling argument for ensuring that the central harm is in fact named and labelled by the criminal law. It is this category of unproblematic overlap that is potentially the most relevant to the sexual violence case study.

In the context of this case study, as discussed in section 10.2, sexual assault and general assault offences do appear to overlap with one another in descriptive terms. The section analysed the example of a unit of behaviour in which an adult man holds down an adult woman and forcibly penetrates her vagina with his penis while she says “no.” As noted in the section, common assault offences describe the unit of behaviour, as it would describe the unit in question to say “person A applied force to the body of B without B’s consent.” Sexual assault or rape offences from various jurisdictions, though not identical to one another, would also describe the unit of behaviour. So, common assault and sexual assault or rape offer overlapping legal descriptions of the unit of behaviour in question; that is, the offences descriptively overlap. This is not a descriptive gap in criminalisation. Given the unit of behaviour just described, a prosecutor would have the choice of charging the behaviour as a sexual assault or rape, or as a general assault offence.

However, if the unit of behaviour were charged as assault, even assuming for the sake of argument that the assault offence had a sufficient maximum penalty, one can imagine the possible objection that the label of assault fails to capture and represent a crucial central harm inflicted by the unit of behaviour in question. Recall Estrich’s story of the police who were pleased to learn that in addition to being raped she had been robbed, because “that made it armed robbery. Much better than a rape. They got right on the [police] radio with that.” The tone in which Estrich, eleven years later, describes her violent stranger rape and interactions with

---

82 Supra, section 10.2.
83 Supra, section 10.5, at note 71 and 10.6 at note 77.
84 Estrich, “Rape”, supra note 34 at 1088.
police is wry and darkly sardonic. Her account is starkly factual, written with a kind of detached and flat affect that subtly but effectively conveys the numb shock that she seems to recall having felt in the immediate aftermath of the trauma she had just experienced, as well as a remaining trauma years later. Given this tone, the detail of police telling her that armed robbery is “much better than rape” for investigation or prosecution purposes seems to invite the reader to question (along with a host of other matters) whether charging the rape and theft of a small amount of cash as armed robbery rather than as rape would inadequately label the offender’s behaviour and the harm that behaviour had caused her. The trauma, shock and the pain that runs through the account seem much more centrally tied to the sexual assault than to the robbery, or to assault generally, both of which she experienced as a more incidental set of details.

At this point of the analysis, it seems that the central harm of sexual violence may be distinct from the central harm of general assault offences. This appearance alerts us to the possibility that the reason the descriptive overlap between sexualised and non-sexualised violence offences does not strike us as a likely example of overcriminalisation is that sexual assault offences mark out and specifically label the distinct central harm of sexual violence. In order to determine with more certainty whether the reason that this example of descriptive overlap is unproblematic is due to labelling interests, it is important to have a clear idea of the central harm of sexual violence that sexual violence offences specifically label. As mentioned in the introduction to this chapter, even the earliest criminal codes contained rape offences. However, as the next two chapters will discuss, the way in which societies and legal systems throughout history have understood the central harms of sexual violence have changed over time. Yet, the constant thread has been that harms associated with rape have been viewed as sufficiently distinct as to justify separate criminalisation. The following two chapters consider competing theories of the central harm of sexual violence. In the second half of chapter 12, I explain that my favoured understanding of the central harm of sexual violence is as a harm to interests in bodily and sexual autonomy and integrity, understood in the relational and embodied terms set out by feminist theorists. Having established the central harm of sexual violence, the chapter returns to a fair labelling analysis, and considers whether the interest in specifically labelling the central harm of sexual violence explains why the descriptive overlap general and sexual assault offences seems to be unproblematic.
10.8 Summary

This chapter began with an account of the descriptive overlap between sexual assault and general assault provisions (assuming the contemporary view that these are the category of offences with which sexual assault would overlap, rather than other types of offence such as trespass or theft).\textsuperscript{85} Section 10.3 noted that although the jurisdictions that are the focus of this dissertation differ in the ways in which they criminalise sexual violence, they have in common that they each specifically criminalise sexual violence rather than covering it under general assault offences.

After noting in section 10.4 that the overcriminalisation literature almost never mentions the overlap between sexual assault and general assault offences, the rest of the chapter considered why the descriptive overlap between sexual assault and general assault offences has, perhaps rightly, never struck overcriminalisation theorists as a likely source of overdepth in the criminal law. Sections 10.5 and 10.6 considered chapter 5 categories of types of descriptive overlap that frequently are associated with overcriminalisation, and overlap types that are unlikely to be associated with overcriminalisation.

Section 10.7 then analysed the chapter 5 category of descriptive overlap that seems potentially to be more relevant to this case study: descriptive overlap that is justified by a fair labelling interest. The section clarifies that although where there is a within-scope gap in criminalisation, there may be a fair labelling deficit; the converse is not necessarily true. That is, it is possible for an important harm to be insufficiently labelled even when conduct causing that harm is already criminalised, and there is no descriptive gap in criminalisation. The section notes that determining with greater certainty that the descriptive overlap established in section 10.2 by the principle of fair labelling, it is necessary to address the question of exactly what is the central harm of the offence of rape or sexual assault. Chapter 11 and the first half of chapter 12 address this question, canvassing different historical and contemporary theories and understandings of the central harm of sexual assault and rape.

\textsuperscript{85} Section 10.2.
Chapter 11: Historical Understandings of Sexual Violence

11.1 Introduction

This is the second of three chapters discussing the sexual violence case study. Chapter 10 introduced the case study, and noted that the overcriminalisation literature has not commented on the descriptive overlap between general assault and sexual assault offences, and has not suggested this instance of depth in the criminal law is overdepth and part of overcriminalisation. Chapter 10 established that in relation to the sexual violence case study, the most pertinent chapter 5 category of justifications for depth is the category of justifications founded on fair labelling interests. That is, it may be that the reason the descriptive overlap between sexual assault and general assault offences does not seem to be part of the problem of overcriminalisation is that sexual assault offences specifically label a central harm of sexual violence that would otherwise not be labelled by general assault offences.

In order to assess whether specifically criminalising sexual assault is justified on fair labelling grounds, it is important to have a clear idea of the central harm of sexual violence. As mentioned in introduction to this case study, rape is an ancient offence that was present in even the earliest criminal codes. However, as this and the following chapter will illustrate, the way in which the central harms of rape or sexual assault are understood has changed over time. As noted in chapter 10, an account of the descriptive overlap between sexual assault and general assault offences presumes a modern understanding of sexual assault or rape as an offence against the person, like assault. But if an overlap analysis had been performed 300 years ago, then any descriptive overlap would have been with property offences such as theft or trespass.

This chapter and the next chapter present a history of how the offence of rape or sexual assault has been understood over time. This chapter focuses on historical, property-based conceptions of rape, the modern echoes of which can be heard today. Chapter 12 sets out liberal conceptions of rape, and relational, feminist re-imaginings of these interests. The chapter argues that these feminist adaptations of traditional liberal concepts come closest to capturing the central harms of sexual violence as experience and described by survivors. The chapter then

---

1 Chapter 10, sections 10.1 and 10.3.
2 Chapter 10, section 10.1, at footnote 14.
3 Sections 11.2 and 11.3.
returns to the point foreshadowed in the introduction to this case study: that sexual violence is a more challenging example of descriptive overlap because it turns out to be difficult to completely separate descriptive questions about whether sexual assault and general assault offences overlap with one another from normative assumptions or claims about the central harms that are targeted by each set of offence. As is discussed in chapter 12, while it is particularly noticeable in this case study that descriptive and normative questions cannot be entirely separated, the linkages between normative with descriptive questions are not unique to this context.

A roadmap for chapter 11 is as follows. Section 11.2 begins with a note about the historiography of theories of rape law – that is, the ways in which we think about history, and the relationship between evolving theories of the harms of sexual violence. Section 11.3 sets out early historical understandings of sexual violence, that viewed rape not as an offence against the person, or an infringement of the rights of the woman who was sexually violated, but instead, an offence against the property rights of the male family member who had a property interest in a woman or girl’s body. Though these early conceptions of sexual violence as a crime against male property rights may strike the reader as antiquated, the next three sections of the chapter discuss ways in which these early understandings of sexual violence continue to reverberate and echo today. Section 11.4 discusses modern commodity theories of the harms of sexual violence offered by some law and economics theorists, and demonstrates the ways in which such theories fail to represent the experience of sexual violence as described by survivors. Section 11.5 notes that though understanding women’s sexualised bodies as male property may seem a matter of medieval history, in fact, these ideas have had currency and legal legitimacy even very recently. Until a generation ago, rape within marriage was not a criminal offence, based in large part on ideas of contractual or proprietary male entitlement to sexual access to his wife’s body.

Section 11.6 notes a third contemporary vestige of social and legal views that rape was an offence against male property interests: the fact even today in practice, the victimisation of various groups of women is not regarded as equally harmful. As we saw in chapter 10, sexual violence is an intersectionally gendered harm – Indigenous and racialised women, socially and economically disadvantaged women, transgender women and gender non-binary people, lesbians, women with disabilities, sex workers, and women who have previously suffered sexual victimisation are more likely to be sexually assaulted than women who do not share these
characteristics. Section 11.6 notes that in addition to experiencing sexual violence at higher rates than women who do not share these characteristics, the harm suffered by these groups of women is more likely to be regarded as less harmful, and treated less seriously by police and by social networks than is the case for victimised women who more closely adhere to stereotypes of “ideal” victims.

The final section of the chapter, section 11.7 provides a bridge to chapter 12’s discussion of modern liberal and feminist understanding of the central harms and wrongs of sexual violence, and overlap analysis.

11.2 Theories of Sexual Assault and Rape: The Historiography of Rape Theory

Much writing on the subject of rape begins with a legal history of the offence, noting that the offence has existed since the earliest criminal codes. Writers who set out these histories of rape and rape law generally find it natural to adopt a chronological structure, beginning with, for instance, the Babylonian Code of Hammurabi, ancient Greek and Roman codes and canon law, and moving through the history of the Anglo-American common law. These long histories of rape’s criminalisation and conceptualisation demonstrate both continuity and discontinuity, in ways that exist in tension with one another. First, the history of the offence of rape is one of

4 Chapter 10, section 10.1 at footnotes 7 – 13, and chapter 6, section 6.2, at notes 3 – 9 and accompanying text.


continuity in that, for thousands of years, most legal systems have seen fit to criminalise rape on its own terms as its own specific offence. But alongside that, a certain discontinuity is also evident. Despite the offence’s long history, its central harm has been understood radically differently at various times.Keith Burgess-Jackson has written of this tension, stating: “there is no single, canonical understanding of rape”, and instead we have available to us a number of “different theories of rape” or “understandings of what distinguishes so-called normal sexual intercourse from rape, or what makes certain instances of sexual intercourse morally problematic.” That is, different theories of rape offer different accounts of the harms and moral wrongs involved in rape.

To understand these different conceptions of rape’s central wrong, it is useful to understand the history of the offence of rape. In turn, when looking at that history, it is important to be conscious of how we approach the historiography of rape theory – that is, the theory of how best to approach the task of “doing history.” Burgess-Jackson classifies the various theories of rape as falling into three broad groups: “conservative”, “liberal” and “radical” theories of rape. He regards the three theoretical groupings as loosely corresponding with political theories of the same names, and presents groups of theories as chronologically situated within the historical moments in which they arose and prospered.

Feminist writers like Christine Boyle and Victoria Nourse are wary of the possibly reductive conceptual neatness of accounts like Burgess-Jackson’s of the historiography of rape theory. Boyle cautions against the notion that any kind of fundamental organising principle underpins current sexual violence offences, or their historical development. Instead, she regards

9 This observation is consistent with the discussion in chapter 10, section 10.3 at footnotes 28 - 34 and accompanying text about competing theories that variously conceptualise rape as an offence of sex, of violence, or of a combination of both.
10 Christine Boyle, Sexual Assault (Toronto: Carswell, 1984) at 3.
11 Burgess-Jackson, Rape, supra note 8 at 43.
12 Ibid, at 42.
the law best understood as containing, without necessarily reconciling, inherently conflicting values. She argues that:

This is crucial if one is not to see [the law] in an aridly positivistic way, as if it were a set of value-free rules and neutral standards. At any one time the law has not demonstrated a commitment to any particular goal or value, but has displayed ambivalence, a shifting compromise between the values perceived, either consciously or unconsciously, as important.

Writing in the context of the prospects of feminist law reform “progress”, Nourse also notes the way that different theoretical understandings of harms such as rape do not neatly overtake each other, but rather exist in parallel, in conversation with, and as challenges to, one another:

Old norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics. Indeed, old norms not only do not die, but they live alongside, and are perpetuated by the denial that they still live.

A theme that emerges from approaches like Boyle’s and Nourse’s is the danger of adopting too whiggish an historiographical approach to analysing the historical development of legal and social conceptions of rape. Indeed, it is not the case that history has seen one theory or perspective on rape entirely supplant another. Rather, while “liberal” perspectives on rape emerged more recently than conservative perspectives, and radical perspectives more recently still, today all three groups of perspectives exist in conversation with one another in various ways. Current rape law and perspectives on the central wrongs of rape reflect, and react to, elements of each perspective. As Boyle suggests, in order to situate these perspectives, I will give something of the historical context of the development of rape law, and social conceptions.

---

13 Boyle, Sexual Assault, supra note 10 at 3.
of rape. But for reasons of space, and also in order to avoid conveying a false sense of linear progress regarding conceptions of, and perspectives on, rape,20 these next sections give only a brief historical overview rather than a complete history, and focus on various ways of conceptualising the central wrong of rape.21 I adopt two of Burgess-Jackson’s three categories - conservative and liberal theories of sexual violence – as a method of organisation in the following sections, but do not suggest that these categories are rigid or discrete. Rather, I use them as a way of exploring the central themes associated with two key families of ways of conceptualising rape.

11.3 Conservative Theories of Sexual Assault and Rape: Rape as a Property Crime

Susan Brownmiller’s 1975 history of rape is the starting point for many contemporary treatments of the history of the offence.22 Brownmiller and many other writers who followed her begin by noting that early legal conceptions of rape viewed it as an offence against male property interests in sexual access to female bodies:23 a form of theft or trespass that devalued a man’s property interest in a woman’s body or sexuality.24 The “defilement” of a woman’s body and morals was often spoken of in terms of clear property and devaluation metaphors, with women’s virtue

---

22 Brownmiller, Against Our Will, supra note 5.
described as a damageable chattel. Consider for instance this description of the harms of rape from a Georgia Supreme Court’s judgment in 1860:

What is the annihilation of houses or chattels … compared with the destruction of female innocence; robbing woman of that priceless jewel, which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, “thy glory is departed?” Our Sacked habitations may be rebuilt, but who shall repair this moral desolation?

BJ Cling describes early rape laws as demonstrating a striking and “utter disregard” for the experiences and interests of women and girls who were the victims of rape.

Brownmiller argued that since before even the earliest legal systems, women have been physiologically vulnerable to rape: men are on average larger and stronger than women, and heterosexual intercourse is penetration of a woman by a man. She suggests that the fear of rape is a central reason why, as discussed in Chapter 6, in many societies, women did not historically have their own legal personality outside of their relationships with men. She argues that since the earliest social orders, women have been incentivised by the fear of “an open season of rape” to engage in “protective mating” – accepting a subordinate position to, and subjugation by, a husband, father, or other male relative in return for his protection from other men and that this social contract reduced women to chattels. As such, crimes against a woman’s body, like rape, were not crimes against her own interests as a legal person, but rather

28 Brownmiller, Against Our Will, supra note 5 at 16.
29 See discussion in chapter 6, section 6.6, at footnotes 106 – 112 and accompanying text of women lacking legal personality and instead being represented by their husbands, fathers or other male family members.
31 In addition to the usage, familiar today, of the word “husband” as the male companion word to “wife”, note also the Old English and more explicitly patriarchal usage connoting: “the master of a house, the male head of a household”: The Compact Edition of the Oxford English Dictionary: Complete Text Reproduced Micrographically (New York: Oxford University Press, 1971).
against the property interests of the man to whom she belongs. As noted by Joel Feinberg, “interests of property,” defined as the exclusive enjoyment and possession of chattels and their good physical reputation are key legally protectable and protected interests.

The earliest written laws making rape a crime focused on the status of the woman in relation to her male protectors, rather than on factors relating to the integrity of the female victim’s body and mind. For instance, in Roman law, canon law, and medieval English law, rape or “raptus” was defined not in terms of the woman’s consent or even in terms of a sexual act occurring, but as the abduction of a daughter without her father’s consent. For instance, if a woman was forced to have sex with a man against her will, but her father consented to the man having sex with her, legally it was not rape. On the other hand, if a woman chose to elope with her lover but her father refused to consent to the marriage, that did legally constitute rape.

Raptus thus encompassed at least two meanings: something like our modern meaning of rape – non-consensual sex – and something more like bride capture. Both threatened male property interests, but in somewhat different ways. In the former case, the rape of a marriageable virgin would severely compromise her marriageability, and decrease her value on the marriage market, representing an economic loss for her father, as his daughter would either command a lesser bride price, or perhaps would be regarded as entirely unmarriageable, and would require permanent support within the father’s household. In the latter case, if she was taken for the purpose of marriage by a man without her father’s consent, then her father had suffered the loss

---

33 For a history of the father’s property right in his daughter’s pre-marriage chastity in the parallel context of the development of the tort of seduction, see: Larson, “Women Understand so Little, They Call My Good Nature ‘Deceit’”, supra note 112.
34 Joel Feinberg, Harm to Others (Oxford University Press, 1987) at 61.
38 Brundage, Law, Sex, and Christian Society in Medieval Europe, supra note 24 at 48.
of not being able to choose an economically optimal match.\textsuperscript{40} But even more seriously for wealthy fathers, since marrying a woman was a way to gain title to her property, a way of accessing a man’s wealth was to marry one of his daughters without his consent.\textsuperscript{41} Rape of a man’s wife, rather than a daughter, represented a different threat again – that a man’s wife might become pregnant to another man, leaving the husband to unwittingly raise another man’s biological children as his legal heirs.\textsuperscript{42}

As Kathryn Graval points out, in early legal codes, rape was construed as having occurred and was prosecuted when a man of sufficient status protested that his property rights in respect of the victimised woman had been breached.\textsuperscript{43} For instance, following the Norman conquest of England, the method of trial for rape was by combat: that is, legal recourse for rape was only available in respect of a raped virgin whose “chivalrous kin” felt sufficiently motivated to pursue a remedy by combat.\textsuperscript{44} Women were property, but some were regarded as more valuable than others: when a marriageable virgin with a dowry was raped, it was regarded as a serious offence.\textsuperscript{45} However, when various other “lower value” women were raped, it was not a crime, or not one worth pursuing: “if no one owned the property (as in the case of a widow or a prostitute) or the property had already lost its original value (as in the case of a married woman), then there was no crime.”\textsuperscript{46}

It is clear here that under these early property conceptions, rape did not descriptively overlap with general assault offences. The central harms addressed by rape were to male

\textsuperscript{40} Nazife Bashar, “Rape in England between 1550 and 1700”, in The Sexual Dynamics of History (London: The London Feminist History Group, 1983) 29 at 42; Renae Franiuk and E Ashley Shain, “Beyond Christianity: The Status of Women and Rape Myths” (2011) 65 Sex Roles 783 at 786.
\textsuperscript{41} Patricia Peacock, “Marital Rape”, in Raquel Kennedy Bergen, ed, Issues in Intimate Violence (SAGE, 1998) 225 at 227; Brownmiller, Against Our Will, supra note 5 at 17.
\textsuperscript{43} Gravdal, “Chrétien de Troyes, Gratian, and the Medieval Romance of Sexual Violence”, supra note 5 at 583.
\textsuperscript{44} MacFarlane, “Historical Development of the Offence of Rape”, supra note 5 at n 16–17 and accompanying text; also see: Elizabeth A Sheehy, “Legal Responses to Violence against Women in Canada” (1999) 19 Can Woman Stud 62 at 63.
\textsuperscript{45} Gravdal, “Chrétien de Troyes, Gratian, and the Medieval Romance of Sexual Violence”, supra note 5 at 583; Louis M Epstein, Sex Laws and Customs in Judaism (Ktav Pub House, 1968) at 180.
\textsuperscript{46} Gravdal, “Chrétien de Troyes, Gratian, and the Medieval Romance of Sexual Violence”, supra note 5 at 583; MacFarlane, “Historical Development of the Offence of Rape”, supra note 5 at n 22 and accompanying text.
property interests and male interests in familial reputation. These harms are entirely distinct from
the harms of assault as an offence against the person.

These early understandings of rape are likely to strike a reader as so far removed from the
more modern understandings, to be discussed in chapter 12, as to be of little more than quaint
historical interest. In the jurisdictions I am writing about in this dissertation, women are no
longer considered to be the legal chattels of their husbands and fathers. Women have legal
personality, and the harms of rape have come to be understood as harms to the woman who is
sexually assaulted, rather than to her male protectors.\textsuperscript{47} However, this historical theory of rape as
a crime against male property does still have a place in the ongoing historiographical
conversation Christine Boyle spoke of above. Certain ideas still circulate and have currency
today that descend from these ideas of women’s bodies as property of men, or if not full
property, something over which men have an intervening interest. Echoes of the understanding
of rape as a property crime persist today in a number of ways, and in conversation with newer
ways of thinking about rape.\textsuperscript{48}

11.4 Modern Commodity Theories of Rape

One such echo is that some contemporary writers, including some in the law and economics
movement,\textsuperscript{49} argue that the central harm of rape is best understood as a harm to a proprietary or
economic interest in sexuality.\textsuperscript{50} Unlike the historical conception which saw women’s sexuality
as owned by their fathers or husbands, under this picture, the woman herself is the interest

\textsuperscript{47} Lynda Lytle Holmstrom and Ann Wolbert Burgess, “Rape: The Husband’s and Boyfriend’s Initial
Reactions” (1979) 28:3 Family Coordinator 321.
\textsuperscript{48} Susan B Boyd and Elizabeth A Sheehy, “Feminism and the Law in Canada: Overview”, in Tullio
1989) 255 at 265.
\textsuperscript{49} The law and economics movement applies economic theory and method to the field of law, seeing law
as a social tool that promotes efficiency: Robert Cooter and Thomas Ulen, \textit{Law and Economics}, 6th ed
\textsuperscript{50} Guido Calabresi and A Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One
the Criminal Law” (1985) 85:6 Colum L Rev 1193 at 1199; but see, Katharine K Baker, “Gender, Genes,
and Choice: A Comparative Look at Feminism, Evolution, and Economics” (2001) 80 NCL Rev 465; and
363–64.
Nicola Lacey explains that for such writers, “a woman or man has a right in her or his body much like that in other property, and it is the right to freely dispose of this odd form of property which rape violates.” According to Donald Dripps’ commodity theory of rape, people have a property right in their own bodies, and a right to make choices about how use their bodies and strike deals within a free labour market. GA Cohen likens rape to the non-consensual “violent borrowing of sexual organs.” As Robin West puts it, Dripps “rethink[s] sex as a commodity and rape as theft” or “expropriation … of sexual services.” She describes his “commodificationist” view of the world as entailing that “consensual trade typically, if not definitionally, leaves consenting parties better off than before the trade and does so pretty much regardless of what is traded.” Dripps understands rape as a disruption of efficient and free bargaining in a sexual labour market: “sexual cooperation is a service much like any other,” in which “erotic assets” are exchanged for monetary or nonmonetary compensation as the individuals involved choose. Thus, he understands rape as the unjustifiable “violent compulsion of a person’s labor;” and the rapist, something akin to Richard Posner’s notion of the “sex thief.”

Such commodity theories also echo the claims of Michael Davis, Martin Schwartz and Todd Clear discussed in chapter 10, that rape should simply be treated and understood as assault rather than criminalised separately under specific sexual assault provisions. Davis states

53 Dripps et al, “Men, Women and Rape Women and the Law”, supra note 35 at 144; also see, Corey Rayburn, “To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials” (2006) 15 Colum J Gender & L 437 at 451–53.
54 GA Cohen, Self-Ownership, Freedom, and Equality (Cambridge University Press, 1995) at 244.
57 Dripps, “Beyond Rape”, supra note 7 at 1786.
58 Ibid.
60 See chapter 10, section 10.4, at footnotes 41 – 58 and associated text.
on the basis of what he calls “armchair social science [and] deductions from plausible but unproved empirical assumptions” that:

[t]he reaction of a man who has been badly beaten for no particular reason does not seem all that different from that of a woman who has been raped. Both will feel humiliated, frightened and violated…. [I]t is hard to see that the difference between a beaten man (or woman) and a raped woman (or man) can be all that great. Most women would, I think, prefer to be raped if forced to choose between simply being raped and being very badly beaten (but not raped).

Dripps argues in very similar terms that that “[p]hysical violence in general does far more harm to the victim’s welfare than an unwanted sex act,” and analogises that “violent” is to “non-violent rape”, as robbery is to larceny. Like Davis, Dripps reasons from his intuitions about how “most people” would feel about rape as opposed to other forms of offending:

people generally, male and female, would rather be subjected to unwanted sex than be shot, slashed, or beaten up with a tire iron…. [A]s a general matter unwanted sex is not as bad as violence. I think it follows that those who press sexual advances in the face of refusal act less wickedly than those who shoot, slash, or batter.

It is striking the degree to which Davis and Dripps’ intuitions about what “most women” would prefer, or how “people generally” would feel after experiencing a sexual assault diverge from the reported experiences of many sexual assault survivors. One rape survivor, speaking directly on this point, said “[t]here’s something worse about being raped than

\[62\] Dripps, “Beyond Rape”, supra note 7 at 1800.
\[63\] Ibid, at 1801; Dripps et al, “Men, Women and Rape Women and the Law”, supra note 35 at 141.
\[64\] Davis, supra note 61 and associated quotation in text.
\[65\] Dripps, supra note 63 and associated quotation in text.
just being beaten. It’s the final humiliation, the final showing you that you’re worthless and you’re there to be used by whoever wants you.”

Patricia A Resick argues that psychological and social science studies on the impact of sexual assault have been important in demonstrating that sexual assault is not “merely unwanted sex,” but rather “a life threatening and traumatic event.” Researchers have found that sexual assault of all kinds can cause a wide range of negative psychological effects on survivors, including rape trauma syndrome and post-traumatic stress disorder, fear and anxiety, and depression. These research findings demonstrate that Dripps and Davis’ distinction between “violent” and “non-violent” sexual assault is a false dichotomy. The distinction underlies another damaging false dichotomy: between “real rape,” understood as random, extremely violent stranger rape; and “not real” rape, understood as everything else. As numerous studies establish, the harmfulness of sexual assault is not confined to stereotypical violent stranger rape: controlling for other variables, sexual assaults in which the victim already had a close or intimate relationship with the perpetrator in fact tended to be more traumatic than stranger rapes; and even in sexual assaults in which the assailter does not assault or injure the victim beyond the sexual assault, the sexual assault itself is experienced as an intrinsically harmful act of violence.

Dripps and Davis’ suppositions about what “most people” would prefer given a hypothetical lesser-of-two-evils choice between “non-violent” sexual assault and a “violent”

---

beating causing grievous bodily harm disconcertingly echo, in thought experiment form, the kind of “decision” sexual assault victims face, or may feel they face, during their assaults. Survivors frequently describe not resisting, or ceasing resistance after an initial struggle, because they feared or believed they would be killed or severely injured if they did not submit. Survivors also commonly report having “frozen” or disassociated during an assault, which is an involuntary physiological trauma response. Interestingly, research indicates that sexual assault survivors who were passive or felt paralysed while they were being sexually assaulted are more likely to later blame themselves for not resisting the assault, or to be blamed or disbelieved by others, which are in turn related to higher rates of post-traumatic stress.

These studies, and survivors’ accounts of their experiences, indicate that survivors who either consciously “chose” to remain passive, or involuntarily froze, did not look back on their reaction in the manner that Dripps and Davis’ framing would suggest. If indeed “most people” would “prefer” to be “non-violently” sexually assaulted than “violently” beaten, then one might expect that women who froze or decided it was safer not to resist would look back at their reactions without regret or guilt, recognising that they reacted rationally and sensibly to a

---

difficult dilemma. Instead, survivors in this position frequently felt self-blame and experienced the memory of their non-resistance or overborne resistance efforts as an ongoing source of guilt, shame and trauma.\textsuperscript{79} Survivors of sexual assault experience this kind of self-blame and related PTSD at higher rates than survivors of other non-gendered, non-sexual forms of assault.\textsuperscript{80}

A number of writers have raised concerns about Dripps’ and other law and economics analyses of rape, and the associated proposals that sexual offences should be understood as being analogous to property offences.\textsuperscript{81} They argue that Dripps’ and other economic theories of rape are reductive,\textsuperscript{82} and rely on deeply flawed analogies.\textsuperscript{83} Though modern commodity theories frame their conception of \textit{women} as the “owners” of their own bodies and sexuality as progressive, feminist commentators emphasise that understanding sexual violence in terms of “a discourse of property and things,” ironically enough “bracket[s] out the body” such that the specificities of the first person, embodied experience of rape disappear.\textsuperscript{84} Commodity theories of rape talk of the harm of rape as constituting an impediment to negotiating the most rational, free market bargain that one would otherwise have reached. I agree with Lacey’s critique that this is “a peculiarly mentalist, incorporeal” and emotionless understanding of the harm of rape.\textsuperscript{85} For all its mentalism, it is also deeply unconcerned with the emotional experience of rape – it brackets out not just the body, but also all the parts of the mind that are not starkly “rational”.

In a powerful response to Dripps, West argues that conceptualising rape as theft “wildly misdescribes the experience of rape,” strikingly omitting “the violence, and hence the injury, of


\textsuperscript{80} Avigail Moor et al, “Rape: A Trauma of Paralyzing Dehumanization” (2013) 22:10 J Aggress Maltreatment Trauma 1051 at 1064.

\textsuperscript{81} Lacey, “Unspeakable Subjects, Impossible Rights”, \textit{supra} note 23; Victor Tadros, “Rape Without Consent” (2006) 26:3 Oxf J Leg Stud 515 at 538; Roberts, “Rape, Violence, and Women’s Autonomy Symposium”, \textit{supra} note 23 at 361; for a particularly powerful critique of Dripps, see West, “Legitimating the Illegitimate”, \textit{supra} note 55.


\textsuperscript{85} Lacey, “Unspeakable Subjects, Impossible Rights”, \textit{supra} note 23 at 112.
the penetration itself.”\textsuperscript{86} At a purely descriptive level, people do not experience sex as a commodity, or as something that can be “‘taken’ quickly, cleanly or painlessly.”\textsuperscript{87} In fact, West characterises rape as sui generis: “[i]t is not accurately captured by any analogy, no matter how clever or elaborate.”\textsuperscript{88} Such criticisms of the failure of commodity theories to describe the experience of the rape survivor are examples of Adrian Howe’s point, discussed in chapter 6,\textsuperscript{89} that the law is historically better structured to recognise harms that are socially coded as “non-gendered” or male, like assault, or like property offences, than gendered harms that are predominantly experienced by women, such as rape.

Modern commodity theories of rape, or related theories that overtly analogise rape to theft, are admittedly minority positions.\textsuperscript{90} But they do exist and are in conversation with other newer conceptions of rape. Furthermore, Phillips argues that commodity theories of rape are “not so dissimilar” to the more frequently held view of rape as “the illicit appropriation of a woman’s sexuality” or a violation of bodily integrity.\textsuperscript{91} This language of bodily integrity appears again in the next set of theories, discussed in chapter 12. That is, modern liberal conceptions of rape share some roots and conceptual commitments with property-based conceptions of rape. An important distinction is of course that the modern theories regard the property in a woman’s body and sexuality as belonging to the woman herself, rather than to her husband or father. But as I will argue in the next section, some of the echoes of property theories of rape still heard today are rooted in notions of male property in, or entitlement to, women’s sexed bodies.

11.5 Other Modern Echoes of Property Theory: Marital Rape

The historical and contemporary treatment of rape within marriage is another place in which we hear the echoes of rape’s history as an offence against male property. For most of its history in

\textsuperscript{86} West, “Legitimating the Illegitimate”, supra note 55 at 1448; Linda Fairstein in Dripps et al, “Men, Women and Rape Women and the Law”, supra note 35 at 147; Phillips, Our Bodies, Whose Property?, supra note 37 at 48; but see, Donald Dripps, “More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West” (1993) 93 Colum L Rev 1460 at 1461.

\textsuperscript{87} West, “Legitimating the Illegitimate”, supra note 55 at 1448–49; Linda Fairstein in Dripps et al, “Men, Women and Rape Women and the Law”, supra note 35 at 159; but see, Dripps, “More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault”, supra note 86 at 1462–63.

\textsuperscript{88} West, “Legitimating the Illegitimate”, supra note 55 at 1449.

\textsuperscript{89} See discussion at Chapter 6, section 6.3.

\textsuperscript{90} Phillips, Our Bodies, Whose Property?, supra note 37 at 45.

\textsuperscript{91} \textit{Ibid}. 

312
Anglo-American law, the crime of rape was defined as the forceful non-consensual sex with a person not the defendant’s wife. “Spousal rape” was an oxymoron because by definition a man could not rape his wife. John Stuart Mill had the spousal exemption in mind when he characterised the position of women in England in the 1800s as one of slavery, subject to their husbands:

The vilest malefactor has some wretched woman tied to him, against whom he can commit any atrocity except killing her, and, if tolerably cautious, he can do that without much danger of the legal penalty.

Commentators have suggested several possible theoretical rationales for the historical treatment of spousal rape as a legal impossibility. One is that women’s bodies, and sexual access to women’s bodies, were understood as male property. That is, a husband who had sex with his wife against her will did not rape her, but rather “merely ma[de] use of his own property.” Lord Matthew Hale is often quoted on this point, and also in support of a related second theory, according to which a man cannot rape his wife because under the marriage contract she implicitly has consented to all sexual intercourse within the marriage:


95 Russell, Rape in Marriage, supra note 1240 at 17.


99 Lalenyia Siegel calls this the “implied consent and contract theory”: Siegel, “The Marital Rape Exemption”, supra note 93 at 354–56; also see Burgess-Jackson, “Wife Rape”, supra note 93 at 4.

the husband cannot be guilty of a rape committed by himself, upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.\textsuperscript{101}

Christine Boyle has written that the spousal immunity rule was an area in which legislators’ “identification with the rapist was extremely strong, as was the fear of false accusations out of spite or ill-will.”\textsuperscript{102} In cases of marital rape, unlike the rape of unmarried virgins,\textsuperscript{103} there was no aggrieved father figure who felt victimised by the rape of a daughter\textsuperscript{104} – the only victim was the woman herself and her interest in not being raped was in direct opposition to her those of her husband, whose opposing interest was demonstrated by the fact that he had raped her.\textsuperscript{105}

The idea that a historical conception of women as the property of their husbands was the initial rationale for the marital rape exemption may seem to be a historical oddity that has no direct relevance to today’s laws and ideas about sexual violence. However, the exemption is no mere historical footnote. In the jurisdictions that are the focus of this thesis, the marital rape exemption began to be dismantled in the jurisdictions only as recently as the mid 1970s, with the bulk of the repeals taking place during the 1980s.\textsuperscript{106} The immunity was repealed in Canada in 1983,\textsuperscript{107} New Zealand, in 1985,\textsuperscript{108} Scotland in 1989,\textsuperscript{109} Republic of Ireland in 1990,\textsuperscript{110} England

\textsuperscript{101} Also see, Abigail A Tierney, “Spousal Sexual Assault, Pennsylvania’s Place on the Sliding Scale of Protection from Marital Rape” (1986) 90 Dickinson L Rev 777 at 781.

\textsuperscript{102} Boyle, Sexual Assault, supra note 10 at 8.


\textsuperscript{104} Boyle, Sexual Assault, supra note 10 at 8.


\textsuperscript{107} Boyle, Sexual Assault, supra note 10 at 8; Ronald Hinch, “Canada’s New Sexual Assault Laws: A Step Forward for Women?” (1985) 9:1 Crime Law Soc Change 33 at 34–35.


\textsuperscript{109} Law Commission, Rape Within Marriage, supra note 92.

and Wales in 1991, and in various Australian states and territories from the late 1970s until 1991, and in the United States, between 1974 and 1993. Notions of women’s bodies as male property were confrontingly evident during early national debates around the possible repeal of spousal exemptions. For instance, Eric Berkowitz quotes a United States commentator in the 1970s as saying “a husband forcing sex on his wife was merely making use of his own property.” In 1989, California state senator Bob Wilson said to a group of female lobbyists for repeal of the spousal immunity, “If you can’t rape your wife, who can you rape?”

By 2015, at least 52 countries had explicitly outlawed marital rape in their criminal codes. However, myths and stereotypes that rape occurring within marriage either is not real rape at all, or if it is rape is a comparatively much less serious type of rape, continue to have purchase today. A 2016 study indicates that police are more likely to charge instances of intimate partner violence that are physical assault or aggravated assault than instances of intimate

111 Ibid, at 152.
115 Ibid; Freeman, “But If You Can’t Rape Your Wife, Who[m] Can You Rape?”, supra note 100; Senator Jeremiah Denton, a Democrat from Alabama is quoted as complaining to Congress while trying to prevent marital rape from being affirmed as a crime, “Dammit, when you get married, you’ve got to expect a little sex”: Mary Kay Kirkwood and Dawn K Cecil, “Marital Rape: A Student Assessment of Rape Laws and the Marital Exemption” (2001) 7:11 Violence Against Women 1235 at 1243.
partner sexual assault.\textsuperscript{118} Research also indicates that people tend to think that the emotional and psychological impact of unwanted sex with someone the victim has previously been willingly intimate with is less severe than unwanted sex with a stranger or with someone with whom there has been no previous sexual contact.\textsuperscript{119} As mentioned in section 11.4,\textsuperscript{120} psychological research counters these assumptions.\textsuperscript{121}

If one interrogates the myth that rape by a husband is less serious than rape by a stranger, it seems linked with notions of a husband’s entitlement to his wife’s sexualised body either as a kind of property right, or through a notion that his wife by marrying him has implicitly consented to sex on an ongoing basis as a “wifely duty.” Even for those who consider the notion of implicit ongoing \textit{contractual} consent to sex as a result of a marriage to be old-fashioned and regressive may nonetheless retain a vestigial intuition that the “sexual precedence”\textsuperscript{122} established in an intimate relationship makes questions of consent more ambiguous, and heightens risks of sexual miscommunication.\textsuperscript{123} A 2013 study found that in mock trials of an accused who had previously had an intimate relationship with the complainant, mock jurors found it more difficult to reach a

\begin{footnotes}
\item[120] See section 11.4, at note 73 and associated text.
\item[121] Campbell, Dworkin, and Cabral, “An Ecological Model of the Impact of Sexual Assault On Women’s Mental Health”, \textit{supra} note 66 at 232; Temple et al, “Differing Effects of Partner and Nonpartner Sexual Assault on Women’s Mental Health”, \textit{supra} note 73; Culbertson and Dehle, “Impact of Sexual Assault as a Function of Perpetrator Type”, \textit{supra} note 73; Ullman et al, “The Role of Victim-Offender Relationship”, \textit{supra} note 73.
\item[123] See, Ellison and Munro, “Stranger in the Bushes?”, \textit{supra} note 71 at 310–12.
\end{footnotes}
guilty verdict because they found issues of consent, questions or a reasonable but mistaken belief in consent more ambiguous and “delicate” than they would have in respect of an alleged rape by a violent stranger.

11.6 Other Modern Echoes of Property Theory: Hierarchies of Victims

A further echo of historical property theories still reverberates today. As discussed in section 11.3, in rape’s early days as an offence against property, prosecution depended on the status of the raped woman, and the value of her chastity and honour to her male family members. Although rape and sexual assault has long been a public criminal matter, prosecuted by the state rather than individual families, it is still the case that in practice, certain kinds of victims attract greater attention and concern from police and prosecutors than others. The criminal justice system is often accused of responding more readily and reliably to victims of sexual violence who are “white, middle-class, and reasonably chaste.” The less “respectable” the victim of a rape is, and the further she is from the picture of an “ideal victim,” the more likely are police and juries to: disbelieve that the victim was raped; believe she was responsible for her victimisation; or believe that she was harmed less by her victimisation than a more “ideal” victim would have been. For example, sex workers are particularly vulnerable to sexual victimisation, and sexual assaults of sex workers involve higher than average amounts of additional violence. Despite this, rape myths about sex workers persist, such as that they cannot be raped, or that when they are raped, they do not suffer much harm. Sex workers who

124 Ellison and Munro, “Devil You Know?” supra note 119 at 310.
125 Ibid.
126 Section 11.3 at notes 43 – 46 and associated text.
127 MacFarlane, “Historical Development of the Offence of Rape”, supra note 5 at 6.
129 Le Grand, “Rape and Rape Laws”, supra note 30 at 938.
report sexual assaults to police are more likely than other survivors to be disbelieved, or not to be prioritised for investigation and prosecution. As a consequence, “those very women who are less likely to be defined as male property are simultaneously the most likely to be victimized by rape in the first place.”

Rapes of racialised women may also be pursued by the state with less vigour than offences against white women. Racist stereotypes, rooted in histories of colonialism, and racist state practices and policies, conceive of racialised women as “licentious” and “sexually loose” and thus “unrapeable.” Racist stereotypes, intersecting with class stereotypes, may also construe racialised women as less valuable than white women, so that their rapes are less harmful or of less concern. Dianne Harman wrote in 1984 that although while black women in the United States were three times as likely to be raped than white women,

---

136 PIVOT Legal Society, Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws (Vancouver, BC, 2004) at 16–17, Vancouver, BC.
137 Miller and Schwartz, “Rape Myths”, supra note 128 at 2.
142 bell hooks, Ain’t I a Woman (London: Pluto Press, 1982) at 54.
144 Roberts, “Rape, Violence, and Women’s Autonomy Symposium”, supra note 23 at 363–64.
rapes of black women were less likely to be prosecuted, because “[t]he rape of poor, black women is not an offense against men of power.”

These hierarchies of rape victims do not rely on a literal understanding of racialised, prostituted or otherwise intersectionally marginalised women as low-value or unowned property. However, such stratification uncomfortably recapitulates patterns from periods in which rape was literally understood as a crime against male property: women who are regarded as sexually available – perhaps even a kind of sexual public property – or of low value are much more likely to be subjected to sexist and racist rape stereotypes, to be regarded as “unrapeable,” to be suspected as liars when they “cry rape” or, if they are believed, to be regarded as not having been seriously harmed by the rape.

11.7 Summary

I began section 11.2 by explaining why it is useful for an overlap analysis of the offence of rape or sexual assault to understand the history of the offence, and the changing theories in terms of which the offence’s central harm have been understood. In the next section, I explained the offence’s early history as, quite literally, an offence against male property in female bodies and sexuality. I ended the section with the supposition that traditional property theories of sexual violence are likely to strike the reader as quaintly interesting, but far removed from modern understandings of sexual violence. In section 11.4, I set out modern “commodity theories” of sexual assault, and sections 11.5 and 11.6 have illustrated ways in which historical conceptions of the central harm of rape as a harm to men’s valuable property in women’s sexualised bodies continue to have resonances today.

The marital rape exemption discussed in section 11.5 has been formally repealed for scarcely a generation in the jurisdictions that are the focus of this thesis, and rape myths persist today about intimate partner rape. These myths suggest both that women are more likely to lie about sexual assault by an intimate partner than about stranger rape, and that when women are sexually assaulted by men with whom there is “sexual precedence,” the harms are less than for

---

149 See section 11.3.
women assaulted by strangers or those with whom they have not previously been intimate. In this section, I have discussed the discriminatory difference in the ways in which victims of sexual assault are treated due to rape myths and stereotypes about who can be raped, who is likely to tell the truth, and who is the most harmed by sexual assault.

As suggested by Christine Boyle and Victoria Nourse at the beginning of this historiography of sexual assault theory, a final way in which property theories continue to have significance and resonance today is simply as the original, conservative theory of rape and sexual violence that more contemporary theories have reacted against. The theories of sexual violence as an offence against property that I have discussed are not directly helpful to an overlap analysis, in the sense that if sexual violence is viewed as an offence against property, it clearly does not overlap with general assault offences and offences of violence. And if it is rare for writers about sexual violence today to suggest it should be subsumed within general assault offences, it is rarer to the point of outright improbability that anyone would suggest that rape or sexual assault should be absorbed within general offences of theft or trespass. Even writers who subscribe to modern commodity theories of sexual violence suggest specific offences or torts of sexual fraud, or sexual theft, rather than going so far as saying sexual assault could be covered just as well by general theft or fraud statutes. Examining property-based conceptions of the harm of rape is still a helpful exercise, partly because it illustrates that – even at a descriptive level – conceptions of harm addressed by a given set of offences reflect prevailing ideologies and are susceptible to change over time.

Section 11.3 explained that early rape offences framed the central harm of sexual violence as a harm to male property interests in women and girls’ sexed bodies. Sections 11.4 to 11.6 gave examples of ways in which the history of the offence of rape continues to have contemporary impacts. Chapter 12 will set out the more recent understandings of the central harms of sexual violence that are more directly relevant to this case study’s overlap analysis: liberal theories of sexual violence, and feminist re-imaginings of these liberal theories. These families of theories arose in reaction to property theories of rape. The time spent in this chapter examining property theories of sexual violence provides crucial context for understanding these theories. These more recent theories of sexual violence react both to the historical conception of

---

150 Section 11.2, at notes 13 to 21 and associated text.
151 For instance, Michael Davis, Martin Schwartz and Todd Clear discussed in chapter 10 at section 10.4.
rape as an offence against male property, and against the echoes of the property theory that still reverberate today.
Chapter 12: Modern Understandings of Sexual Violence: Overlap, Overcriminalisation and Dangers of Circularity

12.1 Introduction

This is the last of three chapters addressing the sexual violence case study. Chapter 11 considered the early history of the offence of rape, and particularly a time when rape was conceptualised as an offence against male property interests rather than as an assault against the person affecting the interests of a female victim. This chapter examines the ways in which more recent theories of rape and sexual assault conceive of the central harms of sexual assault, and how these theories are informed by and react against earlier property theories of rape. The chapter discusses liberal conceptions of sexual assault, which conceptualise sexual assault as an infringement of bodily and sexual autonomy and integrity, and thus as a battery.\(^1\) The chapter adopts feminist criticisms of liberal concepts like autonomy and bodily integrity,\(^2\) arguing that these concepts as construed by liberal theories of sexual violence are inappropriately individualistic, decontextualised and disembodied.\(^3\) Section 12.7 presents feminist re-imaginings of concepts including bodily autonomy, bodily integrity and sexual integrity as relational and contextual interests and argues for these re-imagined concepts as the central harms and wrongs of offences of sexual violence. Section 12.8 considers objections of some commentators that these understandings of the central harms of sexual violence are subjective because they centre the experiences of survivors, and that this subjectivity renders them less than rational and scientifically objective. In section 12.9, I answer such criticisms, drawing upon Drucilla Cornell’s argument that harms to socially constructed interests, such as autonomy and bodily integrity, are nonetheless experientially and socially real.

In section 12.10 I return to the principle of fair labelling. The section assesses whether the interest in labelling harms to embodied and relational interests in bodily and sexual autonomy and integrity caused by sexual assault justify the specific criminalisation of sexual violence separate from the criminalisation of violence more generally. Section 12.11 notes that although the principle of fair labelling is often referred to, but the details of what it means are often left

---

\(^1\) Sections 12.2 – 12.4.
\(^2\) See earlier discussion in chapter 6, at section 6.6.
\(^3\) Section 12.5 and 12.6.
blurry or open textured. The section considers a range of commentators’ characterisation of fair labelling as an exercise in balancing risks of “particularism” against risks of “moral vacuity.” Section 12.12 examines the principle of fair labelling in the context of the descriptive overlap between offences of sexual violence and assault more generally. The section concludes that the interest in labelling and naming the essential harms of sexual assault established in section 12.7 justifies the descriptive overlap, so that the descriptive overlap is not part of the problem of overcriminalisation.

Section 12.13 notes that the fair labelling principle is a flexible concept, and frequently it is possible to make plausible fair labelling arguments for two diametrically opposed propositions. The section concludes by acknowledging that justifications of descriptive overlap based on fair labelling interests will depend on foundational assumptions and arguments about the central or essential harms of a particular offence and the units of behaviour it will describe. A fair labelling justification for overlap is only as persuasive as the normative assumptions and arguments on which it is founded. In this case study, the conclusion that there is a strong labelling interest in marking out the specific harms associated with sexual violence in addition to the harms of violence more generally is supported by the arguments and analysis in section 12.7.

Section 12.14 returns to a theme that has run throughout the body of this dissertation: the importance of holding separate descriptive questions about whether offences describe the same unit of behaviour and normative questions about when descriptive overlap is part of overcriminalisation. This practice is important in order to avoid defining overlap as something that is necessarily problematic. The section discusses the reasons why the sexual violence case study seems at times to risk combining descriptive and normative questions, but explains that by narrowly focusing the descriptive question, this risk can be avoided both in the context of this case study, and more generally.

12.2 Liberal Theories: Rape as Battery and an Infringement of Autonomy

Chapter 6 of this thesis included an overview of liberalism, which provides context for this and the following sections. As was discussed in that chapter, the central values of liberalism are autonomy and freedom of choice, such that individuals may all direct their own lives and decisions, in light of their own goals and values. Keith Burgess-Jackson argues that, seen

---

4 Chapter 6, section 6.6.
through a liberal lens, rape looks less like an offence against property than a battery: an unlawful and intentional application of force to the body of another person without that person’s consent.\(^5\) Joel Feinberg describes the liberal interest in bodily autonomy and self-determination as a clear subset of autonomy interests more generally: that is, “the right to make choices and decisions – what to put into my body, what contacts with my body to permit, where and how to move my body through public space…”\(^6\) Liberalism prioritises the individual interest in autonomy, and understands the harm of sexual violence in relation to that interest.\(^7\) According to this framework, what makes rape morally wrong is analogous to what makes battery wrong: each “as an action … bypasses the victim.” Punching a person in the nose interferes with her right to control who touches her body, and to move her body through the world unmolested. The rapist, like the batterer, disregards the preferences, interests, and choices of the victim, treating her as an object, and a means to his own end in the Kantian sense.\(^8\) Accordingly, liberal conceptions frame rape as an infringement of several key interests:\(^9\) individuals’ rights to autonomy,\(^10\) bodily integrity,\(^11\) and choice.\(^12\)

---


\(^6\) Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) at 54.

\(^7\) Burgess-Jackson, *Rape*, supra note 5 at 50.

\(^8\) Ibid.


Jed Rubenfeld has argued that as we have moved away from historical, conservative understandings of rape as an offence against male property towards liberal understandings of the harms of rape, these changes “have created a conceptual gap.” Rubenfeld asks: if rape is not an offence of defilement, irreparably damaging the property value of female chastity, then what is the special wrong of rape that accounts for “why sexual assault is different from other assaults?” While Rubenfeld does not expressly refer to issues of overlap or overcriminalisation, his question can be reframed in terms of those concepts: under a liberal conception of sexual violence, why should we criminalise sexual assault separately from general assault offences? Why does this re-criminalisation strike many as either justified depth in the criminal law, rather than as forming part of the problem of overcriminalisation?

The next sections tease apart the concepts of bodily autonomy and bodily integrity, and explore the possible differences between these concepts generally, and in the particular context of sexuality. In comparing these concepts, and looking for similarities and differences between interests and the respective harms involved in interfering with the interests via assault or sexual assault, it is important to keep in mind Cornell’s insight that a concept such as bodily integrity is socially constructed, imagined and projected. Questions of whether sexual assault and assault more generally criminalise overlapping harms really means examining the differences and similarities of the harms of the offences as these harms are socially constructed and understood.

12.3 Bodily and Sexual Autonomy and Self-Determination

Autonomy relates to the ability of individuals to make their own choices and to pursue their own ends. Metaphorically, autonomy means steering the ship of one’s own life. Bodily autonomy then relates to the ability of individuals to make choices about how to use and move their bodies throughout the world.

14 Ibid.
Many commentators have answered the question expressed by Rubenfeld about how the central harm of rape differs from the harms of general assault by stating that the central interest protected by prohibitions against sexual violence is the interest in not just autonomy, but sexual autonomy, and not just bodily integrity, but sexually understood bodily integrity. Jeffrey Gauthier defines sexual autonomy as “the capacity of a person to act on the basis of her own sexual desires and interests.” The United States Supreme Court has described sexual autonomy as a person’s “privilege of choosing with whom intimate relationships are to be established.” That is, sexual autonomy relates to the ability to make choices about whether, how, and with whom to use and enjoy one’s body sexually. This understanding of sexual autonomy foregrounds the concept of consent: sexual autonomy is the ability to make one’s own choices about whether to engage in sexual activity or not, and the right to have those choices respected.

Under a liberal conception of sexual violence, sexual assault impinges upon a victim’s sexual autonomy: an aggressor overrides the victim’s ability to make her own sexual choices.

Stephen Schulhofer has argued that while liberal theories frequently regard sexual autonomy as the central interest harmed by sexual assault, they often lack a developed theory of precisely what sexual autonomy is. Mary Childs has critiqued Schulhofer for not explaining why “he wish[es] to specify a principle of specifically sexual autonomy, as distinct from physical


18 Coker v Georgia (1977) 433 US 584, at 597 (plurality opinion).


autonomy generally.” However, Childs agrees that “sexual privacy and autonomy do involve matters which are distinct in kind as well as weight from general matters of bodily autonomy.”

Dorothy Roberts has posed the question “why does sexual autonomy deserve society’s extra protection? What is so special about women’s agreements to engage in sexual intercourse (as opposed to the multitude of other ‘choices’ people make) that warrant the intervention of the criminal law?”

Dan Kahan has argued that rape harms a woman’s autonomy in a way that physical assaults do not. Jeremy Horder likewise regards sexual autonomy as different in kind and weight from bodily autonomy more generally:

The separate existences of the crimes of rape and sexual assault are thus not simply two more examples of the vice of particularism in the law…. For rape and sexual assault are unwarranted invasions of a victim’s sexual autonomy, and sexual autonomy is an autonomy whose intrinsic worth may be valued separately from bodily autonomy.

Definitions of the interest in sexual autonomy often refer to it as relying on other interests, in particular, the interest in bodily integrity. Jane Larson lists bodily integrity as one of three “constituent aspects” of sexual autonomy, along with sexual self-possession and sexual self-governance. She argues that:

Bodily integrity denotes the interest in maintaining secure physical boundaries, and includes a person’s interest in controlling access to her body and sexuality. Sexual self-possession includes a person’s interest in sexual self-expression through acts with partners that satisfy her present desires and purposes. Nonconsensual sex is an act of bodily and sexual dispossession: the aggressor appropriates the victim’s body and sexuality for his own purposes…. [S]exual self-governance … requires both bodily integrity and sexual self-possession for its realization, but it further requires that a person have the power to shape sexual expression in ways that support and advance her personality and life projects.

---

23 Ibid.
In the Supreme Court of Canada case of *Ewanchuk*, Justice Major’s majority judgment identified the purposes of sexual assault law as the protection of physical integrity, understood as a key component of autonomy: 28

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual’s right to physical integrity is a fundamental principle, “every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner”… It follows that any intentional but unwanted touching is criminal.

Thus, bodily or sexual autonomy and bodily integrity are often understood as linked concepts – the interest in bodily autonomy relates to the ability to make one’s own decisions about which interferences with bodily integrity to consent to.

### 12.4 Bodily Integrity and Sexual Integrity

The concept of bodily integrity is not always clearly articulated separately from related concepts of bodily autonomy in the legal context, but at its core seems to connote notions of wholeness, coherence and consistency, and of intact rather than breached physical and symbolic boundaries of the self. Lynn McFall calls integrity “the state of being ‘undivided; an integral whole.’” 29 Martha Nussbaum lists bodily integrity as one of ten core capabilities that should be supported in a democracy, defining it as “[b]eing able to move freely from place to place; being able to be secure against violent assault, including sexual assault … having opportunities for sexual satisfaction and for choice in matters of reproduction”. 30

The concept is discussed in more detail in the field of contemporary bioethics 31 in relation to issues such as amputation, 32 transplantation of organs and other body parts, 33

---

31 Margrit Shildrick, “Some Reflections on the Socio-Cultural and Bioscientific Limits of Bodily Integrity” (2010) 16:3 Body & Society 11; Norman L Cantor, “A Patient’s Decision to Decline Life-
abortion,\textsuperscript{34} and various other surgical interventions,\textsuperscript{35} focusing on whether and when “it is morally desirable to intrude, be it medically, cosmetically or ritually, upon an (intact) body.”\textsuperscript{36} In this bioethical context, Jenny Slatman and Guy Widdershoven understand physical integrity as implying both bodily wholeness, and a notion of inviolability, in the sense of not touching or hurting.\textsuperscript{37} In a different context, when we speak of a person’s ethical character, saying for instance that a public figure has integrity, we invoke the notion that there is coherence and consistency within her set of principles and commitments and actions.\textsuperscript{38} Cheshire Calhoun calls this the “integrated self” picture of integrity.\textsuperscript{39} The idea of physical integrity in the context of the harm of assault and sexual assault invokes an analogous picture of physical coherence and wholeness.\textsuperscript{40}

\textbf{12.5 Liberalism as Individualistic, Decontextualised and Disembodied}

Liberal language and understandings of sexual violence are familiar today. By understanding the central harm of rape as a breach of the victim’s interest in bodily and sexual autonomy, and physical integrity, liberal accounts centre questions of consent: a person exercises her sexual

---


\textsuperscript{34} Christyne L Neff, “Women, Womb, and Bodily Integrity” (1990) 3 Yale JL & Feminism 327 at 327; Ruth A Miller, \textit{The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective} (Routledge, 2016); Cornell, \textit{The Imaginary Domain}, supra note 15.


\textsuperscript{36} Slatman and Widdershoven, “Hand Transplants and Bodily Integrity”, supra note 33 at 70.

\textsuperscript{37} JD Rendtorff and P Kemp, Basic Ethical Principals in European Bioethics and Biolaw, Vol 1: Autonomy, Dignity, Integrity and Vulnerability (Copenhagen: Centre for Ethics and Law, 2000) at 38.

\textsuperscript{38} McFall, “Integrity”, supra note 29 at 7.

\textsuperscript{39} Calhoun, “Standing for Something”, supra note 29 at 240.

autonomy by choosing to consent – or not – to sexual contact. However, in practice the criminal rape law remains at best “uneven” in its “commitment to sexual autonomy.”

Some feminist scholars have criticised liberal understandings of sexual violence as harming interests in autonomy or self-determination on the basis of these concepts being overly “atomized” and “individuated,” theorising the kind of sexual bargaining and agreement that takes place in sexual interactions in an overly abstract, decontextualised way: imagining these negotiations taking place between two individuals with equal power. According to Keith Burgess-Jackson, liberal theories of rape see it as an offence committed against and by non-gendered individuals: it is only “an accident, ontologically speaking, that rape is overwhelmingly a crime of men against women.” Writing in a United States context, Larson has argued that:

Liberalism as a political theory and tradition defends (indeed, celebrates) the freedom of individuals to define their own satisfactions through self-interested choices. Yet … frequently treats the mere presence of a choice as a sufficient moral justification for otherwise unjust, degrading, or exploitive relationships.

At the level of tone and emphasis, Larson’s wording may overstate the point: the presence of choice might not be thought sufficient to morally justify in a positive sense otherwise unjust, degrading, or exploitive relationships. Furthermore, the criminal law places limits on the extent

---

42 See discussion in Chapter 6, section 6.6, of feminist criticisms of liberalism.
45 Munro, “Constructing Consent”, supra note 19 at 925; Monica Burman, “Rethinking Rape Law in Sweden: Coercion, Consent or Non-Voluntariness?”, in Clare McGlynn and Vanessa Munro, eds, Rethinking rape law: international and comparative perspectives (London: Routledge, 2011) 196 at 204.
46 Burgess-Jackson, Rape, supra note 5 at 50.
to which one may consent to bodily harm,\textsuperscript{48} and on the age at which consent may validly be given to certain activities.\textsuperscript{49} Thus, perhaps a more accurate way to word Larson’s criticism is to say that the presence of choice is frequently taken as licensing, in an \textit{amoral} sense, otherwise unjust, degrading or exploitive but legally “consensual” interactions, such that those interactions though perhaps not morally laudable, are matters that are largely inoculated from criminal consequences.

Lise Gotell cites Justice Major’s discussion of autonomy and physical integrity in \textit{Ewanchuk}\textsuperscript{50} as an example of viewing sexual assault through a “decontextualized liberal lens.”\textsuperscript{51} Gotell argues that “liberal legalistic discourses of rape” can have the effect of “re-privatiz[ing], …depoliticiz[ing],… individualiz[ing]” and decontextualising the harms of social violence.\textsuperscript{52} Jeffrey Gauthier defines sexual autonomy as “the capacity of a person to act on the basis of her own sexual desires and interests,” and notes that because the liberal picture of sexual assault assumes that all human beings possess freedom and autonomy, it:\textsuperscript{53}

ignores the fact that the concrete capacity to act responsibly and in one’s self-interest depends critically on having the capacity respected in the institutions and practices of a society…. Where institutional respect for the autonomy of members of a particular class is absent, members of that class will find themselves in a double-bind where the law expects them to act as if they were simply autonomous.

\textsuperscript{51} Gotell, “The Discursive Disappearance of Sexualized Violence”, \textit{supra} note 28 at 145.
\textsuperscript{53} Gauthier, “Consent, Coercion, and Sexual Autonomy”, \textit{supra} note 17 at 73.
Rebecca Johnson has noted the ways in which a rhetoric of choice, and a focus on consent, can be used to bring home to the victim responsibility for the particular consequences of a “choice,” even in circumstances where the choices available to the victim are unpalatable: “If a given situation is the result of a person’s own choosing, it would be inappropriate to intervene: the person suffering made choices – made their own bed so to speak.”

Sherene Razack’s analysis of the trial of Bradley Barton, a white truck driver, for the murder of Cindy Gladue, an Indigenous woman, speaks powerfully to this issue. Razack’s discussion illustrates the ways in which a focus on consent can obscure the wider context and the systemic power relationships within which sexual interactions take place. Razack is critical of the court’s “framework that revolved around ideas of consent and contract in the context of prostitution.” The defence argued that Gladue’s death was the result of consensual “rough sex” that had inadvertently (and unknown to Barton) resulted in the fatal injury. A central issue in the Court’s framing of the case was whether Gladue had consented to the activity that caused an 11 cm wound in her vaginal wall, from which she bled to death. Razack argues that framing the issue as one of consent distracted from questions about the force with which Barton had acted.

The legal focus on consent constructed Gladue and Barton as two autonomous individuals, each rationally bargaining with the other in a commodified sexual market. Legal concepts of consent “responsibilized” Cindy Gladue for her death, which was characterised

56 Johnson, Taxing Choices, supra note 12 at 125.
57 R v Barton, 2015 ABQB 159.
58 Sherene H Razack, “Gendering Disposability” (2016) 28:2 Can J Women Law 285; also see Emma Cuniffe, Gendered Racial Violence: R v Barton and the Death of Cindy Gladue (8 March 2016), Lecture, Centre for Feminist Legal Studies, Peter A Allard School of Law, University of British Columbia.
within the courtroom as stemming from her “choices” to engage in sex work and her (alleged) consent to Barton’s forceful activities.\textsuperscript{61} In adopting this frame, the court overlooked a vast panorama of context including: Gladue’s Indigeneity and Barton’s whiteness; “a history of colonial terror” and “gendered pattern of … attempted annihilation” of Indigenous women’s bodies”\textsuperscript{62}; Gladue’s poverty and addiction issues; and the fact that her blood alcohol level raised real questions about her level of consciousness.\textsuperscript{63} Instead of a liberal emphasis on autonomous bargaining and contract in a sexual market, and focus on narrowly construed questions of consent, Razack proposes a different analytical framework for understanding Cindy Gladue’s death: “a framework of disposability” of Indigenous women.\textsuperscript{64}

As Martha Minow has noted, liberalism’s emphasis on choice, abstracted from the actual circumstances in which “choices” are exercised in practice, may appear “laudable for the respect it seems to accord individuals [but in fact] is too often used to assign responsibility to someone who had little power to choose, or to infer a waiver of right by someone caught in severe constraints.”\textsuperscript{65} Johnson and Minow both argue that the distinction between choice and being forced is not a binary one, but rather, a contextual continuum.\textsuperscript{66}

\textbf{12.6 Bodily Integrity as both Territorial and Disembodied}

Phillips has noted that conceptions of rape as a harm to bodily integrity are often advanced using territorial or property-based language, likening violations of bodily integrity to illicit border or boundary crossings.\textsuperscript{67} An example of these territorial metaphors is Joan McGregor’s description of physical sexuality as a “central zone for our identity.”\textsuperscript{68} Another is Ngaire Naffine’s image of the bounded body of the criminal law and liberal theory as an unpierced “body bag,” its integrity

\begin{footnotes}
\item[61] \textsuperscript{61} Johnson, \textit{Taxing Choices}, supra note 12 at 125.
\item[62] \textsuperscript{62} Razack, “Gendering Disposability”, \textit{supra} note 58 at 291.
\item[63] \textsuperscript{63} \textit{Ibid}, at 304; Hunt and Sayers, “Cindy Gladue Case Sends a Chilling Message to Indigenous Women”, \textit{supra} note 59.
\item[64] \textsuperscript{64} Razack, “Gendering Disposability”, \textit{supra} note 58 at 291.
\item[65] \textsuperscript{65} Minow, “Choices and Constraints”, \textit{supra} note 54 at 2093–94.
\item[66] \textsuperscript{66} Johnson, \textit{Taxing Choices}, \textit{supra} note 12 at 126; referring to Minow, “Choices and Constraints”, \textit{supra} note 54.
\item[68] \textsuperscript{68} McGregor, \textit{Is It Rape?}, \textit{supra} note 20 at 221–22.
\end{footnotes}
assured by the preservation of its boundaries. Phillips cautions that these territorial or property metaphors “threaten … to turn female sexuality into a thing rather than an activity, and can thereby contribute to symbolic objectification.” That is, a woman’s interest in physical and sexual autonomy and integrity can come to be understood as relying on a “shoring up” of women’s physical boundaries against external threats; rape becomes the “invasion of the inner space… and [t]he entire female body comes to be symbolized by the vagina, itself conceived of as a delicate, perhaps inevitably damaged and pained inner space.”

This slippage into the language of territory and property also uncomfortably echoes property and commodity theories of sexual assault of the kind discussed in the previous chapter. While the territorial and possibly objectifying language of physical integrity and autonomy is more restrained than overt commodity theories of sexual assault, Alan Wertheimer suggests that “the distance between the (ugly) property model and the (attractive) autonomy model is not very great.” Phillips argues that a key reason why property and commodity metaphors for sexual assault strike us as “ugly,” and autonomy models may not be so different from them, is that although property and territory are physical, three dimensional concepts, they are not metaphors of flesh, blood or emotion. This means territorial metaphors “sideste[p], expung[e]… poorly underst[an]d,” “bracket .. out” or “imagine away” bodily experience and affectivity.

Lacey criticises as “impoverished” the evaluative framework for the harms of sexual violence offered by liberal notions of autonomy and bodily integrity. She and others have

---


70 Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2, note 30 and associated text.


74 Chapter 11, section 11.3 - 11.4.

75 Wertheimer, “Consent and Sexual Relations”, supra note 20 at 34.

76 Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2, notes 21 and 28 and associated text.
“challenged the way in which the mind-body dualism reflected in the criminal law problematically privileges the mental (typically identified as masculine) over the physical and affective (typically identified as feminine).” Lacey argues that liberal understandings of the harms of sexual violence to interests in autonomy, bodily integrity and consent “are indeed peculiarly mentalist [and] incorporeal,” conveying a “very partial idea of the body” and a “virtual absence of affectivity.” This dualist understanding sees the relationship between mind and body as “an external relationship between two distinct entities, to the point where rape can no longer be recognized as embodied experience.” Naffine suggests this understanding implies that the mind is separate from, and a kind of “property owner” of, the body:

The important thing for self-ownership is that the subject ‘I’ – the person as mind – should retain control of its object body; no one else should exercise this self-possession or self-control. The divided self must operate in this manner if personhood is to be retained.

Viewed in this way, the sexual autonomy interest protected by criminal law doctrine “simply is proprietary autonomy: the choice to exclude another from access to bodily ‘property’.” Understood as sex minus consent, sexual assault becomes a “mind crime” and the body is bracketed out. The objection to these disembodied understandings of the harms of sexual

---

78 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 112.
79 Ibid, at 102.
84 Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2 note 56 and accompanying text.
violence is that they poorly capture the experiences as reported by victims, or our intuitive reflections on what feels so harmful about offences of sexual violence.

12.7 Feminist Re-imaginings of Bodily Autonomy, Bodily Integrity and Sexual Integrity

Feminists have expressed considerable scepticism about whether liberal individualism and traditionally understood liberal principles such as autonomy and bodily integrity can accurately or adequately describe the central harms of sexual violence. For instance, Jennifer Nedelsky labels as pathological the traditional liberal conception of autonomy as “a wall (of rights) between the individual and those around him” according to which “[t]he most perfectly autonomous man is thus the most perfectly isolated.” Lynne Henderson has said she “disagree[s] with theorists who see rape as an invasion of bodily integrity or privacy or personal autonomy. It is those things, too, but it is more.” However, rather than rejecting liberal concepts like autonomy and bodily integrity, writers such as Lacey, Phillips, Nedelsky and Elaine Craig have suggested ways of re-imagining and contextualising these concepts in communitarian rather than individualistic ways, and in ways that reflect the embodied and emotional experience of sexuality, and of sexual violence. Feminist re-imaginings of these concepts adapt traditional liberal concepts of autonomy and integrity in several key ways, which I will distinguish and deal with separately in this section. First, they propose communitarian, rather than individualistic conceptions of autonomy and bodily integrity, and emphasise that these are highly contextual matters. Second, they emphasise that interests in bodily and sexual autonomy and integrity are

85 See discussion in chapter 11, section 11.4, at notes 64 – 91 and associated text, discussing the ways in which commodity theories of sexual violence diverge from the reported experience of survivors of sexual violence.


indeed embodied interests. Third, they emphasise that the positive interest in sexuality, and in bodily and sexual autonomy and integrity, are relational interests. Although I treat these three ways in which feminist theorists re-draw the traditional liberal theories as somewhat separate propositions, the three dimensions are also connected in ways I will highlight.

Here, I will begin with the first dimension of difference between feminist re-imaginings of concepts of bodily autonomy and integrity and the traditional liberal concepts. Section 12.5 of this chapter described feminist criticisms of traditional liberal understandings of autonomy as being individualised, decontextualised, and depoliticised. With respect to sexual violence, liberal conceptions of bodily and sexual autonomy emphasise individual choice and consent to engage in sexual contact, without paying sufficient notice to the social context in which the sexual contact takes place. Such feminist critiques emphasise that the distinction between choice and being forced is not a binary one, but rather, a contextual continuum. That is, not having been expressly forced to do something does not mean that a person’s constrained “choice” to do that thing exemplifies a socially valuable expression of her autonomy.

On the basis of these critiques, some feminist theorists have argued for communitarian and contextualised understandings of autonomy. They have emphasised that the location of any particular “choice” on the autonomy continuum is a highly contextual matter. Rather than an abstracted “rhetoric of choice” that assumes atomised individuals who are similarly positioned to act in their individual best interests, and “responsibleizes” them for the consequences of such “choices,” feminist theorists have argued that the exercise (or infringement) of autonomy is intensely affected by matters of social, political, economic, religious, racial, and cultural context. By re-inserting this kind of context into concepts of sexual and bodily autonomy, the concepts can better capture the wrong done to victim’s autonomy by sexual violence.

---

92 See section 12.5 above.
93 See section 12.5 above, at notes 50 - 66 and associated text.
94 Johnson, Taxing Choices, supra note 12 at 126; referring to Minow, “Choices and Constraints”, supra note 54.
95 Also see, Minow, “Choices and Constraints”, supra note 54 at 2094.
Next, I turn to the second dimension of difference between feminist re-imaginings of concepts of bodily autonomy and integrity and the traditional liberal concepts. Section 12.6 of this chapter discussed feminist criticisms of liberal understandings of bodily and sexual integrity and autonomy as relying on territorial or proprietary metaphors – such as unauthorised border crossings – while also understanding the harms of sexual violence in peculiarly and mistakenly proprietary yet disembodied ways. Phillips argues that traditional liberal understandings of autonomy and integrity “bracket out the body.” Lacey argues that traditional liberal understandings constitute a kind of mind-body dualism, understanding sexual violence as harming mental, disembodied, and unemotional interests in bodily autonomy and integrity. In light of these critiques, feminist theorists such as Lacey, Phillips, Naffine and Nedelsky have argued for re-interpretations of liberal concepts of bodily and sexual integrity and autonomy as embodied, rather than unduly abstracted, interests. They emphasise that sexual violence is experienced by victims not as an abstract or disembodied infringement of their interests, but as an intensely embodied experience that causes physical, emotional and psychological harm. It is a violence done to a victim’s body, to her emotions and to her sense of self. An offender who enacts sexual violence upon another person viscerally reminds his victim that she is an embodied being.

Thirdly, Lacey and others have argued that traditional liberal and legal understandings of the wrong of rape fail to account for its obverse: the positive value of sexuality. Lacey argues that the liberal notion of autonomy “assumes rather than explicates what is valuable about sexuality itself.”97 As a supplement to the communitarian, contextualised and embodied feminist re-imaginings of autonomy and integrity, Lacey proposes a positive account of the value of sexuality. Through this positive account, it is possible to understand the special nature of the interest in sexual autonomy and sexual integrity, and the harms done to these interests by sexual violence. Lacey, drawing on Cornell, argues that the interest in sexuality is a crucial dimension of human experience, and human flourishing.

Craig proposes a relational account of integrity similar to Lacey’s, but she terms it “sexual integrity” rather than bodily integrity.98 Like Lacey she sees her account as an alternative to the mind-body dualism of liberal notions of autonomy and bodily integrity, emphasising

97 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 104-05.
98 Craig, Troubling Sex, supra note 77 at 74.
“embodied experience,” the emotions and the psyche:99 “integrity ought to include elements of body, mind, and heart, and that there is a relational aspect to each of these elements.”100 Craig stresses that an interest in sexual integrity should not be understood merely as the negative “freedom from” bodily interference, but also the positive “‘conditions for’ sexual fulfilment, sexual diversity, the safety necessary for sexual exploration, and sexual benefit… for example, the conditions necessary to create the capacity for developing a sense of sexual self, sexual self-esteem, the opportunity for sexual exploration, and beneficial sexual interactions.”101

Nedelsky re-imagines autonomy as relational rather than individualistic: “what actually enables people to be autonomous is not isolation, but relationships – with parents, teachers, friends, loved ones – that provide the support and guidance necessary for the development and experience of autonomy.”102 Rape thus threatens the victim’s interest in autonomy, relationally understood, because the experience of rape is the “shattering of the self-in-connection.”103 Susan Brison emphasises the need for the victim of sexual assault to reconnect with humanity.104 Phillips uses this relational sense of autonomy to explain the difference between the harm caused by a sexual assault and non-sexual assaults:105

As violations of bodily territory, being raped and being knifed look very similar. But there is nothing about being knifed that makes you even an unwilling participant; it does not simulate something in which you would normally play an active part; it does not force you, against your will, to be part of what someone else is doing. The violation in rape is relational as much as territorial.

Lacey suggests that part of the criminal law’s inadequacy in construing the wrong of rape flows from its “impoverished conception of the value of sexuality.”106 Liberal understandings of the value of sex are based on interests in autonomy, privacy and bodily integrity, but

100 Craig, Troubling Sex, supra note 77 at 73.
101 Ibid, at 72.
104 Brison, Aftermath, supra note 86; Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2 note 37 and accompanying text.
105 Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2, note 37 and associated text (emphasis added).
“conspicuously missing is any sense of why sexuality matters to human beings in the first place…. The idea of autonomy is one which … assumes rather than explicates what is valuable about sexuality itself.”107 Lacey draws on Drucilla Cornell’s concept of the “imaginary domain,” meaning the psychic and political space and freedom to “pursue [one’s] life project of becoming a person.”108 In a similar vein, Archard emphasises that our status as sexed and embodied beings is a crucial aspect of human experience and the pursuit of human flourishing.109

Among the reasons Lacey lists for sexuality’s positive value and importance in people’s lives are “[i]deas of self-expression, connection, intimacy [and] relationship.”110 The harms of sexual violence then are the interference with those positive values and interests, as well as harms of “violation of trust, infliction of shame and humiliation, objectification and exploitation.”111 Lacey suggests a move from conceptualising the rape as threatening an interest in a traditional liberal conception of autonomy, towards a relational, embodied notion of bodily integrity: “the real damage of rape might be expressed more fully [within the language of bodily integrity], recognizing the way in which rape violates its victims’ capacity to integrate psychic and bodily experiences.”112 Deborah Tuerkheimer, drawing on the work of Kathryn Abrams, suggests a conceptual move from liberal understandings of autonomy to the notion of sexual agency.113 Like Lacey, Tuerkheimer emphasises the positive value of sexuality.114 Part of that value is that sexuality is implicated both in self-definition and self-direction.115 Framing the value of sexuality as closely linked to one’s ability to engage in self-definition and self-direction,

107 Ibid, at 104-05.
112 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 118; Lacey draws on Drucilla Cornell’s notion of the “imaginary domain,” which generates the psychic space in which each of us can imagine ourselves as whole persons: The Imaginary Domain: Abortion, Pornography & Sexual Harassment (Routledge, 1995); also see discussion in Craig, Troubling Sex, supra note 77 at 73.
114 Ibid.
and to integrate psychic and bodily experiences is consistent with feminist writers and sexual assault survivors who liken the experience of sexual assault to “murder of the spirit.”

These relational understandings of the positive interests in sexuality, and re-imaginings of sexual autonomy and sexual integrity as relational, embodied and contextualised interests, suggest that sexual violence involves sets of harms that are different from those inflicted by general forms of assault. These positive understandings of what is valuable about sexuality and sexual integrity and autonomy help to account for what is particularly harmful about damaging those interests, while also mapping onto the traumas of sexual violence described by survivors.

In this dissertation, I follow Cornell, Phillips, Lacey, Nedelsky and others in conceptualising the central harm of sexual violence as an embodied, emotional and relational harm. Sexuality is a central dimension of human identity. Sexual autonomy and sexual integrity are important interests not in and of themselves, but precisely because they provide the metaphorical space for this dimension of human identity to be explored – or not explored. The harm of sexual violence is that it disrupts this zone of human identity, and in so doing, harms the victim’s ability to experience “self-expression, connection, intimacy [and] relationship.” In reaching this view, my perspective has been influenced by survivor perspectives and accounts of experiences of sexual violence and its aftermath. I have not carried out empirical research as part of this dissertation, so when I speak of survivor accounts, I am referring to empirical studies of survivor experiences, and survivors’ written accounts of their experiences.

Of course, survivors are individuals, not an undifferentiated group with uniform characteristics, and survivors report a broad range of distinct experiences. However, trends and themes that emerge from survivor accounts, including that survivors describe the trauma of sexual assault and its aftermath as different from those associated with non-sexual violence.

---


117 Abrams, “From Autonomy to Agency”, supra note 113 at 805; Burman, “Rethinking Rape Law in Sweden: Coercion, Consent or Non-Voluntariness?”, supra note 45 at 204.

118 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 106.


Theorists and survivors of sexual violence describe the experience of sexual assault as a form of “spirit murder.” Lacey writes that the trauma of sexual violence interferes with victims’ capacity to integrate psychic and bodily experiences. Shane Muldoon and co-authors’ study of sexual assault victim police interviews found that most survivors’ narratives demonstrated an overarching theme that the researchers termed “identity shock,” which negatively affected survivors’ social relationships and identities in a range of interconnected ways. Jo Clarke describes the process of “identity renegotiation” which many survivors experience even years after sexual victimisation.

Other studies indicate that survivors of sexual violence frequently describe feeling shame or self-blame for their victimisation, and in many cases experience ongoing psychological trauma following sexual victimisation. Survivors of sexual violence demonstrate higher rates of post-traumatic stress disorder symptoms than other groups of trauma survivors, including survivors of non-sexual assaults and robbery. These studies demonstrate that the harms

---

122 Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 118; Lacey draws on Drucilla Cornell’s notion of the “imaginary domain,” which generates the psychic space in which each of us can imagine ourselves as whole persons: The Imaginary Domain, supra note 112; also see discussion in Craig, Troubling Sex, supra note 77 at 73.
associated with sexual violence are embodied and relational, and may be longstanding; it causes real, life-altering harms to victims. For this reason, I understand the central harm of sexual violence to be the negation of the positive human interest in sexuality. It is also instrumentally an infringement of contextualised, embodied interests in sexual and bodily autonomy and integrity. The value of these interests is instrumental: the human interests in sexual self-determination, self-direction and self-possession derive their substance from the positive interest in sexuality, as a central domain of identity and the opportunity for human flourishing. Feminist re-interpretations of traditional liberal concepts of bodily autonomy and integrity refocused to account for victims’ emotional and physical experience of sexual violence, coupled with the relational understanding of the central positive interest in sexuality, provide the theoretical lens through which I understand the central harms of sexual violence within this dissertation.

### 12.8 Considering Concerns about Subjectivity

Some commentators who do not subscribe to feminist re-imaginings of traditional liberal concepts have argued that attending to the personal narratives of victims can tell us relatively little in philosophical terms about the essential nature of the wrong done to them.\(^{128}\) Gardner and Stephen Shute’s article examining the central “wrongness” of rape, as distinct from the wrongness of interpersonal violence more generally,\(^{129}\) critiques the “assumed centrality of the experience of rape to an understanding of what makes rape wrong.”\(^{130}\) They note, and Tadros and David Archard each agree on this point, that the question of whether an event was experienced as a violation is logically distinct from the question of whether it was a violation.\(^{131}\)

Gardner and Shute agree with the common intuition that rape is “worse” than general assault offences, but suggest this worseness is frequently simply assumed or stipulated, rather

---


\(^{130}\) Gardner and Shute, “The Wrongness of Rape”, *supra* note 128 at 3.

than explained and justified.\textsuperscript{132} They argue that the concept of consent cannot account for the distinct wrongfulness of rape, because other offences of interpersonal violence as well as offences such as theft and vandalism could also be defined in terms of absence of consent.\textsuperscript{133} Next, they argue that the wrongfulness of rape cannot stem wholly from its harmfulness,\textsuperscript{134} and state that: “focusing on the [physical and psychological] harms [of rape] tends to occlude the wrongfulness of the act itself.”\textsuperscript{135}

Gardner and Shute’s rationale for the proposition that wrongfulness of rape cannot stem wholly from its harmfulness is that even hypothetical cases of what they call “utterly harmless” instances of rape are clearly still wrongful.\textsuperscript{136} They illustrate this claim with a thought experiment involving an atypical but “pure” case of “utterly harmless rape.”\textsuperscript{137} The thought experiment involves a victim who was raped while she was “drugged or drunk to the point of unconsciousness,” so that she did not consciously experience the rape as it happened. In the hypothetical, the rapist wore a condom, so she was not exposed to risk of sexually transmitted infections or pregnancy. Furthermore, the assault did not cause any physiological injury to her body, so no physical symptoms or sensations later alerted her that anything happened to her while she was unconscious.\textsuperscript{138} The victim in the hypothetical remains forever unaware of, and thus psychologically and physically “unharmed” by, the wrong that was done to her.

According to Gardner and Shute, in such a hypothetical “we have a victim of rape whose life is not changed for the worse, or at all, by the rape. She does not … ‘feel violated.’ She has no feelings about the incident, since she knows nothing of it.”\textsuperscript{139} They further insulate the hypothetical by stipulating that no one else knows of the rape, and the rapist is killed in an unrelated chance accident shortly after the assault.\textsuperscript{140} Thus, though something wrongful has been done to the victim, she has not been harmed. Archard offers a refinement to Gardner and Shute’s

\textsuperscript{133} Ibid, at 5.
\textsuperscript{134} Also see Daniel Statman, “Gardner on the Wrongness of Rape” (2012) 4 Jrslm Rev Legal Stud 105 at 105.
\textsuperscript{135} Gardner and Shute, “The Wrongness of Rape”, supra note 128 at 5.
\textsuperscript{136} Ibid, at 4–8.
\textsuperscript{137} Ibid, at 6–7.
\textsuperscript{138} Ibid, at 5.
\textsuperscript{139} Ibid; quoting Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge, MA: Harvard University Press, 1987) at 166.
\textsuperscript{140} Gardner and Shute, “The Wrongness of Rape”, supra note 128 at 5.
discussion of the thought experiment, distinguishing the notion of “harm” from that of “hurt.” The unconscious victim who never becomes aware of her victimisation may not have experienced hurt, in the sense of physical or psychological pain, but she has suffered a harm, in Joel Feinberg’s sense of a setback to her interests; namely, her interests in bodily and sexual integrity and autonomy.141

Gardner and Shute argue that though atypical, their thought experiment scenario, far from being a borderline case, is instead a philosophically “pure case, entirely stripped of distracting epiphenomena” such as physical and psychological harm.142 The rape of an unconscious victim who never learns she was raped is still a rape. The victim is violated, even though she does not consciously experience it as a violation. As such, a theory of the essential wrongfulness and harmfulness of sexual assault should be able to explain why this “pure” case of “utterly harmless rape” – or in Archard’s terms, “hurtless” rape – is nonetheless wrongful.143

Gardner and Shute state that their account is motivated by a desire to avoid doubly victimising survivors of sexual violence.144 They argue that regarding affective, emotional and psychological experiences of sexual violence as the central harms of sexual violence risks stigmatising survivors and casting them as being harmed by their (irrational) reactions to sexual assault rather than by the assault itself.145 They argue that such a framing adds “insult to injury”.146 Gardner and Shute’s argument is as follows. The psychological harms a victim of sexual assault experiences “depend… on the victim’s evaluations of what has been done to her.”147 They caution that defining the essential or central harm of rape as an “evaluation-dependent harm” risks framing the essential harm as “reflecting the victim’s own irrationality, superstition, oversensitivity …[or as] manifestations of her weakness.”148

141 Archard, “The Wrong of Rape”, supra note 83 at 378–79; citing Feinberg, Harm to Others, supra note 129 at chap 1.
145 Ibid., at 6–7.
146 Ibid., at 8.
147 Ibid., at 6.
148 Ibid.
Daniel Statman writes that Gardner and Shute’s line of argument is based on:

a general philosophical view concerning the normative status of emotional reactions, according to which emotional pain cannot by itself ground normative claims unless it is based on good reason, in which case it is this reason that does the justificatory work, not the emotional pain.

To avoid the consequence of framing psychological traumas of rape as “irrational reactions on the victims’ part,” Garner and Shute set out to:

explain what it is about the act of rape that gave the victim a reason to react this way. If nothing was wrong with being raped apart from the fact that one reacted badly afterwards, then one had no reason to react badly afterwards.

For Gardner and Shute, in order to understand victims’ reactions to trauma as “rational, those reactions] must be epiphenomenal, in the sense that they cannot constitute, but must shadow, the basic, or essential, wrongness of rape.” They locate the central wrongfulness of rape not in the victim’s experience of rape but instead, in Kantian terms, in the offender’s “sheer use” of the victim, objectifying and dehumanising her.

In one sense, Gardner and Shute do not necessarily reject relational understandings of the emotional and psychological harms of sexual violence discussed in the previous section. Gardner and Shute acknowledge that rape frequently causes victims life-changing emotional harm, writing that survivors of sexual violence “may be traumatised, lose [their] trust in men, be deprived of [their] own security, suffer from a reduction in [their] self-esteem, feel humiliated and/or dirty.” There is a clear relational dimension to these listed harmed interests. For instance, the undermining of one’s ability to trust others echoes Nedelsky’s description of rape as the “shattering of the self in connection.” Gardner and Shute also regard these kinds of reactions as generally (that is “[b]arring exceptional pathological cases”) not irrational or “mere

---

149 Statman, “Gardner on the Wrongness of Rape”, supra note 134 at 106.
151 Ibid, at 7.
153 Section 12.7.
156 Nedelsky, “Violence against Women: Challenges to the Liberal State and Relational Feminism”, supra note 103 at 475.
manifestations of a victim’s weakness.” However, the double negative of their framing is telling. It may not be irrational to experience sexual violence as an emotional and psychological trauma, but they emphasise that “our interest [is] in finding what else it is about rape that makes for such trauma.” However, Gardner and Shute understand victims’ experiences of the harms of rape, including harms to relational interests in connection and sexuality, as epiphenomenal to what they consider to be rape’s essential wrongness: the offender’s sheer use of the victim.

Gardner and Shute’s project of thinking philosophically about the wrongness of rape and sexual assault is an important one – indeed, it is one of my key projects of this second case study. However, I disagree with Gardner and Shute’s contention that centring survivor experiences of sexual violence in understandings of what makes sexual violence wrong is a “questionable philosophical assumption” or, in even stronger terms, an “anti-philosophical line of thought.” Commentators have responded critically to Gardner and Shute’s argument on a number of grounds. Two commentators who have directly challenged Gardner and Shute’s view that emotional reactions are insufficient to ground normative claims about the wrongfulness of criminal offending are Statman and Bob Watt.

Statman, quoted above, notes that Gardner and Shute approach the question of what constitutes the central wrong of rape from the starting assumption that emotional pain, in order to count as “rational” must be supported by “good reason[s],” and that “[i]f no good reason can be provided, then the emotional pain is irrational, and irrational emotions cannot serve as bases for

---

159 Also see Archard, “The Wrong of Rape”, supra note 83 at 380.
163 Statman, “Gardner on the Wrongness of Rape”, supra note 134; Watt, “The Story of Rape”, supra note 162 (Watt spells his first name with a lower case “b”).
164 Supra note 149 and accompanying text.
arguments to impose moral or legal constraints on others.” Statman is unconvinced by what he calls “the old stoic line against the rationality of emotions in general, and of humiliation in particular.” Statman concludes that psychological harm caused by sexual violence can indeed constitute an independent basis for its wrongfulness, rather than needing to be justified by another argument.

Watt’s critique is even more strongly worded. He calls Gardner and Shute’s approach “fundamentally or radically wrong” and attacks their argument not “from the ‘inside’ – by attempting to demonstrate some logical flaw in [their] argument – but by attacking [their] worldview” and inviting them to make a “paradigm shift.” Watt argues that Gardner and Shute’s picture of “sheer use” cannot adequately account for what is different about sexual violence as compared to interpersonal violence more generally. It is possible to “use” another person’s body in various ways that do not involve sex. For instance, John Stanton-Ife gives the example of a person, fleeing from police, who comes to a park wall that he needs to jump over in order to escape. He steps onto a park bench, and then onto the shoulder of a woman sitting on the bench in order to scramble over the fence. He has used the woman, just as he has used the bench, as mere means to his ends. He has wronged the woman, but the wrong he has done to her is much less severe than that of sexual assault. On this basis, Stanton-Ife argues “there is, in short, nothing about the notion of sheer use that implies it must be very serious.”

Watt is deeply critical of Gardner and Shute’s view of emotions as epiphenomenal, overlaying more philosophically fundamental and “rational” central wrongs of sexual violence. Watt calls this theoretical picture disconnected from “reality as perceived in our everyday lives by most, or all, of us.” Watt argues that rather Gardner and Shute’s approach of seeking to

---

165 Statman, “Gardner on the Wrongness of Rape”, supra note 134 at 106.
166 Ibid.
168 Indeed, Gardner refers to Watt’s critique of the Gardner and Shute article as “bracing”: Gardner, “Reasonable Reactions to the Wrongness of Rape”, supra note 158 at 3.
170 Watt, “The Story of Rape”, supra note 162 at 47.
171 Ibid; Statman, “Gardner on the Wrongness of Rape”, supra note 134.
173 Ibid (emphasis in original); also see: Watt, “The Story of Rape”, supra note 162 at 47; Statman, “Gardner on the Wrongness of Rape”, supra note 134 at 109.
explain the wrong of rape without reference to emotion is wrong. Instead, he favours a different paradigm: “[t]he explanation [of the wrongfulness of sexual violence] needs to start from a different position by explicitly including emotion in the explanation.”

The philosophical “style of argument” of the kind that Gardner and Shute employ tends to present itself as dispassionate, logical, or even neutral and thus as “rational” and theoretically robust. Watt’s analysis usefully draws attention to the fact such a style of argument is not neutral, but rather is situated within a particular paradigm, and premised on a set of assumptions about the world and how to reason about it. Those assumptions can be questioned. In Phillips’ terms, the style of philosophical argument that Gardner and Shute argue for also “encourages us to bracket the body out” and “imagine away the sexed body.”

Gardner and Shute painstakingly construct their thought experiment hypothetical to be – according to their understanding of these terms – as conceptually and philosophically “pure” as possible: the imagined sexual assault is “insulat[ed]”, and stripped of all contingent and “epiphenomenal” details, like injury, pain, distress and trauma. The victim in this “pure case” is forever-unaware, and “utterly unharmed” or “unhurt.” It is difficult to imagine a clearer demonstration of “rational” philosophical analysis “sidestepp[ing], expung[ing]… poorly underst[an]d[ing],” “bracket[ing] .. out” or “imagin[ing] away” bodily experience, affectivity, emotion and indeed subjectivity of any kind. Not only do Gardner and Shute “bracket out the body,” they stipulate that by definition, what counts as “good philosophy” in determining the essential wrong of rape is to treat the matter as “a purely philosophical puzzle,” and to imagine away the conscious, embodied woman who experiences and is harmed by rape, replacing her with an unconscious, insensate body, and a mind that even upon regaining consciousness will remain permanently oblivious to the fact of the assault.

175 Ibid, at 47.
179 Archard, “The Wrong of Rape”, supra note 83 at 379.
180 Phillips, Our Bodies, Whose Property?, supra note 11 at chap 2, notes 21 and 28 and associated text; Lacey, “Unspeakable Subjects, Impossible Rights”, supra note 10 at 102; Craig, Troubling Sex, supra note 77 at 73; Priaulx, “Beyond Stork Delivery”, supra note 77 at 109 and 129.
Tadros, writing in the context of how best to criminalise ongoing coercive control within abusive intimate relationships notes Gardner and Shute’s point that the victim experience cannot wholly constitute the harmfulness of a wrongful behaviour like domestic abuse or sexual assault. He agrees that any conceptualisation of the wrongfulness of rape needs still to categorise as wrongful rape the thought experiment case of unconscious victim who never learns of her victimisation. However, he also stresses that we should not be too quick to dismiss empirical research detailing the effects of abusive conduct on victims, suggesting that:\(^{182}\)

[The fact t]hat a particular response is common among victims of a certain kind of behaviour might at least … put us on notice that a certain kind of wrong has been perpetrated, even if that response is not sufficient to demonstrate the distinctiveness or significance of that wrong.

In chapter 6, I noted feminist criticisms of the ways in which the law has historically not done well at recognising women’s perspectives, interests and values, and the harms suffered particularly by women and girls.\(^{183}\) Gendered harms have traditionally not been recognised and named by the law, and so have been “hidden” from view. Theorists like Adrian Howe and Robin West have written about the value of the law naming and providing remedies in respect of gendered harms.\(^{184}\) It would be naïve to suppose that law is the only discipline vulnerable to these kinds of criticisms. For instance, just as it is a simple empirical matter that most lawmakers and lawyers in Anglo-European jurisdictions throughout history have been men,\(^{185}\) the philosophical tradition in which Gardner and Shute situate their analysis has a similarly gendered history.\(^{186}\) As such, even if one assumes for the sake of argument that it is by definition “anti-

---


\(^{183}\) Chapter 6, section 6.3.


\(^{185}\) Chapter 6, section 6.3.

\(^{186}\) For reasons of space, it is outside of the scope of this thesis to consider the feminist critiques of the gendered history of philosophical thought. The interested reader may wish to take as a starting point: Louise M Antony and Charlotte Witt, *A Mind of One’s Own: Feminist Essays on Reason and Objectivity* (Westview Press, 2002); Charlotte Witt and Lisa Shapiro, “Feminist History of Philosophy”, in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2017); Andrea Nye, *Words of Power: A Feminist Reading of the History of Logic* (Routledge, 1990); Genevieve Lloyd, *Feminism and History of Philosophy* (Oxford University Press, 2002); Ann Cudd and
philosophical” to centre victim experience in understanding the central wrong of sexual assault or in construing concepts like bodily integrity and autonomy, that evaluation is neither objective nor neutral.

It would be circular to take Gardner and Shute at their word that centring the experiences of victims in understanding the harms and wrongs of sexual violence is necessarily “anti-philosophical,” or that their thought experiment of the “utterly harmless rape” is more philosophically “pure” because it is purely rational having removed untidy matters of flesh, blood, emotion and thoughts. Even assuming that Gardner and Shute’s brand of traditional philosophical styles of analysis requires the bracketing out the body in order to theorise the central harms of sexual violence, I reject such an approach on the grounds that it misses much of what seems distinctive and harmful about sexual violence.

In a 2017 response to Watt’s critique, Gardner argues that Watt mischaracterised the Gardner and Shute article in suggesting it makes “a mere sideshow” of emotions “in moral experience, and, more generally, in human life.” I agree with Watt that Gardner and Shute’s view that embodied and emotional experiences of sexual violence cannot account for the central wrongfulness of sexual violence. Applying Lacey’s language, quoted in section 12.7, Gardner and Shute’s account conveys a “very partial idea of the body” and a “virtual absence of affectivity,” and is based on an “impoverished conception of the value of sexuality.” Accordingly, this dissertation proceeds on the basis that the feminist articulations of the harms of sexual assault discussed in section 12.7 provide the best conceptual understanding of these harms for the purposes of an analysis of overlap, and its justification on fair labelling grounds.

---


188 Gardner, “Reasonable Reactions to the Wrongness of Rape”, supra note 158 at 4; citing Watt, “The Story of Rape”, supra note 162 at 49.
12.9 Sexual Autonomy, Sexual Integrity and Subjectivity

It is useful here to consider a further dimension of my understanding of the harms of sexual assault. Recall Rubenfeld’s question from the beginning of this chapter, asking what is the special wrong of sexual assault that makes it different from other forms of assault. Reframed to focus on questions of overlap and overcriminalisation, his question asks whether the essential harm of sexual violence is sufficiently distinct from that of general assault offences that despite the descriptive overlap between sexual assault and general assault, specifically criminalising sexual violence does not contribute to overcriminalisation.

An echo of this question can be heard in Gardner and Shute’s meticulous framing of their hypothetical case of the “utterly harmless rape.” Their efforts to remove all variables relating to the subjective experience of the victim suggest that they believe that denying subjective experiences of harm is the only way to get to a philosophically pure, objective assessment of the central harm of sexual violence. Drucilla Cornell provides a useful analysis of why such an approach is flawed. Cornell writes that bodily integrity is crucial to the human sense of selfhood, but is not “objective” in the sense of existing independently of human ideas about it. Instead bodily and sexual integrity in the sense discussed in section 12.7 is something that is imagined: a fiction that is socially constructed and projected both by the person experiencing (or experiencing a disruption to) bodily integrity, and by the society in which that person is located.¹⁹⁰ Cornell writes that “the projection and confirmation of one’s bodily integrity remains fundamental to the most basic sense of self. The body is socially conceptualized at the very moment we imagine ‘it’ as ours.”¹⁹¹ That is, although we think of a human body as a coherent unified whole, rather than an unruly agglomeration of disparate parts, this is in some sense a fiction. An important aspect of a sense of selfhood is maintaining this imagined sense of continuity over time of bodily integrity.¹⁹²

Cornell notes that various events such as illness and medical treatment, or the trauma of assault, can expose the imagined continuous unitary embodied self as a fiction. These physical and psychological traumas can have the effect of “splitting” or “dismember[ing]” the “self” by

¹⁹¹ Ibid., at 42.
¹⁹² Ibid., at 43.
“reduc[ing] the imagined unified bodied to its parts.” Cornell refers to studies indicating that the effect of medical traumas on the imagined or constructed sense of bodily integrity can be ameliorated by respecting a patient’s bodily integrity and treating the patient “more like a ‘self’ and not just a diseased body.”

Rubenfeld’s question about the special harm of sexual assault effectively asks: is sexual autonomy a different category of liberal interest from autonomy? And is the impingement of sexual autonomy that occurs in a sexual assault sufficiently different from the impingement of autonomy occasioned by a non-sexual battery to justify criminalising them separately? Cornell’s discussion does not touch directly on the harms of sexual violence, but her insights are nonetheless illuminating in this context. Stating that a concept is socially constructed does not diminish its significance or its experiential reality for those who inhabit a social world in which the concept is meaningful.

I use the term “social construct” to convey the idea that we as a society, through our relationships with one another, construct and perpetuate certain ideas about matters such as healthy relationships, privacy and choice. Such ideas form a filter through which we interpret our experiences and those of others. Carol Smart has also noted the ways in which the law and legal discourse helps to produce and perpetuate gendered norms and subject identities. This experiential filter affects the ways in which we perceive and experience certain interactions as, for instance, positive or intrusive. When a social norm about, for instance, autonomy or bodily integrity is violated, the harms that will result are no less real or serious simply because one can conduct a thought experience in which autonomy and bodily integrity are not the organising

---

193 Ibid, at 46.
194 Ibid.
196 For the view that sexual autonomy is not distinct from bodily autonomy generally, see: Davis, “What Does Rape Deserve?” supra note 11 at 78; Martin D Schwartz and Todd R Clear, “Toward a New Law on Rape” (1980) 26:2 NPPAJ 129 at 134–35.
197 Also see chapter 5, section 5.5, at note 34 and associated text.
198 Carol C Smart, “The Woman in Legal Discourse” (1992) 1:1 Soc Leg Stud 29 at 31–32; Emma Cunliffe, “‘Don’t Read the Comments!’: Reflections on Writing and Publishing Feminist Socio-Legal Research as a Young Scholar” (2013) 3:2 feminists@law 1 at 3–4; also see Shelley AM Gavigan, “Mothers, Other Mothers and Others: The Legal Challenges and Contradictions of Lesbian Parents”, in Dorothy E Chunn and Dany Lacombe, eds, Law as a Gendering Practice (Don Mills, Ont: Oxford University Press, 2000) at 103-05.
principles for society. In this vein, Julius Kovesi states “the whole political, moral, and cultural life we live is man-made,” but immediately adds “I am not saying ‘only man-made.’” 199

Bodily integrity and assaults to it feel no less “real” to us for being socially constructed and a matter of social context. 200 If society or some portion of society, for instance women, inhabit a social world in which sexual assault is constructed as a different harm from non-sexual physical harm, they will experience it differently. As discussed in the previous chapter, a crucial objection to modern commodity theories of sexual assault, which liken the harm of sexual assault to the harm of being prevented from reaching the best bargain in sexual marketplace, is that the theory is completely unlike the ways in which survivors of sexual violence describe their trauma and the harm done to them. 201

Phillips notes that it is “not [a] crazy idea” to challenge culturally constructed “images of women as having a special kind of relationship to their bodies” or seek to “reduce the sexual connotations of rape,” and in so doing, to potentially “reduce the inappropriate sense of shame and defilement many survivors describe.” 202 However, she rejects the approach of trying to achieve this reduction in shame and stigma by understanding the harms of sexual assault in a mind-body dualist, incorporeal manner.

I reject the idea that the most conceptually or philosophically pure way of thinking about the essential harms of sexual assault involves constructing highly artificial hypothetical scenarios in order to factor out of the moral equation the experiences and perspectives of survivors. As such, this dissertation understands the central harm of sexual violence as a breach of re-imagined, relational and embodied interests in bodily and sexual autonomy and integrity. These harms, and the experiences of survivors of sexual violence, are distinct from the harms of violence more generally. From this perspective, offences of sexual violence seem to target

201 Chapter 10, section 10.9, especially at notes 137 – 162 and associated text.
distinct harms to those captured by general assault offences. Though sexual assault could be
criminalised under general assault offences, doing so would mean failing to fairly label these
distinct harms.

12.10 Principle of Fair Labelling

It is useful here to explain in more detail what is meant by the principle of fair labelling. There is
a deep literature on the principle. For reasons of space, this section focuses on providing context
relevant to this case study’s consideration of whether descriptive overlap between sexual assault
and general assault offences is necessary, and thus justified, in order to properly label the
particular harms and wrongs of sexual assault as distinct from the harms and wrongs of assault
more generally. As such, this section is not a comprehensive review of the fair labelling
literature, but interested readers may find the footnotes, and particularly James Chalmers and
Fiona Leverick’s excellent intellectual history of the concept, a useful starting point for further
reading.203

Chalmers and Leverick trace the principle of “fair labelling” back to a 1981 article by
Andrew Ashworth.204 Ashworth argued that while it is conceivable that the criminal law could be
structured with only a small number of broadly defined offences, in practice “we shrink from this
in the belief that the label applied to an offence ought fairly to represent the offender’s
wrongdoing.”205 Ashworth attributed this to the principle of “representative labelling,” now
widely referred to as fair labelling,206 which holds that “widely-felt distinctions ought to be
preserved, and … new categories of offence ought fairly to reflect the offender’s criminality.”207
The principle operates in parallel with, and in addition to, notions of sentence proportionality.
That is, while a sentence should reflect the offender’s culpability and the seriousness of an
offender’s conduct, as a separate matter, the label applied to a crime is an important component
of punishment and must accurately reflect the moral content of the conduct being punished.

204 Andrew Ashworth, “The Elasticity of Mens Rea”, in Rupert Cross, ed, Crime, Proof and Punishment:
Essays in Memory of Sir Rupert Cross (London: Butterworths, 1981) 45; Chalmers and Leverick, “Fair
Labelling in Criminal Law”, supra note 203.
205 Ashworth, “The Elasticity of Mens Rea”, supra note 204 at 53.
206 Glanville Williams, “Convictions and Fair Labelling” (1983) 42 Cambridge LJ 85 at 85; Andrew
Ashworth and Jeremy Horder, Principles of Criminal Law, 7th ed (Oxford: Oxford University Press,
2013) at 77.
207 Ashworth, “The Elasticity of Mens Rea”, supra note 204 at 54.
Scholars and law reformers refer frequently to the principle, arguing for or against various criminal law proposals and developments. For instance, the principle has been used to argue in favour of retaining a clear distinction between murder and manslaughter, distinguishing theft from obtaining property by deception, classifying non-fatal offences against the person in terms of the specific type of injuries suffered, or by reference to the offender’s mens rea, and for distinguishing rape from other serious sexual assaults. The principle has also been employed in discussions about whether international criminal law genocide offences are too broadly framed, “lumping together radically different levels of blameworthiness under one label.”

Chalmers and Leverick argue that although the fair labelling principle is widely invoked, the precise contours of the principle’s meaning are seldom interrogated in detail. Instead, it is frequently “assumed to be a principle of self-evident value.” Glanville Williams makes a similar point when he says, “[fair labelling] is immune from challenge as a principle of justice. No one could argue that unfair labelling is acceptable (apart, of course, from cases where it has to be accepted for practical reasons).” The danger of employing a principle without clearly defining its contours is that it may be used as a rhetorical device to retroactively rationalise a

210 Horder, “Rethinking Non-Fatal Offences against the Person”, supra note 26 at 345–347.
211 Ibid.
214 Chalmers and Leverick, “Fair Labelling in Criminal Law”, supra note 203 at 220. Indeed, Chalmers and Leverick confess that this is something that they have themselves “been guilty of”.
215 Ibid.
216 Williams, “Convictions and Fair Labelling”, supra note 206 at 85–86 [Emphasis added].
conclusion that one has already reached, rather than as a clarifying lens and a tool to investigate and decide whether a particular harm is fairly labelled by the offences that currently criminalise it. Indeed, fair labelling arguments are generally advanced in favour of new offences, and an imaginative legislator, lobbyist, or policy adviser seeking to introduce a new criminal provision can almost always fashion an at least *prima facie* plausible argument for why a particular type of offending is special, and deserves special attention and labelling.

One way to ameliorate the risk of treating, or of being perceived as treating, the fair labelling principle as a post hoc rhetorical device is to spend some time in the next section considering its contours.

**12.11 Contours of the Principle of Fair Labelling**

The principle of fair labelling is often referred to, but it can be a complex matter to fill in the concept’s arguably “open texture.” Thoughtful considerations of the principle tend to emphasise that fair labelling means striking a balance so as to avoid competing perils at both extremes of the labelling and offence sub-division spectrum. One danger is to categorise and label offences too broadly, capturing under a single label kinds of behaviour that are morally distinct. Jeremy Horder calls this “moral vacuity.” At the other extreme is “the ‘vice of particularism’”: the possibility of labelling in too fine-grained a manner by separately labelling too many specific kinds of offences and thus treating the same moral wrongs under a number of different specific offences. Horder describes particularism as “the inclusion of definitional detail that merely exemplifies rather than delimits wrongdoing.” It is undesirable because it is inefficient to draw more offence distinctions than is necessary, and also such a drafting mode draws distinctions without (moral) difference. In a similar spirit of balancing, William Wilson writes of the role that offence labels have in helping people “make moral sense of the world”,

---

219 Horder, “Rethinking Non-Fatal Offences against the Person”, *supra* note 26 at 339.
220 *Ibid*.
221 *Ibid*.
223 Horder, “Rethinking Non-Fatal Offences against the Person”, *supra* note 26 at 338.
while also warning that excessive specificity and particularism can confound rather than aid that aim.\textsuperscript{224}

When it comes to determining how to find the balance between moral vacuity and particularism accounts are often vague and impressionistic, suggesting that the difference between too much and too little differentiation in offence labelling is a matter for context-dependent judgment. For instance, CMV Clarkson argues that fairly labelling does not require the marking of “every precise difference” but rather “something of a broad-brush approach [which] calls for questions of judgment as to when moral differences need to be marked by the criminal law.”\textsuperscript{225} Barry Mitchell’s guidance is similarly high-level, emphasising that to implement the principle of fair labelling, we must “identify the essential or distinctive nature and seriousness of [an accused’s] wrongdoing,”\textsuperscript{226} criminalising an accused’s behaviour with distinct offences and labels when that is necessary to “encapsulate and indicate the essential nature of the wrongdoing.”\textsuperscript{227}

These explanations of balance, context and carefully identifying an offence’s essential or distinctive moral nature emphasise that offences should be not too general, nor too specific – but what amount of detail is “just right”? In the context of an overlap analysis, the question is: do descriptively overlapping offences avoid contributing to overcriminalisation because the more specific offence articulates morally significant details of a subset of criminalised behaviour that is not described by the moral language of the more general offence, or instead do the descriptively overlapping offences merely spell out different ways of carrying out harm that is essentially morally equivalent?

Jeremy Horder argues that the key to finding the degree of differentiation and detail that is neither too particular nor morally vacuous is to focus on the specific ways in which victims’ interests are infringed by a criminalised unit of behaviour: offences should reflect how victims

\begin{thebibliography}{9}
\bibitem{224} Wilson, “Murder and the Structure of Homicide”, \textit{supra} note 208 at 23.
\bibitem{225} Clarkson, “Context and Culpability in Involuntary Manslaughter: Principle or Instinct?”, \textit{supra} note 208 at 144.
\bibitem{226} Barry Mitchell, “Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling” (2001) 64 Mod L Rev 393 at 399.
\bibitem{227} \textit{Ibid}, at 409.
\end{thebibliography}
are affected or disadvantaged by the harmful units of behaviour in question. Clarkson makes a similar point, noting that the reason robbery is criminalised, labelled and penalised separately from theft is that “the wrongdoing in robbery is qualitatively different from that of theft (involving an attack upon a person which can induce fear, risk of injury, further violence and so on).” Mitchell similarly points out that “distinctions between offences are not self-evident: there is [always] the question of how narrowly and precisely offences should be defined, how broad a category of harms should be permitted in any one crime” and argues that the best approach “is to seek to reflect qualitative distinctions between the ways in which victims are wronged.”

Horder’s suggested focus on the specific ways in which victims’ interests are infringed by a criminalised unit of behaviour dovetails with my earlier conclusion in section 12.7 that the central harm of sexual violence is the breach of a re-imagined, embodied and relational interest in bodily and sexual autonomy and integrity.

12.12 Fair Labelling and Descriptive Overlap between Assault and Sexual Violence

The relationship between the harms to victims of rape or sexual assault and general forms of assault are cited by several authors as particularly clear examples of offences that could in theory be criminalised under the same offence, but that for labelling reasons are rightly treated separately in order to recognise the distinct harms to victims involved in each type of offending. Horder writes that an offence of “intentionally causing serious injury could cover conduct from breaking another’s nose to torture. It could also, in theory, cover rape.” Yet, he

---

228 Horder, “Rethinking Non-Fatal Offences against the Person”, supra note 26 at 344; also see Mitchell, “Multiple Wrongdoing and Offence Structure”, supra note 226 at 399.
229 Clarkson, “Context and Culpability in Involuntary Manslaughter: Principle or Instinct?”, supra note 208 at 142 (emphasis added).
230 Mitchell, “Multiple Wrongdoing and Offence Structure”, supra note 226 at 399.
232 Horder, “Rethinking Non-Fatal Offences against the Person”, supra note 26 at 343.
regards it as clear that the descriptive overlap between offences of sexual violence and general assault offences is:

not simply [another set of] examples of the vice of particularism in the law…. For rape and sexual assault are unwarranted invasions of a victim’s sexual autonomy, and sexual autonomy is an autonomy whose intrinsic worth may be valued separately from bodily autonomy…. The important point here is that the moral warrant for creating a separate offence is that the offence protects an important value whose worth is not merely separable from other values, but is partly constituted by its separateness. One diminishes the significance and value of sexual liberation (indeed, one denies its independent existence) if one treats it as nothing more or less than a freedom to do with one’s body as one wishes.

Benjamin Brooks writes that sexual assaults “share superficial physical characteristics with general assault offences,” but are criminalised separately from general assault, and often housed in a different part of the Act or code from other offences against the person in order to recognise that the “stigma and trauma [of sexual violence] is a distinct experience which cannot be equated with a non-sexual physical injury.”

Commentators have commented on the distinctive moral meaning of the label “rape,” which by implication would not be conveyed under more general assault terminology. For instance, John Gardner emphasises the “moral clarity” of the term rape, which he regards as rightly signalling that rape is not solely or even necessarily a crime of violence, but rather is a crime of “sexual invasion.” Horder lists rape along with murder and torture as the clearest examples of crimes against the person “known by a name that not only describes factually what the defendant has done, but also purports to capture the moral essence of the wrong involved.”

In the context of this dissertation, the interest in sexual and physical autonomy and integrity understood in the embodied, relational terms that I have adopted would not be named or

233 Ibid.
237 Horder, “Rethinking Non-Fatal Offences against the Person”, supra note 26 at 335; also see Tadros, “Rape Without Consent”, supra note 10 at 540–41.
labelled if sexual violence were only criminalised and classified under general assault offences. This would be a failure on the part of the criminal law to recognise and address a significant gendered harm experienced in greatest numbers by women and girls and perpetrated overwhelmingly by men. As discussed in chapter 6, although the law has historically not been good at recognising gendered harms, an appropriate and just law reform goal for anyone invested in the ideal of a just legal system, that treats people equally and fairly under the law, is a legal system that reflects the interests of women as well as men.  

Chalmers and Leverick write that: “[o]ccasionally, the state may create offences which do not bring any new behaviour within the ambit of criminal sanction, but instead simply reclassify existing behaviour” in the interests of better labelling the essential harm of that behaviour.  

As canvassed in chapter 11, rape has been specifically criminalised since the earliest criminal codes. Today, if sexual violence were not criminalised under specific offences, something important would be missing from the criminal law: the distinct central harm of sexual violence would not be named or labelled by the criminal law. The criminal law would not name or label the particular harm done to predominantly women and girls who experience sexual violence, and that would be under-criminalisation.

12.13 Can Fair Labelling found arguments for and against the same provision?

The fair labelling principle is often invoked in arguments for or against proposed law changes, or the creation of new criminal offences. However, it is not clear that this principle drives these arguments as a decisive decision making tool. In section 12.10, I noted that a hazard associated with fair labelling arguments for specific offences that re-criminalise conduct already covered by more general offences is that it is often possible to craft plausible fair labelling arguments both for and against the same proposed new offence. In many cases, it seems that parties form a view on whether a new offence is desirable or not, and then use the fair labelling principle, along with other rhetorical devices, to rationalise and justify that view.

The fact that it is often possible to mount fair labelling arguments both for and against the same offence does not necessarily imply that either of the contradictory arguments is made

---

238 Chapter 6, at section 6.5.
240 See section 12.10, at note 217 and associated text.
cynically or in anything other than good faith. Depending on one’s own point of view and set of normative values, intuitions and commitments, one or the other argument might strike one as the more correct, and more persuasive. But others with a different set of values, intuitions, assumptions and commitments might find more persuasive the opposing fair labelling argument and its background assumptions.

Consider an example of fair labelling arguments for contradictory conclusions in the context of sexual violence criminalisation. As mentioned in chapter 10, though the jurisdictions that form the focus of this thesis all criminalise sexual violence under separate sexual violence offences, rather than under general assault offences, they also vary in a number of respects. One matter on which there is room for variation is whether the jurisdiction uses the offence label “rape” or another term such as sexual assault. As discussed in chapter 10, there is a deep literature on whether sexual violence is best understood through the lens of sex or violence, or as an offence of dual character. The prevailing Canadian view during the country’s 1983 reforms to sexual violence legislation was that the offence was primarily an offence of violence. The word rape was removed from the criminal code, and the new sexual assault offences were housed alongside general assault offences, rather than in a separate part of the Code. The labelling argument advanced in Canada was that the word “rape” stigmatised victims, because it was so freighted with sexualised meanings and rape mythology. It was also noted that a focus on rape requiring penetration of a penis by a vagina did not get to the heart of the harm of sexual assault: for instance, sexual assault that was not penetrative, or could not be proved to be

241 See chapter 10, section 10.3.
242 Chapter 10, section 10.3, at notes 28 – 34 and associated text.
penetrative, or that involved penetration with an object rather than a penis was not necessarily less harmful than traditionally understood rape.\footnote{Christine Boyle, “Sexual Assault and the Feminist Judge” (1985) 1 Can J Women & L 93 at 96.}

However, as Chalmers and Leverick note, in the same context, others have made the opposite argument, claiming that rather than stigmatising victims, the label of rape for penetrative sexual assault carries important moral weight that properly recognises the harm a rapist does to a victim when he violates her in this way.\footnote{Chalmers and Leverick, “Fair Labelling in Criminal Law”, supra note 203 at 234–35; Wallace D Loh, “What Has Reform of Rape Legislation Wrought? Truth in Criminal Labelling” (1981) 37:4 J Soc Issues 28 at 37.} England and Wales do use the term rape to label an offence defined as non-consensual penetration of the vagina, mouth or anus by a penis without reasonable belief in consent.\footnote{Sexual Offences Act 2003, s 1 (England and Wales) (maximum penalty of life imprisonment)} However, a neighbouring offence with the same maximum penalty of life imprisonment is labelled assault by penetration. It is defined as non-consensual penetration of the vagina or anus using a body part or object without reasonable belief in consent. A lesser offence of sexual assault, subject to a maximum penalty of 10 years’ imprisonment, relates to intentional non-consensual sexual touching without reasonable belief in consent. Siobhan Weare argues that the rape label should extend to both penetration-based offences, on the basis that the word rape has powerful moral content, and that the harm to a victim who has been non-consensually penetrated with an object or body part other than a penis is the same harm as penetration by a penis, and as such both paths to conviction should bear the morally powerful label of rape.\footnote{Siobhan Weare, “‘Oh You’re a Guy, How Could You Be Raped by a Woman, That Makes No Sense’: Towards a Case for Legally Recognising and Labelling ‘Forced to Penetrate’ Cases as Rape” (2018) 14:1 Int J Law Context 110; also see Warburton, “The Rape of a Label Why It Would Be Wrong to Follow Canada in Having a Single Offence of Unlawful Sexual Assault”, supra note 231.}

As I noted at the beginning of this case study, I do not take a view in this dissertation on the question of whether sexual assault or rape is the preferable term, and the dissertation uses both terms interchangeably. What is important from the point of view of the fair labelling principle is that plausible arguments can be mounted on either side of the question as to whether a jurisdiction should use the term “rape” or should prefer a less traditional reformulation like sexual assault or assault by penetration. Other commentators have taken strong views on this matter, but in such cases, the determinative factor was likely not the fair labelling principle per
se, but rather whatever conclusion a particular commentator reached on questions such as: whether sexual assault was best understood or emphasised as an offence of sex, violence or some mixture thereof; whether the moral force of the label rape operated predominantly to label the harm done by the rapist, or rather, primarily and counterproductively stigmatised the victim, unduly intensifying her suffering; and associated related matters such as whether the most culpable offence of sexual violence should be defined to include penetration or all forms of sexual touching and so on.

The malleability of the fair labelling principle does not disqualify labelling interests from genuinely grounding the need for instances of descriptive overlap. As I have argued in this case study, and particularly in this chapter, the central harm of sexual violence is experienced by victims differently from the central harm of violence more generally. If the criminal law elided this difference and covered sexual violence alongside general violence offences, it would be missing something important. Sexual assault would still be criminalised – there would not be a descriptive gap in the criminal law – but the criminal law would not label or name the distinct essential harm caused by sexual violence. Assessing fair labelling arguments for a particular offence thus is a layered matter involving assessing not only the fair labelling argument, but also the underlying arguments and assumptions about the central nature of the criminalised harm. This can be an involved matter – indeed, it is why I have spent chapter 11 and much of this chapter comparing and analysing competing ways of understanding the harm of sexual violence.

In respect of this case study, as stated in section 12.7 and reaffirmed in section 12.9, the view advanced in this dissertation is that the central harm of sexual violence is a breach of re-imagined, relational interests in sexual and bodily autonomy and integrity. The true nature of these harmed interests would not be labelled or named if sexual assault were criminalised under general assault offences. Thus, their separate criminalisation is justified by the principle of fair labelling. This justification suggests that though the descriptive overlap between sexual assault and general assault offences constitutes depth in the criminal law, it is not overdepth, and is not part of the problem of overcriminalisation.
12.14 Circularity and Descriptive and Normative Overlap Questions

A risk I have sought to avoid, and have discussed in earlier parts of the dissertation, is of possible analytic circularity between descriptive questions about what counts as overlap and normative questions about when overlap counts as overcriminalisation. It has been important to avoid understanding overlap as something that is by definition problematic and part of overcriminalisation. Equally, it has been important to avoid understanding overlap in such a way that once an example of apparent descriptive overlap turns out to be justified and not overcriminalisation, for instance because it addressed pragmatic or evidential enforcement difficulties or is justified on fair labelling grounds, then it must not really have been descriptive overlap in the first place.

As I introduced near the end of chapter 6, the risk of analytic circularity particularly threatens to crystallise in relation to this sexual violence case study: if the central harms of sexual assault and general assault are indeed distinct as I have argued, then despite the initial presumption that sexual assault and general assault offences overlap, could it be that the apparently overlapping offences capture different central harms, they do not overlap with one another after all? For this case study, normative questions about the central harm of sexual violence and descriptive questions about which units of behaviours various offences describe are particularly interconnected. This may seem to give rise to circularity but I will show this is not the case. Furthermore, although the impression of potential circularity is particularly pronounced in this case study, as I will explain, that impression is a feature of questions about overlap and overcriminalisation generally.

In assessing potential circularity or the interrelationship between descriptive and normative questions about overlap in this case study, it is useful to re-articulate the distinction between descriptive and normative matters. The descriptive overlap asks: can both of these offences properly describe the unit of behaviour in question? Here, I mean “properly” in the sense introduced in chapter 4: can I with grammatical and idiomatic correctness use the statutory descriptions contained in general assault and common assault offences to describe the unit of

251 Chapters 4 and 5 treat separately descriptive questions about overlap, and normative questions about overlap that is part of overcriminalisation; Chapter 6, section 6.8 introduces the idea that this second case study highlights the danger of circularity in overlap and overcriminalisation analysis.
252 Chapter 6, section 6.8.
253 Chapters 4 and 5.
behaviour in question? That is, could a prosecutor at least in theory use either offence to charge the unit of behaviour in question? This question is purely descriptive, so does not ask whether one of the descriptions is better than the other, or whether a prosecutorial choice to charge a unit of behaviour with charge B rather than charge A would be a worse exercise of discretion. An offence that describes a unit of behaviour in an unusual way, or in a way that seems strained, may nonetheless still describe that unit of behaviour.

For the purposes of illustration, it is also useful here to parse the New Zealand statutory offences of common assault and rape. Though these offences have markedly different maximum penalties, for simplicity, I parse common assault rather than an elevated assault offence that will introduce more offence elements.

<table>
<thead>
<tr>
<th>Table 12.1: Common Assault (Crimes Act 1961, s 196)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common Assault</td>
</tr>
<tr>
<td>Conduct</td>
</tr>
<tr>
<td>Circumstances</td>
</tr>
<tr>
<td>Consequences</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table 12.2: Sexual Violation: Rape (Crimes Act 1961, s 128(2), and s 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
</tr>
<tr>
<td>Conduct</td>
</tr>
<tr>
<td>Consequences</td>
</tr>
</tbody>
</table>

254 Chapter 4, section 4.2.
255 I select the New Zealand legislation mainly for ease of comparison with the assault offences parses in chapter 4. The same exercise could certainly have been carried out comparing Canadian offences.
256 Under the Crimes Act 1961, common assault is subject to a 1-year maximum penalty (s 196), whereas sexual violation by rape has a 20-year maximum penalty (s 128B(1)).
Either of the two parsed offences above could properly describe the unit of behaviour discussed in chapter 10.\textsuperscript{257} Recall that the chapter 10 example was a scenario in which an adult man holds down an adult woman and forcibly penetrates her vagina with his penis while she says “no.”\textsuperscript{258} I constructed the scenario in such a way that it would clearly satisfy the most stringent legal definitions of rape or sexual assault in most jurisdictions, and indeed, it satisfies New Zealand’s rape offence.\textsuperscript{259} The unit of behaviour involves intentional penetration of the victim’s genitalia using the offender’s penis. The victim did not consent, and because of her verbal protests, the offender clearly had knowledge of her lack of consent, or at the very least, lacked any reasonable grounds for any alleged mistaken belief that she consented. Yet, it would also be grammatical and idiomatically correct to describe the unit of behaviour in the example using the language of the common assault definition. Penetration requires some physical force; so penetrating another person’s vagina could be accurately and meaningfully described as the direct application of force to the victim’s body.

As noted above and in chapter 4, at this descriptive stage of identifying overlap, it is important to resist the urge to further assess whether one of several possible descriptions of a unit of behaviour seems better than the others. Indeed, it might strike the reader that the definition offered by the rape offence in Table 12.2 is a “better” description of the unit of behaviour than the Table 12.1 common assault offence, because the former is more specific, or because it more closely maps onto how we would probably describe the unit of behaviour in ordinary, non-legal and conversational language, or because we think the rape offence conveys with greater moral accuracy the nature of the harm the offender has done to the victim than the assault offence. Alternatively, it is also possible to imagine an assessment that the common assault description is the “better” description, because it will be easier to prove in court, or because the more neutral sounding description of the facts will be less likely to stigmatise the victim, or because a fact finder may be more likely to convict the offender of assault than to label him a “rapist” if for

\textsuperscript{257} Supra note 254.
\textsuperscript{258} Chapter 10, section 10.2, at note 21 and associated text.
\textsuperscript{259} Ibid.
instance, the offender does not match stereotypes of what a typical or “monstrous” rapist is like,\textsuperscript{260} or the victim is for various reasons not an “ideal victim.”\textsuperscript{261}

The point is that these are not purely descriptive assessments. They are evaluative assessments, and in some cases normative assessments in the sense of invoking norms that are either internal to the legal system, or norms external to the legal system such as moral norms. Arguably, the reason these evaluative questions are so tempting to consider even at the descriptive stage is that they are substantial and interesting questions. The question of whether a unit of behaviour involving particular bodily movements and mental states can be meaningfully described using a particular legal form of words is a mechanical or syntactical logic question; the question of whether one of two descriptively overlapping offences does a better job of describing a unit of behaviour involves evaluations about how to best effect the internal purposes, goals and practices of the criminal law, and about how to make sure the law is consistent with broader norms external to the law itself, such as notions that the criminal law along with other tools of the state should reflect the interests of women as well as men. Indeed, the bulk of my analysis in this case study has centred on normative matters about the central wrongs at the heart of sexual violence, and whether the special labelling of these wrongs is sufficient to justify descriptive overlap in the criminal law, so that this overlap is not problematic and part of overcriminalisation.

My normative conclusion has been that the central harm of sexual violence is distinct from the central harms of violence more generally, and that the harms of sexual violence to victim’s interests in sexual and physical autonomy and integrity, understood in the embodied and relational sense discussed above, are important to label, name and recognise. As such, I have argued that indeed there is a strong fair labelling interest in specifically marking out offences of sexual violence, separately from offences of violence more generally. It is at this point that the risk of circularity may seem to loom: if the harms at the centre of sexual assault are so distinct


from the harms at the centre of general assault, then perhaps it is more accurate to say there is no overlap between these offences after all?

However, my contention is that this apparent threat of circularity is metaphorically a kind of optical illusion: we first detect descriptive overlap, then turn to normative questions, and having decided those questions, turn back to the descriptive question and find that it now seems to look different to us. This apparent difference represents a kind of category slippage. By deliberately holding the idea of descriptive overlap in mind, it becomes clear that the differences between the central harms of sexual violence and interpersonal violence more generally do not alter the fact that descriptively speaking, the assault offence and rape offence parsed in Table 12.1 and Table 12.2 overlap, in the sense that both can properly apply to the unit of behaviour I have been discussing in this section.\(^{262}\) That is, as outlined in the discussion following Tables 12.1 and 12.2, both the common assault and rape offences describe the unit of behaviour.

The potential normative justification for descriptive overlap between offences of sexual assault and offences of interpersonal violence more generally is a fair labelling argument. This normative analysis will necessarily involve asking questions about not just how bodily movements and mental states of sexual violence can be described, but also, what are the meanings of the particular unit of behaviour. The labelling question is how well do offences offering competing descriptions of a unit of behaviour represent and convey those meanings. As suggested by the section 12.9, the particular meanings of at least some harms are dependent on facts about human thoughts, feelings and interests rather than mind-independent natural kinds. As discussed in sections 12.7 and 12.9, at least some of the harms of sexual violence are due not just to the exertion of certain physical forces to certain part of the body, but rather to the ways in which the wider society understands gender, bodies, sexuality, interests such as bodily integrity and autonomy, and so on. These ways of understanding are not independent of the society in which they are situated, or the minds of the people within that society, but this makes them no less real.

This leads me to a second way in which the risk of circularity is relevant in overlap analysis. As I have just outlined, the normative analysis of whether two competing descriptions of a unit of behaviour are justified by reference to, for instance, fair labelling interests as

\(^{262}\) Supra, note 258.
discussed in this case study, or pragmatic or evidential interests of the kind discussed in the non-fatal strangulation case study, is context dependent. But there is also a way in which the descriptive question of whether two offences can describe the same unit of behaviour is also context dependent. Context influences the kinds of descriptive overlap we can “see.” For instance, as I noted earlier in this case study, 300 years ago in England or the United States, a person who understood rape as an offence against property, and as being harmful and wrong because it devalued male property interests in the women of their household, would likely not have “seen” the potential for general assault offences to also describe the unit of behaviour labelled as rape. Conversely, today it would be unlikely to be seriously argued by proponents of the commodity theory of sexual violence that today’s modern sexual assault offences descriptively overlap with theft offences or trespass offences.

That is, just as the social and cultural context in which the criminal law operates influences normative questions about the central harms of certain types of criminal behaviour, and about the appropriate aims and goals of the criminal law, so too it influences the kinds of purely descriptive language we are able to see as describing units of behaviour. This is particularly pronounced in the case of this second case study, but is not unique to this case study.

12.15 Conclusion

As discussed in chapter 10, rape and sexual assault offences descriptively overlap with general assault offences. In this case study, I established that the chapter 5 category that best accounts for why this descriptive overlap has struck overcriminalisation theorists as an unproblematic form of depth in the criminal law is that the descriptive overlap is justified by the fair labelling interest in specifically naming and labelling the particular harms of sexual violence. In chapters 11 and 12, I described historical understandings of sexual violence as an offence against male property and compared these understandings with more contemporary liberal conceptions of sexual violence as harming interests in bodily autonomy and integrity. In chapter 12, I discussed feminist critiques of the ways in which even liberal understandings of the harms of sexual assault tend to “bracket out the body” and overlook the relational dimensions of sexual assault, and thereby fail to capture the fullness of the harm of sexual violence as experienced by survivors. I have argued that a feminist, embodied and relational understanding of interests in bodily and sexual autonomy are the central, distinctive interests harmed and threatened by sexual violence. I
concluded that these harms indeed warrant specific labelling; as such, the specific criminalisation of sexual violence separately from other forms of violence is normatively justified.

Fair labelling arguments justifying the creation (or retention) of descriptively overlapping criminal provisions are complex. As discussed in this chapter, the principle is flexible and open ended, and a creative advocate of a new criminal offence will very often be able to produce a plausible fair labelling argument in support of the new offence. This flexibility means that the normative assessment of whether an instance of descriptive overlap is justified cannot be swiftly performed by merely identifying that a fair labelling argument exists. Identifying the existence of a fair labelling argument is merely the first step, which needs to be followed by normative assessment of the assumptions and arguments on which the fair labelling argument is premised. In this case study, that meant assessing the possible distinct harms of sexual violence, and determining how best to conceptualise and understand those harms. Only having reached a conclusion as to what the special harms of sexual violence are could I return to the question of whether that is a harm that justifies specific labelling.
Chapter 13: Conclusion

13.1 Objectives and Themes

In this concluding chapter, I return to the two objectives that motivated this dissertation, and draw out several key themes that have informed both objectives, and which run throughout the body of the dissertation as a whole. As I set out in the introductory chapter, this dissertation has two central objectives. My first objective has been to consider when overlap in the criminal law forms part of the problem of overcriminalisation. My second objective has been to situate my investigation of overlap and overcriminalisation in the particular context of the criminalisation of gendered violence.

With respect to the my first objective, as discussed in chapter 2, the existing overcriminalisation literature often mentions in passing that much criminalised conduct is criminalised many times over by distinct, overlapping offences. However, these references to depth in the criminal law are generally cursory, with much more energy and detail devoted to questions of overbreadth, and concerns about the criminalisation of conduct that is outside of the proper scope of the criminal law. Beyond these general and glancing mentions of overlap as a contributor to overcriminalisation, the literature does not consider in detail what kinds of depth in the criminal law are problematic and therefore form part of the problem of overcriminalisation.

This dissertation addresses that gap in the literature, exploring in greater detail questions of whether and when overlapping criminal offences give rise to the problems and dangers associated with overcriminalisation. In addressing this first objective, I have been careful to avoid the circularity of constructing overlap as problematic simply by definition. In order to avoid that potential pitfall, I have separated descriptive questions about what constitutes overlap from normative questions about when overlap contributes to the problem of overcriminalisation. In chapter 4, I considered the descriptive question of when two or more criminal offences can be described as overlapping with one another, in the sense that they each apply fully to the same unit of behaviour. Chapter 5 turns to the normative question of when descriptive overlap seems to give rise to the problems associated with overcriminalisation, and when it does not.

---

1 Chapter 1, section 1.1.
2 Chapter 2, section 2.11.
3 See Chapter 2, sections 2.09 – 2.11.
4 Chapter 5, sections 5.2 – 5.7.
Chapter 6 introduced the concept of gendered harm, and explained why it is a particularly useful lens through which to consider questions of overlap and overcriminalisation. The chapter both introduced the two gendered harm case studies addressed in the six case study chapters, and introduced conceptual tools drawn from feminist legal theory, which I went on to apply in the case study chapters. In the six case study chapters (chapters 7 to 12), I applied the analytical framework introduced in chapter 4 to determine whether the case studies were examples of descriptive overlap. Having demonstrated prima facie descriptive overlap in both case studies, I then applied chapter 5’s categories of types of descriptive overlap that are warning signs as to the possible presence of overcriminalisation, and categories that are unlikely to be associated with overcriminalisation. These categories served to focus my normative analysis and determine whether that descriptive overlap constitutes part of the problem of overcriminalisation.

The dissertation’s second overarching objective, also introduced in chapter 1, has been to situate my investigation of overlap and overcriminalisation in the particular context of the criminalisation of gendered violence. Chapter 6 explains why gendered violence provides an important and clarifying lens through which to look at questions of overlap and overcriminalisation. The case studies considered in chapters 7 to 12 involve gendered violence: the case for a specific offence of non-fatal strangulation, and the specific criminalisation of sexual assault separately from general assault offences.

In this final chapter, I will draw out and highlight several themes that run through the dissertation’s pursuit of these two objectives.

13.2 Overlap, Overcriminalisation and Circularity

Throughout this dissertation, I have sought to avoid approaching overlap as something that is by definition problematic and part of overcriminalisation. It is equally important that the case studies selected to illuminate the concept of overlap avoid an obverse risk of circularity of being immediately identifiable as instances of overlap that are clearly part of the problem of overcriminalisation. If in order to test when overlapping criminal offences are part of the problem of overcriminalisation I selected only case studies of overlapping offences that were on their face clearly problematic, then I would not get far in the task of determining when overlap is

5 Chapters 7 – 9.
6 Chapters 10 – 12.
part of overcriminalisation. If one accepts the basic premise, set out in chapters 4 and 5, that not all overlap is normatively problematic, then testing and knocking down a straw person case study of overlap would not address the gap in the literature concerning which kinds of descriptive overlap in the criminal law contribute to the wider overcriminalisation problem. Accordingly, an important criterion in selecting my case studies was that they should be overlapping offences for which robust and principled supporting arguments could be made, rather than case studies that would quickly and clearly turn out to be part of overcriminalisation.

13.3 Taxonomy of Overlap and Overdepth in the Criminal Law

Taking care to avoid conceptual circularity of the kind just described, a foundational element of this dissertation is to propose a two-phase analysis of overlap. First, it is necessary to consider what it means to say that two offences overlap with one another in a descriptive sense. Second, when two offences do indeed overlap it is necessary to consider whether the presence of more than one way of criminalising a given unit of behaviour contributes to problems associated with overcriminalisation. This analytical framework is foundational to the dissertation as a whole, and is the basis for the analysis of my two case studies.

In addition to forming the foundation on which I built in the case studies, this analytical approach fills a gap within the existing literature on overcriminalisation. The existing literature has referred to overdepth in the criminal law, in the sense of problematic overlap or depth that contributes to overcriminalisation, but has not distinguished between overlap, or depth, in the purely descriptive sense and overdepth and overlap that contributes to overcriminalisation in the normative sense. My dissertation addresses this analytical oversight, proposing and defending the premise that not all instances of overlap in the criminal law form part of the problem of overcriminalisation.

This initial insight provides both the foundation from which to analyse whether particular instances of overlap constitute overcriminalisation, and motivates that enquiry: what is it about the prospect of the criminal law re-criminalising conduct many times over that, unanalysed, makes it appear prima facie problematic to overcriminalisation theorists? In addressing these questions, I have considered two gendered harm case studies: New Zealand’s proposed new non-fatal strangulation offence, which will descriptively overlap with general assault offences; and
the longstanding criminalisation of rape or sexual assault as a specific offence, differentiated
from general assault offences.

13.4 Power of Naming and Conceptualising Gendered Harms

A key theme running throughout the dissertation is the importance of naming and
conceptualising gendered violence and harms, and the ways in which this public interest in
naming and effectively criminalising gendered violence provides a yardstick against which
overcriminalisation concerns should be assessed. As discussed in chapter 6, certain types of harm
and violence are perpetrated overwhelmingly by men and overwhelmingly against women and
girls. Feminist legal theorists and activists have pointed out that the law has historically not
done well at recognising and providing redress for harms suffered disproportionately by women
and girls. Because of this gendered harms have tended to be “hidden injuries” that are unseen
by the law, and thus unremedied.

The violence described in the dissertation’s two case studies is highly gendered: sexual
violence is disproportionately perpetrated against women and girls, and overwhelmingly
committed by men; and intimate partner violence, particularly forms of coercive control that
are the most highly correlated with eventual fatality, is overwhelmingly a crime committed by
men against women and children. Intimate partner violence and sexual violence are both
serious problems in the Anglo American jurisdictions that form the focus of this dissertation.

Sexual violence and intimate partner and family violence are not solely crime control
problems – they have other dimensions implicating matters such as public and official
awareness, public health, child welfare, economic, access to housing and other complex social
dimensions. As I noted in chapter 6, it would be reductive to suggest that complex social
problems of the kinds raised in the two case studies can be solved solely or even primarily
through law reform of criminal offences and statutes. This dissertation recognises that
combating gendered violence requires not just well drafted criminal offences, but also a wider

---

7 Chapter 6, section 6.2.  
8 Chapter 6, section 6.3.  
9 Howe, “Problem of Privatized Injuries”, supra note 568 at 149; Wildman, “Ending Male Privilege”,
 supra note 568.  
10 Chapter 10, section 10.1.  
11 Chapter 7, section 7.1.  
12 Chapter 6, section 6.4, at note 69 and accompanying text.
strategy of responses to the structural and social conditions that contribute to violence against women. However, within the wider field of questions about how to address gendered violence at a societal, community and social level, the particular focus of this dissertation is on the question of when the structural and social conditions that facilitate gendered violence are properly factored into the structure of criminalisation by including offences that descriptively overlap with one another but facilitate normatively desirable outcomes such as effectively labelling the differential harm inherent in gendered violence. More precisely, my focus is on the relationship between the criminalisation of gendered harms via specific criminal offences that descriptively overlap with more general offences and the problems of overcriminalisation. In this legal and criminological context, the power of naming and criminalising gendered violence via targeted offences can be an important tool in ensuring that the criminal justice system effectively addresses violence against women, but the question of whether any given offence advances this objective should be carefully analysed.

13.5 The Power of Naming Gendered Sexual Violence

The two case studies in this dissertation illustrate different aspects of the importance of specifically naming and criminalising gendered modes of violence. The sexual violence case study illustrates the fair labelling interest in naming the essential harm at the centre of a particular kind of criminalised conduct, rather than criminalising the harm under a more generic, less morally descriptive label. At a purely descriptive level, general assault offences could be used to describe conduct that we are used to calling rape or sexual assault: non-consensual penetration of another person’s genitalia or mouth with a penis or an object necessarily involves the application of force to that person’s body, which is assault. That is, the bodily movements and mental states that make up a unit of behaviour that can be described by an offence such as rape or sexual assault could also be described by general assault offences.

The question just discussed – of whether two offences offer overlapping descriptions of a unit of behaviour comprising particular bodily movements and mental states – is separate from the further question of whether two possible descriptions equally well capture and reflect the essential moral wrongness of that unit of behaviour. That is, even though a unit of behaviour could be described either as rape or as assault does not mean that both descriptions convey equally well the central harm of that unit of criminalised behaviour.
In chapter 10, I noted that a minority of writers have argued that the harms of sexual violence are not essentially distinct from the harms of violence more generally. These commentators have suggested that sexual violence should be labelled and criminalised as a “variety of ordinary (simple or aggravated) battery because that is what rape is.” However, as I have argued in this dissertation, and as other commentators have argued elsewhere, accounts such as “commodity theories” which view the central harms of sexual violence as interchangeable with those of violence more generally “wildly misdescribe[e] the experience of rape” and the particular harms inflicted through sexual violence. The embodied and emotional experience of rape or sexual assault, and the socially constructed meanings associated with sexual violation and violence, are different than the experiences and meanings of non-sexual assault. The specific harms and meanings of sexual violence would not be named and labelled by the criminal law if sexual violence offences were criminalised only via general assault offences.

Sexual violence is a gendered harm. As I discussed in chapter 11, although rape offences were included in even the earliest criminal codes, early understandings of the central harm of rape saw the harm as an economic harm to male property interests in women and girls’ sexed bodies. That is, even though in early criminal codes, the bodily movements and intentional mental states of rape were criminalised, the central harm of that unit of behaviour that was labelled and criminalised by the law was the harm to male property interests, rather than to the woman or girl’s personal embodied and relational interest in bodily and sexual autonomy and integrity. The interests of the woman or girl who had been raped or sexually assaulted, and the

---

13 Chapter 10, at section 10.4.
15 Chapter 11, at section 11.4 and chapter 12, at sections 12.5 – 12.7 and 12.9.
17 Chapter 12, at sections 12.5 – 12.7 and 12.9.
ways in which her interests were interfered with by the offence, and the ways in which she was harmed by the offending, were “hidden injuries” in the eyes of the law and the wider culture.\(^{18}\)

Today, if sexual violence was not criminalised separately as sexual assault or rape, but rather was covered only by general assault offences, again something very central to the embodied and emotional experience of sexual victimisation would be unseen, and unlabelled by the criminal law. Because sexual violence is a gendered harm, there is a significant justice interest in ensuring that the criminal law recognises and responds to harms suffered overwhelmingly by women and girls, rather than allowing such injuries to remain hidden and unaddressed.

As I discussed in chapter 12, arguments in favour of descriptive overlap in order to fairly label distinctive essential harms are complex in practice, because it is frequently possible to produce a plausible fair labelling argument both for and against the same proposed new offence.\(^{19}\) The fair labelling principle’s malleability does not disqualify it from positively justifying particular instances of descriptive overlap, such as the overlap between general assault and sexual assault offences. If, as I have argued, the central harm of sexual violence as experienced by victims is distinct from the central harm of interpersonal violence more generally, and those different harms are both morally important such that they should be named and labelled by the criminal law, then descriptive overlap is justified, and will not contribute to problems associated with overcriminalisation. Whether or not one finds a fair labelling argument in support of a specific offence that will descriptively overlap with other more general offences depends on whether one is convinced that the two offences do in fact capture distinct essential harms, and whether or not one is convinced that those distinct harms are sufficiently important that fair labelling calls for both to be named and labelled by the criminal law. These are not matters that can be assumed. Rather, a sound fair labelling argument in favour of a specific offence that descriptively overlaps with more general offences needs to articulate and justify the premises upon which it relies.

\(^{18}\) Supra notes 8 and 9.
\(^{19}\) Chapter 12, at sections 12.10 and 12.13.
13.6 The Pragmatic Power of Naming Non-Fatal Strangulation

As noted in the previous section, the dissertation’s two case studies each illustrate the importance of specifically naming and criminalising particular types of gendered violence. The sexual violence case study demonstrates the ways in which offences that offer overlapping descriptions of the same unit of behaviour may at the same time emphasise and name distinct central harms. The main arguments in favour of a specific non-fatal strangulation offence relate to evidential and pragmatic difficulties in enforcing general assault provisions with respect to strangulation assaults. However, the strangulation case study also raises some secondary fair labelling arguments. Strangulation is a particularly dangerous mode of assault, and previous strangulation assaults are also highly correlated with future intimate partner violence fatality, but its seriousness both in a causal sense and as a red flag for eventual fatality is widely underestimated by the general public and by medical professionals and law enforcement. As discussed in chapter 9, in addition to all the reasons for criminalising the conduct because of its harmfulness, there are reasons for criminalising it via a specific offence that rely on the importance of raising public and official awareness of the seriousness of strangulation.

First, creating a specific strangulation offence could help to raise awareness and counter current misunderstandings of the seriousness of strangulation assaults, both in terms of the strangulation’s dangerousness in a causal sense, and its status as a red flag for future fatality. Secondly, and more importantly from the point of view of the fair labelling principle, the creation of a specific strangulation offence will allow strangulation assaults to be recorded and labelled as *strangulation* assaults rather than as more generic assaults. That is, strangulation incidents, a known red flag for future escalation and fatality, will be visible to future sentencing judges on an offender’s criminal transcript, more accurately labelling the nature of his offending over time. Furthermore, the specific label can be used to trigger proactive preventive interventions outside of the criminal justice context, alerting other social and governmental agencies that a couple or family are at a particularly high risk of future harm and fatality.

20 Chapter 7, sections 7.8 – 7.10.
21 Chapter 7, section 7.11.
22 Chapter 8, section 8.2.
23 Chapter 9, at section 9.14; also chapter 8 at sections 8.3 and 8.4.
This is a labelling argument, but also quite a general argument. As noted earlier, it is frequently possible to mount a plausible labelling argument in support of any offence that is within the proper scope of the criminal law, in the sense that it is not overbreadth. The convincingness of a particular labelling argument will depend on further questions about as the specific harms argued to be at the centre of the proposed offence, and how similar or distinct those harms are from those at the centre of existing offences with which the new offence will overlap.

While a plausible labelling argument can be mounted for the creation of the new non-fatal strangulation offence, as I argued in chapter 9, the more central and persuasive argument is based on pragmatic considerations of how best to address evidential and practical difficulties that currently impede the effective enforcement of general assault provisions in the case of strangulation assaults. As discussed in chapter 8, a number of unusual characteristics of strangulation assaults mean it is frequently difficult to prosecute under general assault offences. Although strangulation is dangerous every time it occurs, in that it could cause serious injury and death, it frequently does not leave external injuries, or leaves injuries too subtle to be easily documented and photographed at a sufficiently high standard to be used as evidence in criminal proceedings. This means that even in the case of a strangulation incident in which, for instance, the internal structures of a victim’s throat were bruised, and due to oxygen deprivation during the assault, she sustained certain (though difficult to measure) levels of brain damage, it may be impossible to produce medical evidence in court establishing that she was injured or suffered grievous bodily harm as those terms are defined in criminal law. Similarly, it may be difficult to prove that her attacker had an intent higher than intent to assault his victim. As such, even though strangulation assaults are dangerous in the causal sense that strangulation can cause serious injury and death even with relatively low amounts of pressure, and is a risk factor for future fatality, strangulation assaults are frequently charged not as, for instance, injuring or wounding with intent, or assault with intent to injure, but as male assaults female or common assault.

---

26 Chapter 8, section 8.4.
In chapter 9, I determined that a new specific non-fatal strangulation offence will descriptively overlap with a number of existing general assault offences.\textsuperscript{27} However, I argued that in many cases the descriptive overlap between the new offence and, for instance, the offence of injuring with intent to injure is best understood as an objective or ontological sense of descriptive overlap, rather than an overlap in terms of which offence descriptions are pragmatically and evidentially provable. In section 9.3, I invited the reader to imagine an omniscient observer, who is able to know whether a strangulation assault in fact caused damage to a victim’s brain, damaged her carotid artery, and bruised her trachea. Even if it is not possible for a medical doctor with the normal range of diagnostic tools to detect and know the truth of the matter as to, for instance, how many brain cells were killed due to the oxygen deprivation caused by a strangulation assault, objectively speaking, there is some fact of the matter, and our imaginary observer knows that fact of the matter. Similarly, there will be some fact of the matter as to whether the attacker in this scenario intended to cause serious harm to his victim, intended to kill her, intended to scare her and was reckless as to whether he injured her in so doing, or so on. Again, our hypothetical observer knows the truth of this matter, even if the victim, investigating police, prosecutors, and fact finders can only draw educated inferences based on available evidence as to what the attacker’s subjective thoughts and mental state were during the assault.

If the killing of brain cells and the damaging of the carotid artery constitutes injuring, then there will be some objective or ontological fact of the matter as to whether the offence injuring with intent to injure in fact accurately describes the unit of behaviour in question. That fact of the matter is a fact about descriptive overlap. The problem is, because strangulation assaults often leave no visible injuries, or only very minor visible signs of injury, there is frequently a discrepancy between what legal descriptions objectively or ontologically describe a unit of strangulation behaviour, and which legal descriptions in pragmatic terms are evidentially provable in court. This is a different sense of descriptive overlap: that is, a description might objectively speaking pertain to a particular unit of behaviour, but we may not have epistemological access to that fact. As such, we will not know that we can truthfully describe the unit of behaviour not only as male assaults female, but also as injuring with intent to injure. Furthermore, even if we know, or have a hunch, that the unit of behaviour can truthfully be

\textsuperscript{27} Chapter 9, sections 9.5 and 9.6.
described as injuring with intent to injure, we will lack sufficient evidence to prove in court to a fact finder that the description is an accurate characterisation of the unit of behaviour. The question of whether two offences descriptively overlap has an absolute, or objective answer, and also a pragmatic evidential answer. In the case of non-fatal strangulation, commonly the answers to the two questions are different. Since strangulation assaults are dangerous and highly correlated with future fatality, it is important to criminalise them not just in an objective sense, but also to do so effectively, so that strangulation assaults can be reliably prosecuted and proved in court. On this basis, even though strangulation, as a form of assault, is already criminalised – that is no descriptive or within-scope gap exists – there are pragmatic or evidential difficulties in enforcing general assault offences in respect of strangulation assaults. I conclude that the creation of a new, descriptively overlapping offence that would address these practical and evidential enforcement difficulties is justified. As such, though the new offence will overlap with general assault offences, it will constitute depth but not overdepth in the criminal law. As such, the new offence is justified and will not contribute to the problem of overcriminalisation.

13.7 Moral Panics and Crimes du Jour

Another important theme in this dissertation is that that hastily enacted overlapping “crimes du jour” are frequently identified by the overcriminalisation literature as problematic and a source of overcriminalisation.\(^{28}\) Commentators cite examples of specific offences that are enacted reactively to moral panics or high profile incidents of criminal offending, arguably so that legislators may demonstrate to the media and electorate that they are “doing something” about a perceived problem. Examples of crimes du jour discussed in the course of this dissertation include: the often cited United States federal carjacking offence enacted in the 1990s;\(^{29}\) the Canadian offence of distributing intimate images of a person without consent, which was enacted in response to several high profile suicides of teenaged girls whose experiences of online harassment and bullying had contributed to their deaths;\(^{30}\) as well as proposed new offences in New Zealand that, if enacted, would arguably constitute crimes du jour: a specific offence

\(^{28}\) See especially the discussion and examples of “crimes du jour” and “moral panics” in chapter 5, at section 5.6; also see: chapter 1, at section 1.1; chapter 3, at section 3.2; chapter 7, at section 7.1; chapter 9, at section 9.11; and chapter 10, at sections 10.1 and 10.5.

\(^{29}\) Chapter 3, at section 3.2; chapter 5, section 5.6, at notes 52 – 58 and associated text.

\(^{30}\) Chapter 5, section 5.6, at notes 59 – 77 and associated text; discussing Criminal Code, RSC 1985, c C-46, s 162.1; inserted by Bill C-13, the Protecting Canadians from Online Crime Act, SC 2014, c 31, s 3.
covering “one-punch” assaults causing death,\textsuperscript{31} and a specific theft offence relating to looting in the aftermath of an earthquake or other emergency.\textsuperscript{32}

Theorists argue that major contributing drivers of overcriminalisation at a systemic level are political incentives that create a “one-way ratchet” effect,\textsuperscript{33} according to which overcriminalisation only ever increases and never decreases.\textsuperscript{34} David Garland and other critical criminologists have written that since the 1970s, criminal justice policy in Anglo-American jurisdictions has taken a “punitive turn” away from an approach described as “penal welfarism” towards a new “culture of control.”\textsuperscript{35} The literature often cites examples of crimes du jour as illustrations of the one-way ratchet effect, arguing that resulting hastily designed offences re-criminalise already criminalised conduct, creating redundancy, inconsistency and uncertainty. As I noted in chapter 5, “moral panic” is a loaded term – an outpouring of public concern on a particular issue might from some perspectives look like a moral panic, and from other perspectives, seem like justified concern about a pressing social issue.\textsuperscript{36} Given the malleability of the concept of moral panic, it is interesting to note that few commentators suggest that specific offences targeting gendered violence, such as rape or sexual assault, and the proposed new non-fatal strangulation offence, which descriptively overlap with general assault offences are “crimes du jour,” overly populist,\textsuperscript{37} or represent unreflective kneejerk reactions to moral panic.\textsuperscript{38}

\textsuperscript{31} Chapter 5, section 5.6, at notes 80 – 86 and associated text.
\textsuperscript{32} Chapter 5, section 5.6, at notes 88 – 90 and associated text.
\textsuperscript{34} Chapter 3, at section 3.2.
\textsuperscript{35} See chapter 3, at section 3.2; David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Chicago: University of Chicago Press, 2001).
\textsuperscript{37} But for a recent collection of essays discussing the ways in which concerns about sexual offending has resulted in the United States punitive measures such as sex offender registries and preventive detention and that this represents an expansion of the carceral state, see: David M Halperin and Trevor Hoppe, eds, The War on Sex (Durham, NC: Duke University Press Books, 2017).
Neither sexual assault and rape offences nor New Zealand’s proposed non-fatal strangulation offence resemble “crimes du jour.” This was an important selection criterion as I chose my case studies: it permitted me to analyse deeply whether the two case studies’ descriptive overlap with general assault offences represents part of overcriminalisation. However, my conclusion that the case studies both represent descriptive overlap, but are not problematic and do not contribute to overcriminalisation, suggests that perhaps a large component of what is potentially problematic about more classic examples of crimes du jour, such as carjacking, one-punch assaults causing death, earthquake looting offences, and cyberbullying omnibus bills is not primarily that they descriptively overlap with general offences, but that they are hastily enacted crimes du jour that are not well designed, and not well suited to their stated or assumed purpose. This does not mean that part of what makes an overlapping federal offence of carjacking badly designed is that it is redundant, and re-criminalises conduct that is already criminalised, generating uneven maximum penalties, uncertainty and consequential unfairness. However, the root of those problems may be that the offences were hastily drafted, arguably with greater attention to whether the descriptively overlapping offence would appear to “do something” about the perceived carjacking crisis, than

38 Interestingly, in the context of the #metoo movement, which first came to prominence during October 2017, even those suggesting that the movement’s concerns regarding sexual assault and sexual harassment have taken on the character of a “sex panic” or moral panic have focused their concerns on arguments that non-criminal matters are being swept along with “legitimate” gendered abuse, such as sexual assault, or intimate partner violence. For instance, see: Masha Gessen, When Does a Watershed Become a Sex Panic? The New Yorker (14 November 2017); Christina Hoff Sommers, A Panic Is Not an Answer: We’re at Risk of Turning #metoo into a Frenzied Rush to Blame All Men NY Daily News (26 November 2017); Andrew Sullivan, It’s Time to Resist the Excesses of #MeToo New York Magazine (12 January 2018), online <http://nymag.com/daily/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html>; Caitlin Flanagan, The Humiliation of Aziz Ansari The Atlantic (14 January 2018); Cathy Young, Is “Weinsteinising” Getting out of Hand? Los Angeles Times (1 November 2017); Has the #MeToo Campaign Gone Too Far? CBC Radio (13 December 2017), online <http://www.cbc.ca/radio/thecurrent/thecurrent-for-december-13-2017-1.4444967/has-the-metoo-campaign-gone-too-far-1.4445069>; for arguments that it is misleading to see the movement as a moral panic, and which characterise it instead as a justified response to systemic patterns of harassment and abuse, see for instance: Katty Kay, “Why Women Fear a Backlash over #MeToo”, BBC News, 1 December 2017, online <http://www.bbc.com/news/world-us-canada-42200092>; Jessica Valenti, So Men Are Afraid after #MeToo? Think about What It’s like for Women The Guardian (12 December 2017); Katherine Cross, The #MeToo Backlash Is a Moral Panic About Women’s Agency Rewire (17 January 2018), online <https://rewire.news/article/2018/01/17/metoo-backlash-moral-panic-womens-agency/>; Lindy West, “Yes, This Is a Witch Hunt: I’m a Witch and I’m Hunting You”, The New York Times, 17 October 2017.
to questions of how the new offence would operate in practice and relate to existing provisions, or to whether there was really a carjacking *crisis* at all.

Often, arguments for the creation of new criminal offences are accompanied by support from activists, lobby groups such as victims’ rights organisations, media, and members of the public. As noted above, whether this kind of momentum and support for a proposed new offence constitutes a moral panic or timely awareness raising may be a matter of perspective.\(^{39}\) For this reason, it would be unhelpful to simply state that proposals to enact new descriptively overlapping offences are likely to contribute to overcriminalisation if they are the result of a moral panic. Instead, what the case studies, particularly the non-fatal strangulation case study, illustrate is that a sound, unhurried and reflective legislative design process can significantly guard against the risks that a new, descriptively overlapping criminal offence will be redundant or out of step with existing provisions and thus likely to contribute to the problem of overcriminalisation. A thread running through this dissertation is that questions of whether descriptive overlap addresses important pragmatic or evidential difficulties with how existing criminal offences criminalise certain units of behaviour practice, or labels a morally important harm that would otherwise go unnamed and unremedied by the criminal law, are intensely contextual.

### 13.8 Overlap and Overcriminalisation: A Question of Context

I began the research that forms the basis of this dissertation with the goal of articulating general principles that could be referred to by those developing policy, and designing criminal legislation, to help determine when the creation of a new, overlapping criminal offence would contribute to problems of overcriminalisation, and when it would be justifiable and desirable. Through the course of my research, I have come to the view that any such principles must necessarily be deeply contextual, rather than quickly applied yes-or-no decision-making rules. The categories I proposed in chapter 5 are presumptive prompts for further contextual enquiry. To use the sexual violence case study as an example, the category of descriptive overlap that is likely to be justified rather than part of overcriminalisation was the category of descriptively overlapping offences that serve to label a morally important harm in a way that would not adequately be named under general offences that also apply to that behaviour. Though I

\(^{39}\) Supra note 36
identified in the first chapter of the case study that this was a case of descriptive overlap that was potentially justified on fair labelling grounds, this determination forms the beginning of my analytical process. The ensuing chapters analysed a range of possible understandings of the central harms of sexual violence, and considered whether these harms were distinct from those of violence more generally, and whether it is important for such harms to be specifically named and punished by the criminal law.

In order to determine whether proposed new offences will descriptively overlap with existing offences, and if so, whether that overlap will be problematic, it is important to follow sound processes of policy development and legislative design. If part of the problem with crimes du jour is the rushed, unreflective process by which they are enacted, then a jurisdiction concerned to avoid enacting overlapping offences that contribute to overcriminalisation will adopt processes that consider contextual matters of the kind I have canvassed in this dissertation. As I noted at the beginning of this dissertation, arguments about overcriminalisation often take place in the context of partisan political debate. However, overlapping offences that contribute to overcriminalisation are cited as a problem by those who occupy a range of positions on the political spectrum. Whatever one’s position, if one is concerned about avoiding redundant, overlapping offences that contribute to overcriminalisation, one has an interest in ensuring that legislative design and enactment follow sound processes. Some legislatures already adopt such models. One potentially useful example is offered by New Zealand’s Legislation Design and Advisory Committee, and its Guidelines on Process and Content of Legislation. This dissertation’s conclusions illustrate the importance of sound legislative process design, but the question of the specific processes that would best avoid the problems of overcriminalisation is outside the scope of this dissertation, and a topic for further study. From the point of view of avoiding overlap that contributes to overcriminalisation, sound processes will ensure that matters


of context receive due care and attention during policy development, legislative drafting, and statutory enactment.
Bibliography

Table of Legislation

Canadian Charter of Rights and Freedoms (Canada), being Part I of the Constitution Act, 1982
Constitution Act, 1867 (Canada)
Constitution Act, 1982 (Canada), being Schedule B to the Canada Act 1982 (UK).
Courts and Criminal Matters Bill 2010 147-1 (NZ)
Crimes Act 1961 (NZ)
Crimes Act 1958 (Vic) (Australia)
Crimes Act 1900 (NSW) (Australia)
Crime and Disorder Act 1998 (England and Wales)
Crimes Amendment Act (No 2) 2011 (NZ)
Crimes Amendment Act (No 3) 1985 (NZ)
Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW) (Australia)
Criminal Code, RSC 1985, c C-46 (Canada)
Criminal Code 1913 (WA) (Australia)
Criminal Code Act (NT) (Australia)
Criminal Code Amendment (Violent Act Causing Death) Act 2012 (NT)(Australia)
Criminal Law Amendment (Homicide) Bill 2008 (WA) (Australia)
Domestic Protection Act 1982 (NZ)
Family and Whānau Violence Legislation Bill 2017 (NZ)
Fines (Payment and Recovery) Act 2014 (NZ)
Homosexual Law Reform Act 1986 (NZ)
Protecting Canadians from Online Crime Act, SC 2014 (Canada)
Rome Statute of the International Criminal Court
Safe Night Out Legislation Amendment Bill 2014 (Qld) (Australia)
Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014 (Vic)
(Australia)
Sexual Offences Act 2003 (England and Wales)
Summary Proceedings Act 1957 (NZ)
Prostitution Reform Act 2003
US Code (USA)
United States Constitution
United States Model Penal Code

**Table of Cases**

*Ashe v Swenson* (1970) 397 US 463 (US)

*Barnett v Quebec (Cour Municipale de Montreal)* 2003 CanLII 30417 (Que SC) (Canada)

*Beaver v R* [1957] SCR 531 (Canada)

*Biggs v State* (1860) 29 Ga 723 (US)

*Blockberger v United States* (1932) 284 US 299 (US)

*Coker v Georgia* (1977) 433 US 584 (US)

*Kienapple v R* [1975] 1 SCR 729 (Canada)

*Krieger v Law Society of Alberta* [2002] SCR 372 (Canada)

*Miazga v Kvello Estate* [2009] 3 SCR 339 (Canada)

*Miller v Fenton* (1985) 474 US 104 (US)


*R v 974649 Ontario Inc* [2001] 3 SCR 575

*R v Anderson* [2014] 2 SCR 167 (Canada)

*R v Barton, 2015 ABQB 159* (Canada)

*R v Bertrand* 2007 QCCQ 6509 (Que Ct) (Canada)

*R v Beare* [1988] 2 SCR 387 (Canada)

*R v Beatty* [2008] 1 SCR 49 (Canada)

*R v Boucher* [1955] SCR 16 (Canada)

*R v Chamandy* (1934) 61 CCC 224 (Canada)

*R v Cook* [1997] 1 SCR 1113 (Canada)

*R v Creighton* [1993] 3 SCR 3 (Canada)

*R v DeSousa* [1992] 2 SCR 944 (Canada)

*R v Donovan* [1934] 2 KB 498 (England)

*Re BC Motor Vehicle Act* [1985] 2 SCR 486 (Canada)
R v Ewanchuk [1999] 1 SCR 330 (Canada)
R v Harrigan and Graham (1975) 33 CRNS 60 (Ont CA) (Canada)
R v JA 2011 SCC 28 (Canada)

R v Lee [2006] 3 NZLR 42 (CA) (NZ)
R v LL 2015 ABCA 222 (Canada)
R v Martineau [1990] 2 S.C.R. 633 (Canada)
R v Nazif [1987] 2 NZLR 122 (CA) (NZ)
R v Nixon [2011] 2 SCR 566 (Canada)
R v Pierce Fisheries [1971] SCR 5 (Canada)
R v Power (1993) 81 CCC (3d) 1 (Canada)
R v Power [1994] 1 SCR 601 (Canada)
R v Proctor (1992) 69 CCC (3d) 436 (Canada)
R v Raham 2010 ONCA 206 (Canada)
R v Riesberry [2015] 3 SCR 1167 (Canada)
R v Roy 2012 SCC 26 (Canada)
R v S (SS) (1999) 136 CCC (3d) 477
R v Trochym [2007] 1 SCR 239 (Canada)
R v Tutton [1989] 1 SCR 1392 (Canada)
R v Vaillancourt, [1987] 2 SCR 636 (Canada)
R v Waters [1979] 1 NZLR 375 (CA)(NZ)
W(D) v R [1991] 1 SCR 742 (Canada)
Seales v Attorney-General, [2015] NZHC 1239 (NZ)

Articles, Books, Reports


Allan, TRS. Rule of Law (Rechtsstaat) Edited by Edward Craig Routledge Encyclopedia or Philosophy 1998 8 London.


Alter, Adam, Aborigines and Courtroom Communication: Problems and Solutions (Canberra, 1994).


Ashworth, Andrew, “The Unfairness of Risk-Based Possession Offences” (2011) 5:3 Crim L Phil.


Asprey, Michele M., Plain Language for Lawyers (Federation Press, 2003).


Barnes, Jo, “The Use of Firearms in Intimate Murder-Suicide in Australia and New Zealand” (2001) 16:1 New Zealand Sociology.


Bell, Jeannine, Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime, Critical America (New York University Press, 2002).

Bender, Leslie, “A Lawyer’s Primer on Feminist Theory and Tort” (1988) 38 J Leg Ed.


Benedet, Janine, “Annotation” (2008) 53 CR.


Brown, Darryl K., “Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response” (2008) 6 Ohio St. J. Crim. L.


Cameron, Alice, The Cat Sat on the Mat (Boston: Houghton Mifflin/Walter Lorraine Books, 1994).
Campbell, Jacquelyn. The Danger Assessment 1985.
Canadian Bar Association, Bill C-13, Protecting Canadians from Online Crime Act (Ottawa, Ontario, 2014).
Cantor, Norman L., “A Patient’s Decision to Decline Life-Saving Medical Treatment: Bodily Integrity versus the Preservation of Life” (1973) 26 Rutgers L. Rev.
CCSO Cybercrime Working Group, Cyberbullying and the Non-Consensual Distribution of Intimate Images (Ottawa, 2013).
Chamallas, Martha, “Lucky: The Sequel” (2005) 80:2 Ind. L.J.
Chan, Janet B. L., and Richard V. Ericson, Decarceration and the Economy of Penal Reform, 14 (Toronto: Centre of Criminology, University of Toronto, 1981).


Clarke, Alan, Jo Moran-Ellis, and Judith Slaney, Attitudes to Date Rape and Relationship Rape: A Qualitative Study (R 2, Sentencing Advisory Panel, 2002).

Clarke, Jo, A Constant Struggle: Renegotiating Identity in the Aftermath of Rape, Master’s Thesis, University of South Florida, 2008 [unpublished].


Coordinating Committee of Senior Officials (CCSO), Criminal Justice (Canada) et al, Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-Consensual Distribution of Intimate Images (2013).
Corrigan, Rose, Up Against a Wall: Rape Reform and the Failure of Success (NYU Press, 2013).
“Coward’s Punch” (18 October 2016).

*Crime and Disorder Act 1998.*


Cunliffe, Emma, “‘Don’t Read the Comments!’: Reflections on Writing and Publishing Feminist Socio-Legal Research as a Young Scholar” (2013) 3:2 feminists@law.

Cunliffe, Emma. Gendered Racial Violence: *R v Barton* and the Death of Cindy Gladue 8 March 2016 Lecture, Centre for Feminist Legal Studies, Peter A Allard School of Law, University of British Columbia.


Davies, Margaret, “Queer Property, Queer Persons: Self-Ownership and Beyond” (1999) 8:3 Soc Leg Stud.


Dripps, Donald, “More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West” (1993) 93 Colum. L. Rev.


Ellis, Lee, Theories of Rape: Inquiries Into the Causes of Sexual Aggression (Taylor & Francis, 1989).


Estrich, Susan, “Rape” (1986) 95:6 Yale LJ.


Featherstone, Lisa, “‘That’s What Being A Woman Is For’: Opposition To Marital Rape Law Reform In Late Twentieth-Century Australia” (2017) 29:1 Gend Hist.


Feeley, Malcolm M., “The Unconvincing Case against Private Prisons The Jerome Hall Lecture” (2014) 89 Ind. L.J.
Feldthusen, Bruce, “Discriminatory Damage Quantification in Civil Actions for Sexual Battery” (1994) 44 U Toronto LJ.
Feldthusen, Bruce, “The Canadian Experiment with the Civil Action for Sexual Battery”
Fineman, Martha Albertson, “A Legal (and Otherwise) Realist Response to ‘Sex as Contract’” (1994) 4:1 Colum J Gender L.
Fineman, Martha Albertson, “Progress and Progression in Family Law” (2004) U Chi Legal F.


Freeman, Michael DA, “‘But If You Can’t Rape Your Wife, Who[m] Can You Rape?’: The Marital Rape Exemption Re-Examined” (1981) 15:1 Family LQ.

Freeman, Michael DA, “Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?” (1980) 3:4 CJFL.


Gardner, John, “Rationality and the Rule of Law in Offences Against the Person” (1994) 53:03 Cambridge LJ.

Gardner, John, “Reasonable Reactions to the Wrongness of Rape” (2017) 29 Denning L.J.


Gifford, D. J., How to Understand Statutes and By-Laws (Scarborough, Ont.: Carswell, 1996).
Gordon, Robert W., “Recent Trends in Legal Historiography” (1976) 69 Law Libr J.
Green, Stuart P., “Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses” (1996) 63 U Chi L Rev.


Hawley, Dean A., Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults (Indianapolis, IN: Retrieved on May, 2016).


Haynes, of the Department of Justice, Canada, Christine, Regulatory Offences (Saskatoon: Saskatchewan Legal Education Society Inc Seminar, Criminal Law Update, 2005).


Held, Virginia, The Ethics of Care: Personal, Political, and Global (Oxford University Press, 2006).


Holmstrom, Lynda Lytle, and Ann Wolbert Burgess, “Rape: The Husband’s and Boyfriend’s Initial Reactions” (1979) 28:3 Family Coordinator.


hooks, bell, Ain’t I a Woman (London: Pluto Press, 1982).


Johnson, Rebecca, Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law (UBC Press, 2002).


Johnstone, Diana, “Rape Case Reveals Contempt of Women”, 14 June 1978.


Kelly, Henry Ansgar, “Rule of Thumb and the Folklaw of the Husband’s Stick” (1994) 44:3 J Leg Ed.


Laurie, Alison J, and Linda Evans, eds., Twenty Years On: Histories of Homosexual Law Reform in New Zealand (Lesbian & Gay Archives of New Zealand, 2009).
Lennon, Kathleen, and Margaret Whitford, Knowing the Difference: Feminist Perspectives in Epistemology (Routledge, 1994).
Levin, Marc A, “At the State Level, So-Called Crimes Are Here, There, Everywhere” (2013) 28 Crim Just.
Lievore, Denise, and Australian Institute of Criminology, *Prosecutorial Decisions in Adult Sexual Assault Cases* (Canberra, A.C.T.: Australian Institute of Criminology, 2005).


Little, Rory K., “Myths and Principles of Federalization” (1994) 46 Hastings L.J.


Lloyd, Genevieve, *Feminism and History of Philosophy* (Oxford University Press, 2002).


436


MacKay, A. Wayne, “Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media” (2015) 66 U.N.B.L.J.


Manning, Fenyi, Non-Fatal Strangulation: An Analysis of the Implications of a New Offence, LLB(Hons), Victoria University of Wellington, 2016 [unpublished].


Marubbio, M Elise, Killing the Indian Maiden: Images of Native American Women in Film (University Press of Kentucky, 2006).


McConnell, Joyce, “Incest As Conundrum: Judicial Discourse on Private Wrong and Public Harm” (1992) 1 Tex J Women & L.

McDonald, Elisabeth, “From ‘Real Rape’ to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform” (2014) 45 VUWLR.
McDonald, Elisabeth, and Yvette Tinsley, From “Real Rape” to Real Justice (Wellington: Victoria University Press, 2012).
McGillivray, Anne, and Brenda Comanskey, Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System (University of Toronto Press, 1999).
McGregor, Joan, Is It Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously (Ashgate, 2005).
McLean, Morag, The Identification, Care and Advocacy of Strangulation Victims (Edmonton, AB: Victorian Order of Nurses for Canada, 2009).
Melton, Heather C., and Joanne Belknap, “He Hits, She Hits: Assessing Gender Differences and Similarities in Officially Reported Intimate Partner Violence” (2003) 30:3 Crim Just Behav.


Miller, Jody, and Martin D. Schwartz, “Rape Myths and Violence Against Street Prostitutes” (1995) 16:1 Deviant Behav.


Mountier, James, *What Happens on the Field Stays on the Field: When Should the Criminal Law Be Employed for Assaults During Sport?*, LLB(Hons), University of Otago, 2012 [unpublished].


Okin, Susan Moller, “‘Forty Acres and a Mule’ for Women: Rawls and Feminism” (2005) 4:2 Politics, Philosophy & Economics.


Ovenden, Georgia, “Young Women’s Management of Victim and Survivor Identities” (2012) 14:8 Culture, Health & Sexuality.


PIVOT Legal Society, Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws (Vancouver, BC, 2004).
Podgor, Ellen S., “Do We Need a Beanie Baby Fraud Statute” (1999) 49 Am. UL Rev.
Pratt, John, Governing the Dangerous (Sydney: Federation Press, 1997).
Pratt, John, Penal Populism (Taylor & Francis, 2007).
Rayburn, Corey, “To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials” (2006) 15 Colum. J. Gender & L.
Rendtorff, JD, and P Kemp, *Basic Ethical Principals in European Bioethics and Biolaw, Vol 1: Autonomy, Dignity, Integrity and Vulnerability* (Copenhagen: Centre for Ethics and Law, 2000).
Richards, Austin, *Reflected Ultraviolet Imaging for Forensics Applications* (Santa Barbara, CA: Brooks Institute of Photography, 2010).


Rozée, Patricia D., “Forbidden or Forgiven?: Rape in Cross-Cultural Perspective” (1993) 17:4 Psychol Women Q.


Sachdeva, Sam. Earthquake: Government Looking into Harsher Penalties for Looting during a Disaster Stuff 24 November 2016 online


Schauer, Frederick, Thinking Like a Lawyer (Harvard University Press, 2009).

Schechter, Susan, Guidelines for Mental Health Practitioners in Domestic Violence Cases (1987).


Schreiber, Jason, Angela Williams, and David Ranson, “Kings to Cowards: One-Punch Assaults” (2016) 44:2 J Law Med Ethics.
Schwartz, Martin D., and Todd R. Clear, “Toward a New Law on Rape” (1980) 26:2 NPPAJ.
Sepejak, Diana S., “The Dimensions of Dangerousness” (1985) 9:1 L Hum Behav.


Siegel, Reva B., “‘The Rule of Love’: Wife Beating as Prerogative and Privacy” (1996) 105:8 Yale LJ.

Simcoe Muskoka District Health Unit. Choking and Strangulation online


Smith, Cyril J., “History of Rape and Rape Laws” (1974) 60 Women L. J.


Smoking Facts and Evidence *Cancer Research UK* online


Spencer, Herbert, Social Statics: Or the Conditions Essential to Human Happiness (London: Chapman, 1851).
Spiro, Peter, Narrowing the Gap between Regulatory and Criminal Offences in Canada (2013).
Stark, Evan, Coercive Control: The Entrapment of Women in Personal Life (Oxford University Press, 2007).


The Department of Justice and Equality. Fines (Payment and Recovery) Bill 2013 Completes Its Passage through the Houses of the Oireachtas The Department of Justice and Equality online <http://www.justice.ie/en/JELR/Pages/PR14000102>.
The Imaginary Domain: Abortion, Pornography & Sexual Harassment (Routledge, 1995).
Thomas, Kristie A., Manisha Joshi, and Susan B. Sorenson, “‘Do You Know What It Feels Like to Drown?’ Strangulation as Coercive Control in Intimate Relationships” (2014) 38:1 Psychol Women Q.
Thornton, Margaret, “Feminism and the Contradictions of Law Reform” (1991) 19 Int J Sociol L.
Tinsley, Yvette, “Investigation and the Decision to Prosecute in Sexual Violence Cases: Navigating the Competing Demands of Process and Outcome” (2011) 17 Canta L Rev.


Towns, Alison J., and Peter J. Adams, “‘I Didn’t Know Whether I Was Right or Wrong or Just Bewildered’: Ambiguity, Responsibility, and Silencing Women’s Talk of Men’s Domestic Violence” (2016) 22:4 Violence Against Women.


Tuerkheimer, Deborah, “Sex without Consent” (2013) 123 Yale L.J.


Vaillancourt, Roxan, Gender Differences in Police-Reported Violent Crime in Canada, 2008 (Ottawa: Canadian Centre for Justice Statistics, 2010).
Vella, Sylvia A, Cognitions and Behaviors of Strangulation Survivors of Intimate Terrorism, California School of Professional Psychology, Alliant International University, 2013 [unpublished].


Verdi, Nicole, “Releasing the Stranglehold on Domestic Violence Victims: Implications and Effects of Rhode Island” (2013) 18 Roger Williams University Law Review.


Wason, PC, “The Drafting of Rules” (1968) 118 New LJ.


Williams, Glanville, “Convictions and Fair Labelling” (1983) 42 Cambridge LJ.
Williams, Glanville, “The Problem of Domestic Rape” (1991) 141 New LJ.


Woolley, Alice, “Defining Prosecutorial Discretion (With an Invitation to the Court to Re-Define Abuse of Process)” (20 June 2014).


Zedner, Lucia, “Preventive Justice or Pre-Punishment? The Case of Control Orders” (2007) 60:1 Curr Leg Probs.