THAT ALL RAPE IS RAPE EVEN IF NOT BY A STRANGER

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Introduction.

In 1991, in both Australia and England, the pre-eminent courts in the hierarchy had occasion to comment on the common law proposition that a man could not be found guilty of raping his wife. The marital immunity for rape dated back to the early eighteenth century, when Sir Matthew Hale, in his *History of the Pleas of the Crown*,[1] stated that a husband can commit no rape upon his wife because "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract". That it took some 225 years for Hale's proposition to be judicially identified as a legal fiction not in keeping with modern times is remarkable in itself. That the last vestiges of the ethos behind the presumption of spousal immunity are still being felt in the sentencing of sex offenders, particularly those convicted of raping partners or ex-partners, is a matter for grave concern.

Though the immunity has been rejected, its passing has only heightened the public/private divide more acutely for the courts which are now required to intrude on sensitive issues they were previously forbidden to consider. The courts have shown themselves to be uneasy in this unfamiliar environment and have been slow to embrace the new jurisdiction. With legal and community attitudes recognising little distinction between married and non-married partners, one is further led to speculate as to how other cases of partner rape, that were never within the umbrella of the marriage exemption, are now being dealt with in the post abolition years.

A critical indicator against which to gauge the efficacy of the judicial response in this area is that of sentencing and it is the sentencing response on which this article will focus. Ranging across English and Australian

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1 (1736), vol. 1, p 629.

jurisdictions, it is not possible to compare sensibly the terms of individual sentences: a more revealing analysis is to examine the application of sentencing principle in prior relationship cases for an appropriate reflection of the abolition of the immunity. The question that must be asked is whether the sentencing discretion is being exercised in such a way that proper regard is accorded to the personal culpability of the *offender*, in terms of the gravity of the offence and its effect on the particular victim, rather than sentencers focussing on the categorisation of the *victim* to determine these matters, with no justification in sentencing principle for so doing.

The demise of the marital immunity.

For Australia, it was the High Court decision in *R v L*[2] which, in the course of determining the constitutional validity of a partial abolition of the immunity in South Australia, held that if the presumption of irrevocable consent on marriage was ever part of the common law (which was doubted), it could no longer be tolerated in today's society. The majority said that the court "would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage."[3] The High Court decision postdated by only a matter of months the earlier 1991 English House of Lords decision in *Reg v R*[4] which held that the common law fiction was "anachronistic and offensive". Having so found, their Lordships then considered that it was their duty to oversight the fiction's judicial demise.

Given that more than three years has elapsed since those decisions, it is appropriate to pause now to consider their legacy in relation to the judicial treatment of partner rape as a species of non-stranger rape. Now that any issue as to the existence of the spousal immunity has been firmly settled both at common law in Australia and England and by statute in all Australian jurisdictions,[5] can it be said that cases of marital rape, and other cases where

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2 (1991) 174 CLR 379.

3 (1991) 174 CLR 379 at 390 per Mason CJ, Deane and Toohey JJ.

4 [1992] 1 AC 612. Much has been written about the marital rape exemption, for examples of two timely pieces marking its demise see J.L.Barton, 'The Story of Marital Rape', (1992) 108 *LQR* 260 and V.Laird, 'Reflections on *R v R*', (1992) 55 *MLR* 386.

5 See s347 of the *Criminal Code* (Qld) as enacted by Act No. 17 of 1989; WA *Criminal Code* s325 was repealed by Act No. 74 of 1985 and see now Ch XXXIA

there has been previous consensual sexual contact between the victim[6] and the offender, will be treated equally with other allegations of rape/sexual assault? Even accepting that, as Graycar and Morgan have succinctly stated "the law has always had some difficulty in listening to women in rape prosecutions",[7] can it now be said, to adopt the catchcry post *Reg v R*, that all "rape is rape"?[8]

The focus of judicial difficulties in cases of rape and the previously consensual relationship centres on the public/private dichotomy. Prior to the abolition of the spousal immunity, Hale's proposition utilised, inter alia, the concept of private to create a zone where the public criminal law should not

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- Sexual Assaults; NT *Criminal Code* s192 places spouses in no different position as regards liability; similarly NSW *Crimes Act* 1900 s61A(4); see also Vic *Crimes Act* 1958 s62(2) as amended by *Crimes Act (Amendment) Act* 1985 and note particularly the provisions of ss36 and 37 regarding the definition of consent and jury directions on consent as inserted by *Crimes (Rape) Act* 1991; ACT *Crimes Act* 1900 s92R; Tas *Criminal Code* s185(1) enacted by Act No. 71 of 1987. In South Australia, the Mitchell Committee in 1976 recommended (at 14) a partial abolition of marital rape immunity, Goode recommended in 1991 that the partial immunity be abolished (First Interim Report to SA A-G, Nov 91 at 39) and the partial immunity was completely abolished by the *Criminal Law Consolidation (Rape) Amendment Act* 1992.

6 The use of terminology when referring to a woman who has been sexually assaulted is problematic: see *R v Seaboyer; R v Gayme* (1991) 83 DLR (4th) 193 at 205. There is also the question whether appropriate empowering language such as "survivor" should be used in relation to crimes of violence: see Fisher and Ammett, 'Sentencing of Sexual Offenders When Their Victims are Prostitutes and Other Issues Arising out of *Hakopian*' (1992) 18 *MULR* 683 at 683. This paper will use the term "victim" because these women, however they are stereotyped by the courts, have suffered the impact of crime, and it is this critical fact that the courts are tending to discount in current sentencing practice.

7 R.Graycar and J.Morgan, *The Hidden Gender of Law*, Sydney, Federation Press, 1990, 335.

8 This was the catchcry taken up by academic writers and other feminists following the English decision in the Court of Appeal. There Lord Lane said that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim": see *Reg v R* [1991] 2 WLR 1065 at 1074. See also C.Glasman, 'Women Judge the Courts' (1991) 141 *NLJ* 395; 'Rape Decision' (1991) 141 *NLJ* 1472 cf G.Williams, '"Rape is Rape"'(1992) 142 *NLJ* 11 at 11. This is one of the primary reasons that the term "rape", rather than "sexual assault" has been used in this article. A number of jurisdictions continue to call the offence "rape", as do a number of judges, even in the jurisdictions where the descriptive change to "sexual assault" has been effected.

interfere. Out of respect for the privacy of the family in general and for the marriage relationship in particular, the criminal law acceded to and acted on the objection of the inappropriateness of its intervention: the raped wife would be adequately protected by her matrimonial remedies.[9] Feminists have long critiqued the law's complicity in constructing the family as a private zone in this way and the marital rape exemption was often cited as an example of the resort to privacy to justify gender inequality.[10]

Heath and Naffine[11] have also identified the presence of a control factor in the Hale proposition; as explained by MacKinnon, the existence of consent depends on how much *control* women are presumed in law to have over their own bodies when confronted by certain categories of men:

> Some women are therefore incapable of consent (underage girls), while others cannot be raped (sex workers). For other groups of women, consent depends on the status of the man concerned: a married woman is presumed always to consent to her husband but not necessarily to other men, and so on. The real question asked in court therefore seems to be, "who has control over this woman's capacity to consent?", and the assumed answer is never that *she* does. Rather, her husband or her father or a man known to her may be accepted as having that control.
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> MacKinnon seems to mean that rape is, in the main lawful. The crime does not apply to the most common types of forced sex:

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9 See for example, D.Lanham, 'Hale, Misogyny and Rape', (1983) 7 *Crim LJ* 148 at 166. Writing in support of the marital immunity, Lanham argues that rape is too blunt an instrument for dealing with the relationship between husband and wife: "Where the marriage as a whole has become intolerable because of an act of unwanted intercourse the appropriate remedy is divorce or separation." See also G.Geis, 'Rape-in-Marriage: Law and Law Reform in England, the United States and Sweden', (1978) 6 *Adel. LR* 284 at 303 who postulates that "assault prosecutions and legal separation might be regarded as both more benign and more effective".

10 See generally, S.Atkins, and B.Hoggett, *Women and the Law*, Oxford, Basil Blackwell, 1984 at 72, Graycar and Morgan, *above* n.7 at 37.

11 M.Heath, and N.Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law 'Reform'' (1994) 3 *Australian Feminist Law Journal* 30 at 33 citing C.MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs: Journal of Women in Culture and Society* 635 at 646.

> such as on a date or within marriage. Only the "stranger rape" is censured and even then it can be difficult for a woman to establish her credibility.[12]

It is the combined potency of these two influences - MacKinnon's construct of dominion over consent, man against woman, coupled with the privacy of the intimate relationship that constitutes a marriage as between man and woman - that has caused sentencing bewilderment in the Australian prior relationship cases. This will be examined shortly. First, however, it is instructive to attempt to identify other factors weighing on the judicial mind when these cases arise for determination.

The Path to a Marital Rape Conviction

In April 1993, the inherent "difficulties" of these cases were articulated by the Chief Justice of South Australia:

> There are special difficulties in reaching a just verdict where the rape or attempted rape is alleged to have occurred in the matrimonial bed or the bed occupied by the parties to a continuing sexual relationship. There is the risk of motives, disclosed or undisclosed, arising out of tensions in the relationship. There is the risk of misunderstandings as to consent arising out of the habitual physical contact inherent in the relationship. The opportunities for corroboration are slight and an accused can do little to defend himself apart from denying the allegation. These factors, where they apply, are all proper bases for an appropriate warning.[13]

There are other damaging preconceptions at work. In Canada, detailed consideration was given to the prevalence of discriminatory beliefs and their impact on rape trials in *R v Seaboyer; R v Gayme*.[14] In particular, Mme Justice L'Heureux-Dube considered that the woman's "victimisation" was measured against current rape mythologies. Her Honour identified a number

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12 *Id* at 33.

13 *Case Stated by the DPP (No 1 of 1993)* (1993) 66 A Crim R 259 at 263 cf *Longman v R* (1989) 168 CLR 79 at 91-93 per Deane J.

14 (1991) 83 DLR (4th) 193.

of common stereotypical conceptions about women and sexual assault, two of which are especially relevant to the present discussion:[15]

> 2. *Knowing the Defendant: The Rapist as Stranger.* There is a myth that rapists are strangers who leap out of bushes to attack their victims and then abruptly leave - the view that interaction between friends or between relatives does not result in rape is prevalent.
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> [Therefore] the defence uses the existence of a relationship between the parties to seek to blame the victim...
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> ...
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> 7. *Woman as Fickle and Full of Spite.* Another stereotype is that the feminine character is especially filled with malice. Woman is seen as fickle and as seeking revenge on past lovers.

Exacerbating these special difficulties and the undercurrent of discriminatory beliefs, recent history has also shown that the general question of what constitutes consent in rape cases remains problematic.[16] The way in which the courts in recent highly publicised decisions have expressed their understanding of both the victim's position and any consequent harm suffered by her, leaves little room for confidence that the judicial mind is open enough to ever fully reflect the change effected by the spousal immunity's abolition.

The Senate Select Committee on Legal and Constitutional Affairs which considered these matters amongst others in their Report, *Gender Bias and the Judiciary*, emphasised that sexual offences are part of the criminal law and, as these cases often involve delicate matters of proof as well as of degree, it is reasonable to expect that remarks made in the context of summing up and

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15 (1991) 83 DLR (4th) 193 at 208-209 citing Holstrom and Burgess, *The Victim of Rape: Institutional Reactions* at 174-199.

16 See for example the consent born of "rougher than usual handling [to persuade a wife to have sexual intercourse]" comments of Bollen J in *R v Johns* Unreported Supreme Court of South Australia, 26 August 1992 at 12-13; on appeal: *Case Stated by DPP (No 1 of 1993)*. See also Judge Bland's comments in *R v Davie* Unreported Morwell County Court, 15 April 1993 at 34-35 : "...it does happen to the common experience of those who have been in the law as long as I have, anyway, that 'No' often subsequently means 'Yes'".

sentence may, on occasion, be perceived as insensitive.[17] The Committee considered that judicially inappropriate remarks might be explained as suggested by the Acting West Australian Director of Public Prosecutions:

> A matter which needs to be remembered in this debate is that the criminal law is properly weighed in favour of an accused person. The High Court has repeatedly laid down principles based upon the trial judge's obligation to ensure the accused receives a fair trial. From this base, the High Court has dictated warnings, cautions, and comments, be made to a jury in appropriate cases...
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> Where the accused is male, as he generally is, and the victim female, the very task of applying the law with its onus, standard of proof, and cautions, may be suggestive of gender bias to an uninformed listener.[18]

While many feminists could properly take issue with the necessity for various of these "warnings, cautions and comments", particularly in the form of words in which they may ultimately be expressed by judges, defence counsel and offenders *before* the offender is convicted, *on conviction* it would not seem unreasonable to expect that any weighting and sensitivity previously afforded the accused, would be firmly put to one side. It would seem axiomatic that the convicted offender should be sentenced according to the gravity of the offence he has now been found to have committed, in accordance with normal sentencing principles. However, it is becoming increasingly clear that this is not occurring and that the "special difficulties" to which the South Australian Chief Justice referred, which beset the path to a marital rape conviction (or one where there has been any other prior sexual relationship), continue to hold sway in sentencing on that conviction. To this extent, despite the eradication of the distinction, the assaulting cohabiting or ex-cohabiting partner continues to be afforded special treatment.[19]

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17 Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, Canberra, AGPS, May 1994 at para 2.6.

18 *Id* at para 2.7.

19 Following the decision in *R v R*, an editorial in the New Law Journal considered that some questions still remained to be answered, amongst them the matters of the prosecution of and sentencing in cases of marital rape: Editorial, 'Rape after the House of Lords' (1991) 141 *NLJ* 1471.

It might have been thought that the tenor of the Australian High Court judgment in *R v L* was more encouraging for the future than that of its English counterpart: at least all members of the High Court doubted that it may ever have been the common law that consent to sexual intercourse is to be implied from marriage, regardless of the circumstances.[20] Unfortunately, it seems to have come to pass that it is the English courts that have taken up the challenge and sought to resolve the residual issue of sentencing in the spirit of the abolishing decisions. The Australian courts, fragmented in their various jurisdictions, have yet to settle on their sentencing priorities: with rare exceptions, they continue to look for the differences rather than the similarities in cases of rape on the one hand and non-stranger rape on the other.

Is rape something less if not by a stranger?

It is useful to set the parameters for any discussion on rape by having recourse to some statement defining the nature of rape and what constitutes it as a crime. A passage often cited and adopted by the courts[21] is to be found in the English Criminal Law Revision Committee's 1984 Report on Sexual Offences:[22]

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20 See *R v L* (1992) 174 CLR 379 at 390 per Mason CJ Deane and Toohey JJ, at 402-403 per Brennan J, at 405 per Dawson J. There are, of course, those who are uneasy about the High Court's role in "judicial law making" but this is another issue: see Giles, 'Judicial Law Making in the Criminal Courts: The Case of Marital Rape' [1992] *Crim LR* 407. The House of Lords decision also attracted its share of criticism, see for example Williams, *above* n.8. *R v L* is not, of course, the only example in recent times of the High Court's tendency towards judicial law making. See also *Trident General Insurance Co Limited v McNeice Bros Pty Ltd* (1988) 165 CLR 107 on privity of contract; *McKinney v R* (1991) 171 CLR 468 on corroboration of disputed confessional statements; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 on native title; *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia* (1992) 175 CLR 353 on recovery of money paid under mistake of law; *Australian Capital Television Pty Ltd v The Commonwealth [No. 2]* (1992) 177 CLR 106 on freedom of speech; *Dietrich v R* (1992) 177 CLR 292 on unrepresented indigent accused; and, most recently, *Theophanous v The Herald and Weekly Times Limited* (1994) 68 ALJR 713 on defamation and freedom of speech.

21 See, for example, the leading English sentencing decision *Billam* (1986) 8 Cr App R (S) 48 at 49.

22 Cmnd 9213, para 2.2.

> Rape is generally regarded as the most grave of all sexual offences. In a paper put before us for our consideration by the Policy Advisory Committee on Sexual Offences the reasons for this are set out as follows-
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> Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation: after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. *We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.* (Emphasis supplied)

Williams has suggested[23] that the sentencing of a cohabitee (even of an ex-cohabitee) for a first rape on a scale roughly the same as for a stranger is too harsh. He gives what he considers to be four powerful reasons for distinguishing rejected husbands and other cohabitees from strangers, foremost amongst them that

> ...other things being equal, rape by a cohabitee or even ex-cohabitee, though horrible, as all rape is, cannot be *so* horrible and terrifying as rape by a stranger.[24]

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[23] Williams, *above* n.8, at 12 and also in an earlier article in 141 *NLJ* 205 at 246. Williams considers that a husband who rapes his wife should spend less than one year imprisoned unless injury is caused to the woman: 141 *NLJ* at 206.

[24] Williams, *above* n.8 at 12. Williams' approach has, of course, been criticised: see, for example, Harrison, K., 'No Means No - That's Final" (1991) 141 *NLJ* 1489; H.Fenwick, 'Marital Rights or Partial Immunity?' (1992) 142 *NLJ* 831. Harrison points out that the justification for a different offence is unclear. Any exception for a husband in relation to his wife supports a notion of his right to sexual intercourse and her inability to exercise free will (at 1490). Fenwick argues that any categorisation of rapists involves drawing arbitrary, unworkable and indefensible distinctions between attackers (at 832). Some recent cases also

Unfortunately, Williams is by no means alone in his contention, he has merely articulated what some judges have long thought. For example, in the 1983 West Australian case of *Fulker*,[25] the trial judge did not consider the wife's trauma would be as great as that of a woman unknown to her rapist. The Senate Report, *Gender Bias and the Judiciary*, records a February 1993 observation by a Judge handing down a two year suspended sentence to a man who had raped his ex-wife that "this was a rare sort of rape. It is not like someone being jumped on in the street. This is within the family and does not impinge on the public".[26] In September 1994 in *Brooking*, Rummery DCJ ordered periodic detention in a case of "serious rape" which involved physical and emotional violence to the wife which she found to be a "terrifying experience" saying:

> Nevertheless the context of this rape occurring within a marriage that had stood for 26 years is a matter that I must take into account.[27]

Russell in her definitive study, *Rape in Marriage*,[28] opens her chapter on the trauma of wife rape by contesting the widely held belief that wife rape is much less traumatic than stranger rape. She nevertheless recognises that many subscribe to the belief and cites the author of one article who maintains that:

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confront the issue head on: for example, *Harradine* Unreported South Australian Court of Criminal Appeal No SCCRM 790 of 1991, 5 May 1992, a case of multiple rape against the offender's recently estranged de facto wife.

25 Unreported WA CCA 100/83 7 October 1983, noted in R.W.Carter, *Australian Sentencing Digest*, Sydney, Law Book Company, 1985, 158 at 401.01.W22. The trial judge in *Fulker* pointed out that no "actual violence" had been used and noted that Fulker's antecedents were not unfavourable, having put aside a juvenile conviction for attempted rape: sentence 4 years for rape. The CCA thought that the sentence rested on the particular facts and dismissed the appeal.

26 Senate Standing Committee on Legal and Constitutional Affairs, *above n* 14, at para 1.26 quoting "Comments tell it all", *The West Australian*, 19 January 1993.

27 Unreported Gunnedah District Court 2 September 1994; on appeal *R v Brooking* NSW CCA 60563/94 7 December 1994 at 10. On appeal, imposing a full time custody order, Carruthers J said that his Honour seemed "to have been wrongly influenced by the mere fact that the parties had been married for a lengthy period" (at 18).

28 D.E.H.Russell, *Rape in Marriage*, New York, Macmillan, 1982 at 190.

> Many U.S. jurists agree that when a husband compels his wife to engage in sex relations she suffers relatively little of the psychological trauma incurred in rape by a stranger.[29]

It is clear that there is a perception that the category of non-stranger rape should not be treated as seriously in terms of punishment as stranger rape. Is it more than that? In 1979, Walmsley and White conducted a study on English sentencing patterns in cases of sexual offences.[30] They found that custodial sentences were least likely if victims and offenders were well known to each other. The heaviest sentences were most likely to be imposed if victim and offender were strangers. Similarly, in their discussion of rape sentencing in Victoria, Fox and Freiberg, note that:

> Reference is often made in the cases to the fact that the rape has been committed upon a complete stranger. This is treated as an aggravating circumstance...[31]

Estrich ascribes a set of at least four reasons to why prior relationship cases tend to be viewed by the criminal justice system as simply less serious. She identifies each as incorporating the notion of male entitlement and female contributory fault:

> First, prior relationship cases are sometimes described as truly "private" disputes which are not the business of the public prosecution system...Second, [they] are said to be less serious (and the defendants less blameworthy), because they often involve a claim of right while the attacks by strangers do not...Third, prior relationship cases often involve contributory fault by the so-called victim, where offenses by strangers do not...Finally it is said that an attack by a non-stranger - whether it

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29 *Id* at 190 citing *Parade*, April 22, 1979, at 5 as cited by Frieze I, 'Causes and Consequences of Marital rape', Paper presented at the American Psychological Association Meetings, Montreal, Canada, September 1980 at 1.

30 See R.Walmsley, and K.White, *Sexual Offences, Consent and Sentencing*, Home Office Research Study No. 54, London, HMSO, 1979 cited in Atkins and Hoggett, *above* n.10 at 69.

31 R.G.Fox, and A.Freiberg, *Sentencing: State and Federal Law in Victoria*, Melbourne, Oxford University Press, 1985, at 514. The authors immediately go on to question this approach: "...though, if non consent is equally clear, to be raped by a friend may be just as repellent (even more so if there has been a breach of trust).

> is a rape or an assault - is a less terrifying incident and therefore deserving of lesser (or no) punishment.[32]

Lanham would join with Williams and justify a judicial tendency to lighter sentences on the fault and blame calculation referred to by Estrich. Lanham considers that, while in some cases, intercourse without consent between partners will be the sole or principal fault of the active party, in other cases the unwilling spouse may be to blame. In between these two extremes "will occur cases where the fault is roughly evenly divided". He continues:

> Yet if such intercourse is to be held to be rape, a reasonably just allocation of blame should be made in deciding on the severity of the sentence. In cases where the greater share of the blame lies on the victim it would seem that only a small penalty should be attached to the sexual aspect of the crime. If that is to be so, rape will vary from a most detestable crime to a crime varying from a most detestable crime in some cases to a most excusable one in others.[33]

It should be pointed out that non-stranger rape is neither unique nor uncommon. A recent nationwide survey of crime conducted by the Australian Bureau of Statistics has found that 66% of sexual assault victims know their offender.[34] These figures accord with past studies.[35] The same ABS survey

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32 S.Estrich, 'Rape' (1986) 95 *Yale Law Journal* 1087 at 1176-1178.

33 Lanham, *above* n.9 at 166.

34 S.Powell, '75 pc of Sex Cases Unreported', *The Weekend Australian*, April 30-May 1 1994, 1 at 2.

35 Graycar and Morgan, *above* n.7 at 329 cite 1985 figures from the NSW Bureau of Crime Statistics as disclosing that women are far more likely to be raped by someone they know than by a total stranger; in only approximately 25% of cases was the assailant totally unknown to the complainant. Some of the more recent studies are collected in Leggett, 'Case and Comment, *Defina*' (1994) 18 *Crim LJ* 293 at 294. L.Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141 *University of Pennsylvania Law Review* 1103 at 1104 estimates that in the US over 60% of rapes involve cases where "some elements of a consensual sexual encounter are present. In Australia, the Victorian Law Reform Commission, *Rape: Reform of Law and Procedure*, Interim Report No. 42, July 1991, estimated that in 75.5% of reported cases and 84% of unreported cases, the victims knew their assailant. See also A.Moran, 'Patterns of Rape: A Preliminary Queensland Perspective' in P.W.Easteal, (ed) *Without Consent: Confronting Adult Sexual Violence*, Canberra, Australian Institute of

has also confirmed that three quarters of sexual assaults were not reported to the police in 1993, a proportion that has not changed for more than a decade. The women surveyed had four main reasons for not reporting incidents: that it was a "private matter", that they were "afraid of reprisal", that the "police would not do anything" and "the police could not do anything".[36]

Given these findings, that someone as eminent and authoritative as Williams continues to press for a different offence in these terms - less serious to be raped by someone you know than be raped by a stranger - is of concern and reflects a fundamental failure to grasp the reality of the violent and aggressive crime that is rape, let alone to appreciate that rape by a cohabiting or ex-cohabiting partner might actually be of an aggravated, rather than an alleviated, nature.

As disclosed in the recent ABS survey, victim's misgivings about the legal system's ability to deal with sexual assaults, can in no way be diminished by reports of statements such as those made by no less a legal figure than the Commonwealth Director of Public Prosecutions in April 1994. After all the furore created by the now infamous Victorian Judges' comments of "rougher than usual handling" and that "'no' often subsequently means 'yes',[37] after all

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Criminology, 1993 at 45-46 and Easteal, P W, 'Survivors of Sexual Assault: A National Survey' in P.W.Easteal, (ed) *Without Consent* at 76-80.

[36] Powell, *above* n.34, at 1. This finding also accords with other studies. Estrich, *above* n.32, at 1109 found that *reported* cases where victims had had previous consensual sexual relationships with their attacker are rare. Estrich ascribed this to reasons similar to those found by the ABS survey, namely, "the women (who don't press charges)...the police (who unfound them) [and] the prosecutors (who dismiss them)". At 1171-2, Estrich cites a number of studies which conclusively show that the relationship between victim and offender and the circumstances of their initial encounter is one of three factors (force and corroboration being the other two) which will determine whether a rape arrest will lead to a prosecution and conviction. She also points out that prior relationship cases often result in dismissal because the victim withdraws her complaint (at 1176). The reasons victims withdraw range from intimidation by the offender to private resolution to the inadequacy of either imprisonment or probation as a remedy for an individual who is dependent on her attacker (*ibid*). The Victorian Law Reform Commission (*above* n.35) also found that only 10% of reported cases involved incidents where the victims admitted previous consensual sexual contact with the accused. See generally also Leggett, Case and Comment, *above* n.35 at 294; Heath and Naffine, *above* n.11, at 45-46; and *R v Seaboyer; R v Gayme* at 206-207.

[37] *Above* n.16.

the discussions, protestations, claims and counter-claims as to gender sensitivity, Mr Rozenes, the Commonwealth DPP, in an address to a Court Network meeting in Melbourne on 20 April 1994 is reported to have said that it was not as bad to rape a prostitute as it was to rape a nun:

> A person who takes a woman off the street knowing she is a nun and that she has kept her virginity sacred for years, in my view, is [committing] a greater crime than a person who goes to a prostitute who has agreed to do certain things for certain dollars, and when there is a dispute about one or two, he takes the extra one for granted."[38]

The Commonwealth Attorney General immediately expressed his concern to Mr Rozenes that his comments were open to the interpretation that the *victim's background* and particularly sexual history were factors that should be taken into account in assessing the severity of rape. Mr Rozenes himself issued a statement the following day saying that the rape example was "inappropriate".[39]

While the focus of this article is the court's approach to sentencing where the relationship is that of cohabiting or ex-cohabiting partners, the lack of consistency in sentencing sex offenders has recently been vividly highlighted in cases where the prior sexual relationship between the victim and the offender

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[38] P.Weekes, 'Prosecutor's Rape Speech Outrages Nuns, Prostitutes", *The Australian*, April 22 1994, 3. Compare Rozenes's comments with those of the NSW CCA in *Marteene* NSW CCA 76/82 8 July 1982, noted in Carter, *above* n.25 at 116 (401.01.N54), where the court said that while the complainant did place herself at risk, it did not deny her the ordinary protection of the criminal law and in such cases the element of deterrence was properly to be weighed in determining the sentence. Street CJ said:

"There is not the slightest reason for the criminal law to withhold from prostitutes a full measure of protection of their right to determine for themselves when and in what circumstances they will permit access to their bodies by men." (At 116).

Cf Sharpley, 'Heros as Villain: A Defence of the Judicial Approach to Hakopian' (1993) 67 *LIJ* 1064 at 1065 where a Rozenes-like distinction is drawn between raping a nun and raping a "married woman with a healthy sexual appetite".

[39] Weekes, *above* n.38 at 3. Mr Rozenes is reported to have said in his later statement that he was attempting to illustrate why similar crimes should lead to different sentences as some accused "demonstrated a more callous course of criminal conduct...I am fervently of the view that workers in the sex industry are in no different position to anyone else, particularly when it comes to the application of the law."

is one of employment as between prostitute and client. It is essentially the Williams rationale that puts raped partners in the same category as raped prostitutes so far as sentencing attitudes are concerned: it is inconceivable that rape by a partner could be "so horrible" as rape by a stranger, just as it is inconceivable that because the victim was a prostitute she could have suffered the same degree of trauma as a "respectable" woman. Further to this, as Estrich would point out, the perception is that it is inconceivable that the raped partner or prostitute did not in some way contribute to her fate.

The similarities between prostitute and partner rape are instructive as indicative of a general sentencing tendency to categorise the victim in these crimes as, for example, a prostitute or the wife/partner of the offender, and to *then* determine the gravity of the offence and the culpability of the offender for sentencing purposes according to the victim's designated status. In the implementation of this approach, assumptions are made as to the likely effect of the crime on the victim that bear no relationship to the *particular* victim's reaction. With this sentencing focus, there is a consequent failure to assess validly the offender's culpability. Couple this to the baggage of the "special difficulties in reaching a just verdict" that the courts seem unable to leave behind on conviction and serious anomalies in the application of sentencing principle are bound to be evident.

Where the relationship is that of prostitute and client.

It is observations such as those of Williams and Rozenes that raise the spectre of validating the approach to sentencing that caused a deal of public anger in Victoria in 1991 following the decision of Judge Jones in *Hakopian*.[40]

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[40] Unreported, Victorian County Court, Jones J, 8 August 1991. That Rozenes made his comments with certain knowledge of *Hakopian* and the ensuing furore, makes his statements even more remarkable and inexplicable unless it is simply the case that the most senior prosecutor in the land has little understanding of the violent crime of rape. The other possibility is that put by the Women's Electoral Lobby to the Senate Standing Committee on Gender Bias and the Judiciary, *above* n.14 at para 4.49, generally observing in relation to these types of comments "whether or not [they] demonstrate a failure to understand gender issues, at the very least they demonstrate a failure to express such an understanding in terms clearly comprehensible to lay people." Other cases since *Hakopian* have distanced themselves from the decision: see, for example, *R v Myers and Ward* Unreported Victorian County Court, 19 February 1993, Hanlon J expressly rejecting a submission that the experience of a prostitute could be regarded as being less

As prefaced above, the case is useful in the context of the present discussion for the judiciary's treatment of offenders who rape in relationships. Though the relationship between victim and offender in *Hakopian* was that of prostitute and client and not that of male and female partners, the approach to sentencing in that case exposed the destabilising effect that rape mythologies as to the woman's victimisation can have on the application of sentencing principle. The premises on which the court in *Hakopian* proceeded are similar to those that stand in the path of equality of sentencing in prior relationship cases and demonstrate, at least for sentencing purposes, that all rape is not rape.

In *Hakopian*, Jones J took into account the classification of the victim as a prostitute when assessing the harm done and in passing sentence. His Honour said:

> As a prostitute, Miss P would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations. She had, for money, agreed to have oral and vaginal intercourse with [Mr Hakopian], and had shortly before these offences occurred, had oral intercourse with [Mr Hakopian] on a consensual basis. On my assessment, the likely psychological effect on the victim of the forced oral intercourse and indecent assault, is much less a factor in this case and lessens the gravity of the offences.[41]

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traumatic. In *Leary* [1994] ASJB 12/N389, the NSW CCA held that the fact that the victim of a sexual offence is a prostitute neither "requires nor permits a lesser sentence"; *Hakopian* was not followed and was expressly disapproved (at 12).

[41] See Cass, 'Case and Comment , Hakopian' (1992) 16 *Crim LJ* 200 at 202. See further Fisher and Ammett, *above* n.6; Carter and Wilson. 'Rape: Good and Bad Women and Judges' (1992) 17 *Alternative Law Journal* 6; Coss, 'Hakopian's Case - Oh Chastity! What Crimes are Committed in Thy Name' (1992) 16 *Crim LJ* 160; J.Scutt, 'Women Sex and the Law: Beyond Antediluvianism to a Brave New World', paper presented to the Brisbane Conference on the Administration of Criminal Justice, Brisbane, March 1993; Keough 'Sentencing of Sex Offenders in Victoria' (1993) 67 *LIJ* 396; cf Sharpley, *above n* 38. Cf other cases of attacks on prostitutes: *R v Clark* [1987] 1 NZLR 380, *Attorney- General's Reference No. 12 of 1992 (R v Khaliq)* [1992] Crim LR 902. For examples of earlier Australian decisions see: *D'Angelo and Averte* Vic CCA 4 August 1975 where the CCA noted that the character of the victim had been "taken into account" noted in Carter, *above* n.25 at 126 (410.01.V10); Kenny [1980] 4 Crim LJ 57 for a

When the Director of Public Prosecutions appealed against sentence, the Court of Criminal Appeal (CCA),[42] though increasing the sentence, would appear to have accepted the continuing application of the earlier Full Court decision of *Harris*[43] regarding the relevance of the victim's prostitution as a factor in sentencing.[44] This reaffirmation of *Harris* in *Hakopian*[45] effectively legitimises an approach to sentencing which focuses on factors irrelevant to the particular elements of the offence and the nature of the conduct constituting it; particularly, that the crime is a less serious one and that penalty should be adjusted accordingly where there is some pre-existing relationship between the victim and the offender.

Crockett J in the CCA in *Hakopian* said that the real question was whether the offences committed on the victim caused her "fear and terror".[46] With respect, this is much closer to the "real question" except that the tendency in sentencing in these cases is for the court to then proceed to *assume* that, because of the prior association of the victim with the offender (as prostitute or as wife/partner), any consequent fear and terror must be less of a factor. It

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collection of sentencing cases and observations concerning difficulties in obtaining convictions for rape where the victim is a prostitute who has not been "seriously attacked" (at 57); *Marteene*; *Bartholomew* SA CCA 3/83 7 April 1983, noted in Carter, *above* n.25, at 150 (401.01.S6) for a large increase in sentence and statement that a subsequent consensual act of intercourse did nothing to reduce the heinousness of the earlier conduct.

42 Unreported, Victorian Court of Criminal Appeal, 11 December 1991.

43 Unreported, Victorian Court of Criminal Appeal, 11 August 1981.

44 (1992) 16 Crim LJ 200 at 201. The CCA in *Hakopian* approved a concession by counsel for the DPP that the sentencing judge was "not in breach of any sentencing principle when he dealt with the matter as he did on the basis that the complainant was a prostitute. It was admitted that the judge correctly applied what the Court had to say in similar circumstances in the case of *Harris*" (per Crockett J at 11-12). In *Harris*, Justice Starke in the Court of Criminal Appeal justifies this approach as follows:

"...in the case of a chaste woman...very often the forcible act of sexual intercourse, while perhaps not harming her physically to any extent at all, very often has a very serious psychiatric effect on the victim. That in the same degree cannot I think be said here. The factor that the women are or have been engaging in prostitution is relevant...in this way. It follows, in my opinion, that the forcible sexual act itself would not cause a reaction of revulsion which it might in a chaste woman." (at 6)

45 Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure Supplementary Issues*, Report No. 46, July 1992, at 4-5.

46 *Hakopian* at 11-12.

is this flawed application of what one commentator has called the judiciary's "intuitive reasoning"[47] that is completely ignored by those who would seek to defend the approach in *Hakopian* as an "entirely logical and scrupulous application of long standing sentencing principles", in that one of the relevant sentencing considerations is the degree of harm suffered by the victim of the crime.[48] Of course, the obvious answer to such a defence is that provided by the Victorian Law Reform Commission when requested by the Attorney-General to consider the implications of *Hakopian*: namely that the judges in *Hakopian* and *Harris* had no regard to the actual impact on the particular victims, but rather drew general inferences surrounding their occupation - views that were not based on any research at all.[49] The Commission went on to point out that there is now a substantial body of research dealing with the psychological impact of sexual assault which has found no clear divergence in the degree of trauma suffered by various classes of victims, particularly as experienced by victims who were acquainted with the offender as compared to victims of stranger rapes.

The relevance to sentence of the sexual experience of the victim has also been held to be pertinent to both prior relationship and prostitute rape cases. A particularly alarming proposition is put by Justice Starke in *Harris* in this regard:

> ...I should say that it does not appear to me that the learned Judge over-emphasised the fact that the girls concerned were or had been prostitutes. What he said was, 'I have also taken into account the fact that each victim of these rapes was, to say the least, very sexually experienced'.[50]

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47 Coss, *above* n.41 at 160.

48 See Sharpley, *above* n.38 at 1064: "...regard must be had to the consequences of the crime...Current and long established sentencing guidelines require judges to have regard to the harm suffered by the victims of crime, whether actual (where evidence is presented to court as to the victim's suffering) or presumed."

49 Law Reform Commission of Victoria, Report No.46, *above* n.45 at 6 and see also Sharpley, *above* n.38 at 1066. Sharpley's answer to this in turn is to state that the criticism is misguided simply because there was no such material available. He argues that, this being the case, the propriety of the inferences drawn (as to the effect on the prostitutes) is "inescapable". Cf the studies of prostitute rape trauma noted *below* n.53.

50 *Harris* at 7 and see further *King* [1991] ASJB 35/N217. Cf *Billam* at 51:

That the victim is as sexually experienced as a prostitute or as a married woman or as a nun, must surely be irrelevant to the circumstances in which the crime was committed by the offender and the consequent sentencing of that offender for that crime. Indeed any reference whatsoever to the victim in these terms in order to reduce an offender's sentence undermines otherwise consistent legislative attempts to exclude sexual history from rape trials. From the victim's point of view, it is difficult to envisage how her level of sexual experience would in any way bear on her reaction to being attacked as she was on that particular occasion and to what extent she was traumatised by that rape.

It is not disputed that the court may take into account the amount of harm suffered by the victim in assessing sentence and that it is appropriate to consider the psychological as well as the physical harm experienced. As pointed out by the Victorian Law Reform Commission, it is precisely because some crimes such as rape are regarded as so psychologically traumatic that they are treated more seriously than others. However, in the words of the Commission:

> If sentences are to be differentiated on the basis of the psychological effect of the crime on the victim, these assessments must be based on information about the actual impact of the offence on that particular victim, not simply on the fact that the victim comes from a particular social or occupational group, or that she or he has had more or less sexual experience than other victims.[51]

Be the victim someone who has known the offender in a previous relationship or someone who has known the offender as the client of a prostitute for the previous fifteen to twenty minutes, it is erroneous to assume that cohabitees or prostitutes or any other grouping of women as a generic class are likely to be less traumatised by a rape simply because the offender

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"The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

51 Victorian Law Reform Commission, *above* n.45 at 5.

was someone sexually known to them and not a stranger. Should the victim's circumstances or prior sexual experience be at all relevant to sentencing as somehow augmenting the primary focus on the circumstances of the offence as committed (aggravated already in the case of *Hakopian*, for example, where a knife was used to threaten the victim and she was held captive for some time), the only relevant consideration can surely be what the effect of the particular crime was on the particular victim.[52] Unless this remains the emphasis the sentencing process will be flawed. Specifically, in the case of prostitute rape for example, the one known study dealing with the psychological impact of rape on prostitutes found that:

> The emotional trauma experienced by rape victims in general appears to be compounded by several factors in the case of street prostitutes...Most of the prostitutes...dealt with their feelings alone and/or suppressed them...Another factor compounding the negative impact of rape on prostitutes was their general sense of powerlessness. This helplessness usually experienced as a result of rape is exacerbated in the case of street prostitutes by their pervasive feelings of impotence in life.[53]

It is incomprehensible that there should be some automatic mitigation by reason only of the fact that the victim fell within a particular category. Such a focus on the status and circumstances of the victim is also contrary to recent

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52 The efficacy of victim impact statements is still a matter of debate in wider circles in any event. Fisher and Ammett, *above* n.6, argue that the introduction of victim impact statements into rape sentencing would only serve to reinforce the existing practice of sentencers judging the victim rather than the crime and the offender (at 690). See also Carter and Wilson, *above* n.41, at 7-8 and Brown, 'Rape by Degrees' (1992) 3 *Polemic* 9 at 12-13 who, for different reasons, also considers VIS may not be the answer.

53 Victorian Law Reform Commission, Report No. 46, *above* n.45, at 6 citing M.Silbert, 'Compounding Factors in the Rape of Street Prostitutes" in Burgess, AW (ed), *Rape and Sexual Assault II*, Garland, New York, 1988. This study interviewed 200 street prostitutes in the San Francisco Bay area, 73% of whom said that they had been raped at some stage in their lives. See also Coss, *above* n.41 at 162 citing an earlier article by Silbert and Pines, 'Victimization of Street Prostitutes', (1982) 7 Victimology 122 at 130-131: "The strongest sense of power street prostitutes experience derives from a sense of control over their sexual activity...The impact of rape is thus compounded by the fact that it takes this control from them."

authority such as *Bowdidge*,[54] where the West Australian CCA held, on the issue of harm suffered by a sexual assault victim,

> ...bearing in mind the need, particularly in cases involving sexual offences, to adopt a conservative and cautious approach to the application of judicial notice, it nevertheless seems to us to be without doubt appropriate for a Judge to assume, without evidence, that the victim of a sexual assault has suffered severe emotional trauma which will endure for a limited period.[55]

As Scutt has astutely pointed out, should it be the case that any of the matters discussed in *Harris* and *Hakopian* is actually relevant in sentencing, then even that most chaste of woman identified by the court in *Harris*, the married woman living in her own flat, has logically therefore placed herself in the situation where she is acculturated to rape and bashing, if by her own husband in her own home.[56] It is against this alarming background of considerations that have achieved some legitimacy in the sentencing of these sex offenders that the judicial treatment of other forms of non-stranger rape must now be considered.

Where there has been a prior relationship between the victim and the offender - the sentencing considerations.

Just as the seriousness of rape should not be diminished according to the victim's classification by occupation, nor is it a crime deserving of lesser punishment merely because it happens that the perpetrator is someone known to the victim (in whom she may have previously reposed trust or even love) and not Williams's stranger rapist. Responding to Williams, Fenwick specifically addresses the assumption that rape by a cohabitee or ex-cohabitee cannot be "so horrible and terrifying" that it requires a similar sentencing tariff as for stranger rape and concludes that it is far from clear that stranger rape is the more devastating. She argues forcefully that the stranger who rapes is not betraying a trust, destroying the security of the home or raising the same well-founded fear of repetition.[57] Further, Fenwick contends that the victim of marital rape will feel that her trust in her husband has been completely

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54 [1992] ASJB 18/W82.

55 *Ibid.* See also *Hackett* Unreported Queensland Court of Appeal, 23 June 1993 esp at 5.

56 Scutt, *above* n.41 at 29.

57 Fenwick, *above* n.24 at 832.

betrayed; that however trustworthy men seem they are capable of rape. If this victim reports her partner's offence, she will have to do so without the support of some of those (including her husband) on whom she could have relied had she been raped by a stranger.[58]

Usually tension in the sentencing process results from confusion over and contradictions between the range of justifications for and theories of punishment. In prior relationship cases, the tensions appear to be more crucially centred on the sentencer's assessment of the gravity of the offence and the culpability of the offender.

Both at common law and under the sentencing legislation,[59] in constructing justness or proportionality, sentencers are required to have regard to the harm caused by the offence (its gravity) and the culpability (or blameworthiness) of the offender. Ashworth puts it succinctly when he states:

> Culpability, then, is concerned not only with the gravity of the type of offence - the factor which probably has the greatest influence upon popular judgments - but also with the personal responsibility of the offender and with the interplay of aggravating and mitigating factors.[60]

While it is clear that society ranks offences involving attacks on personal safety as very grave,[61] the *nature* of the offence of non-stranger rape seems, however, to attract a different response. As Lacey[62] has pointed out, the notion of culpability also enshrines a moral judgment about the wrongfulness of the behaviour in question:

> Culpability, in other words, is equated with blameworthiness, and blameworthiness is equated in turn with punishment-worthiness...The practical issue is that of determining just what type and measure of punishment is in (moral) fact proportionate to the offence committed by the offender. The difficulty underlying this problem is that the two elements are actually

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58 *Ibid.*

59 See, for example, *Penalties and Sentences Act* 1992 (Qld) s.9(2)(c) and (d); *Sentencing Act* 1991 (Vic) s.5(2)(c) and (d).

60 A.Ashworth, *Sentencing and Penal Policy*, London, Weidenfeld and Nicholson, 1983 at 204-205.

61 See, for example, *id* at 189-190 citing a Sparks, Glenn and Dodd survey (1977).

62 N.Lacey, *State Punishment*, London, Routledge, 1988 at 18.

> incommensurable; there are no acceptable common units of measurement in terms of which we can assess the relationship of equivalence.[63]

And this is the crux of the matter for present purposes. One senses that there is still a reservoir of adherence to the view that this type of wrong should not be criminally regulated, and that, if it is, it is behaviour that is not particularly blameworthy and therefore not particularly punishment-worthy. One may speculate that any failure to address these inequities in sentencing may be rooted in the tendency to view this type of offence as within the private confines of the family; that it is self-regarding and not properly or morally within the public arena of the criminal justice system. This is the approach of the court quoted earlier which found that the rape before it was a "rare sort" - it was "within the family and [did] not impinge on the public".[64] Russell in *Rape in Marriage* also expresses frustration that the women themselves often referred to the crime as "like rape", not that it *was* rape.[65]

Scutt has referred to the "incredible woman", that is, the "not credible" woman, who is evident as a victim and a witness in trials and is also evident in the sentencing stage of certain rape cases. In reference to *Hakopian*, she maintains that there is a

> 'grading' of the credibility of women as victims of crime and a categorisation of women-harm-damage calculated with reference to a woman's sexual experience.[66]

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63 *Id* at 18-21.

64 See *above* n.26.

65 Russell, *above* n.28, at 197. See also J.A.Scutt, "To Love, Honour and Rape with Impunity: Wife as Victim of Rape and the Criminal Law" in H.J.Schneider, (ed) *The Victim in International Perspective*, Berlin, Walter de Gruyter, 1982 at 425 citing the results of a 1979 South Australian survey to the effect that women who had been raped by their husbands did not perceive this as a "crime apart" but as part of a general pattern of violence. C.Barton, and K.Painter, 'The Rights and Wrings of Marital Sex' (1991) 141 *NLJ* 394 refer to a recent survey of 1000 married women in England, Scotland and Wales which found that 6 out of 10 women had sex with their husbands when they did not really want to, but that none of these women perceived themselves to have been raped.

66 J.Scutt, 'The Incredible Woman: A Recurring Character in Criminal Law' in P.W.Easteal, and S.McKillop (eds), *Women and the Law*, Canberra, Australian Institute of Criminology, 1993 at 16.

In prior relationship cases, these factors may serve to discount the generally accepted proposition that rape is a grave offence. At the very least, they cause the courts sufficient discomfort with a rigorous application of the accepted notions of gravity that some resolution of their disquiet is sought in the consequent construction of the offender's moral culpability. This disquiet, and the search for an acceptable answer to it, is very evident in the heightening of another sentencing dilemma: the resolution of the conflict between aggravating and mitigating factors. It is this tension that is particularly evident in the Australian cases examined below.

When the courts do not sentence all "rape as rape", when they introduce an element of differentiation dependant on the prior relationship or prior sexual experience with the offender and mitigate sentence accordingly, they do so on the same "intuitive" basis exampled by *Hakopian*; drawing general inferences about blame, fault and harm with no foundation in fact or research at all. The research evidence that exists on prior relationship rape points to special considerations operating in these cases which, far from having a mitigatory effect, are more likely to be of an aggravating nature in terms of the effect on the particular victim.

Russell in her study, *Rape in Marriage*, also examines the validity of the proposition that wife rape is less traumatic than stranger rape. From her research,[67] she concludes that rape in marriage is no less traumatic than rape outside marriage. Indeed, she asserts that "wife rape is potentially more traumatic than stranger rape which is usually perceived as the most dreadful form of rape".[68] Much of what she found may be thought to be almost self evident to anyone who has given the matter any little consideration from an objective but gender sensitive standpoint. She says:

> ...wife rape can be as terrifying and life-threatening to the victim as stranger rape. In addition, it often evokes a powerful sense of betrayal, deep disillusionment, and total isolation. Women often receive very poor treatment by friends, relatives, professional services when they are raped by strangers. This isolation can be even more extreme for victims of wife rape. And just as they are more likely to be blamed, they are more likely to blame themselves.

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[67] See Russell, *above* n.28 at Chapter 3 for a description of the study.

[68] *Id* at 198.

> Much more is at stake for a victim of wife rape than for a woman who is raped by a stranger. When a woman has been raped by her husband she cannot seek comfort and safety at home. She can decide to leave the marriage or to live with what happened. Either choice can be devastating. Leaving involves all the trauma and readjustment of divorce, economically, socially and psychologically, including feeling responsible for the suffering of the children, if there are any. But staying with someone who has raped you often results in a loss of self-esteem, unless the wife is able to effectively threaten or persuade her husband that it must never happen again. However, staying usually means being raped again, often repeatedly.[69]

Therefore, when the sentencing court assesses the gravity of the offence and the harm caused to the victim, both Russel and Fenwick would argue that, similarly to the raped prostitute, these women may actually experience greater than average trauma because they are less likely to have access to post rape counselling and may be more likely to experience disbelief by the police.[70]

Moreover, it is evident that two particular circumstances of aggravation have special significance in these cases to which sentencing weight should be accorded. The fact that cases of non-stranger rape often occur in the victim's own home is not insignificant. Under general sentencing principles, a rape which take place in the victim's home is usually more severely punished because the home is regarded as a "sanctuary in which a person is entitled to feel secure".[71] Despite the frequency with which prior relationship rapes take place in the homes of the victims[72] (and not infrequently in the face of non-molestation orders), few cases direct specific sentencing attention to this circumstance.

Usually also, abuse of a relationship of trust is a significant sentencing consideration in rape cases. Where an offence involves a breach of trust this is generally treated as an aggravating factor: these offenders are considered to be

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69 *Id* at 198-199.

70 See Victorian Law Reform Commission, Report No. 46, *above* n.45 at 6.

71 See, for example, Fox and Freiberg, *above* n.31 at 515 and the cases there cited.

72 See for example, Graycar and Morgan, *above* n.7 at 329 citing 1985 figures from the NSW Bureau of Crime Statistics: some 44% of all rapes studied occurred in a house in which the complainant or the defendant or both were living. Also generally see Moran, *above n* 35, at 40-41: 61% in a residential dwelling.

particularly blameworthy as their offences are usually deliberate and often involve systematic offending over a considerable period of time. In the context of sexual offences, breach of trust is most usually considered to be a factor in sentencing when a parental or guardian-like responsibility is involved. Significantly, the "predecessor" to the current English sentencing guideline case of *Billam*, the case of *R v Roberts*,[73] was a case involving a husband who had forced his wife to have intercourse with his uncle. The court regarded this as a serious breach of trust.[74] In one of the more recent English decisions, Owen J alludes to this concept when he states that it might be said that to rape "the mother of your children" makes the offence that much worse.[75] If all rape is to be sentenced as rape in accordance with normal sentencing principles, there should be no evident distortion in prior relationship cases: if the culpability of the offender is greater due to the abuse of a relationship of trust then this aggravating factor should be taken into account and not ignored. Unfortunately, this sentencing principle does not appear to have been extended to instances of partner rape, even though the rationale for treating it as aggravating is the same (or at least similar) to the traditional grounds: namely that the offender, in committing the offence, has betrayed the trust placed in him by society at large and by the victims of the particular offence. Further, what studies there have been show clearly that the "systematic offending", often prevalent in breach of trust cases, is commonly evident in relationship rape cases.

As evidence in support of the latter proposition, Russell's study has shown that wife rape is unlikely to occur in one isolated incident but rather over a number of years as part of a larger cycle of violence.[76] In an examination of the characteristics of wife rape, she found that wife rape occurred more that once in 69% of the marriages studied. Only one-third (31%) of the wife rapes were isolated cases (ie, occurring in the marriage only once) while in the exact same percentage of cases it occurred over 20 times. Where the rapes occurred more than once, the highest percentage (27%) occurred over a period of more

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73 [1982] 1 WLR 133.

74 [1982] 1 WLR 133 at 135: "In this case, the husband was, if anybody ever was, in a position of trust". Five years imprisonment.

75 *Hutchinson* (1994) 15 Cr App R (S) 134 at 136.

76 Russell, *above* n.28. This was also found in J.A.Scutt, *Even in the Best of Homes: Violence in the Family*, North Carlton, McCulloch Publishing, 1990, Chapter 6 and P.W.Easteal, *above* n.35 at 75-77.

than five years. 18% percent occurred over a period of more than ten years.[77] Russell further establishes a "statistically significant relationship" between the long term impact of wife rape and the frequency and duration of the rapes.[78] In the occurrences that Russell has investigated therefore, ease of commission of the offence, which from time to time has been suggested as a related aggravating circumstance, also seems to have application to these types of cases. Nevertheless, it is rarely that any of these usual sentencing considerations are transposed into non-stranger rape cases, though courts do seem quite happy to take into account the other side of the sentencing coin and use the circumstance of the prior relationship as a mitigating factor.

While some of the cases, more commonly the English decisions, have shown that certain of these factors have entered into the sentencing determination, at this stage of the evolution of rape sentencing practice, it would appear that the most that can be hoped for is that the existence of the prior relationship will not be treated as mitigation and that the offender will be sentenced according to the usual guidelines; particularly, that the offender will attract the usual tariff where there are present any of the traditional circumstances of aggravation. In the examination that follows it is clear that the English response has been correctly focussed by strong guideline rulings which allow little latitude for the exercise of discretion on the question of the sentencing relevance of the prior relationship. On the other hand, the Australian cases, very few of which are reported, do not compare favourably: there is no strong guideline case for the various jurisdictions and no establishment of sentencing priorities. The Australian cases are littered with continual reference to the existence of the prior relationship while few statements as to its irrelevance for sentencing purposes are to be found. More likely, the Australian courts will observe that there is some mitigatory sentencing relevance to be attached to the offender's prior relationship with his victim, though no foundation in sentencing principle is cited for such an approach.

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77 Russell, *above* n.28 at 111 and see generally Chapter 9.

78 *Id* at 200-201.

Sentencing where there has been a prior relationship - the English response.

In the reported decisions since *Reg v R*, it may be judged that the English sentencers adapted quickly and easily to the abolition of the immunity. The smooth transition in sentencing terms was facilitated by the existence of the 1986 guideline decision of *Billam*[79] which had already determined the irrelevance of certain of the discriminatory preconceptions that had previously lead sentencers into error.

One of the first cases in which an English court had to consider the approach to be adopted in sentencing a husband for the rape of his wife, committed while the parties were still cohabiting, was the decision of *Stephen W*.[80] The parties in that case had cohabited until a few days before the offence, but the victim had said she was leaving the offender shortly before its commission. In that case the English Court of Appeal held that the general sentencing guidelines laid down for rape in *Billam* applied to rape by a husband. The court in *Stephen W* also considered two earlier decisions of the Court of Appeal in *Berry*[81] and *Thornton*,[82] which, in interpreting *Billam*, had held that the existence of a previous relationship was a factor to which some weight could be given in sentencing, and went on to say:

> In our judgment it should not be thought that a different and lower scale of sentencing attaches automatically to rape by a husband as against that set out in *Billam*. All will depend on the circumstances of the individual case. Where the parties were

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79 (1986) 8 Cr App R (S) 48. Certain aggravating features were also identified in *Billam* at 51: the use of violence over and above what is necessary to commit the rape; the use of a weapon to frighten or wound the victim; that the rape is repeated; that it has been carefully planned; that the defendant has previous convictions for rape or like offences; the subjection of the victim to other sexual indignities; that the victim is very old or young; and that the effect upon the victim, mental or physical, is of special seriousness. "Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as a starting point." (*Ibid*). For the factors irrelevant to sentencing see *above* n.47. *Billam* indicated that the starting point for a rape which had no particularly aggravating features and to which there was a plea of not guilty, was a sentence of five years.

80 (1993) 14 Cr App R (S) 256; for commentary see [1992] *Crim LR* 905.

81 (1988) 10 Cr App R (S) 13.

82 (1990) 12 Cr App R (S) 1.

> cohabiting normally at the time and the husband insisted on intercourse against his wife's will, but without violence or threats, the consideration identified in *Berry* and approved in *Thornton*, will no doubt be an important factor in reducing the level of sentencing. Where, however, the conduct is gross and does involve threats or violence the facts of the marriage, of long cohabitation and that the defendant was no stranger will be of little significance. Clearly between those two extremes there will be many intermediate degrees of gravity which judges will have to consider case by case.[83]

The court considered that the present case of *Stephen W* fell at the grave end of the scale as the appellant had contested the case and had used a knife during the offence. The sentence of five years imprisonment was therefore upheld.[84]

In a case decided shortly after the strong statement in *Stephen W*, that of *Michael Guy C*,[85] the Court of Appeal further emphasised that it was necessary to have a clear order of priorities in assessing sentence, in this instance where there had been an extremely bad rape of a woman by her husband. The estranged husband had planned the rape of his wife which he carried out at gunpoint after breaking into her house at night.

> We are bound in these circumstances to put first, in order of priorities, the plight of the victim and the need for women to be protected from such behaviour, even against men to whom they have formerly been married, before other considerations.[86]

In establishing its priorities, the court also made the point, which is one seldom made in prior relationship cases, that here the rape was carried out at a place where the victim should have felt secure "not only because of the normal expectations of a woman in her own bedroom in the small hours of the morning but because of the non-molestation order which she had recently obtained".[87]

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83 *Stephen W* at 260.

84 *Ibid.*

85 (1993) 14 Cr App R (S) 642.

86 *Id* at 645.

87 *Id* at 644; six years imprisonment upheld.

Even before *Stephen W*, the English Court of Appeal, as early as 1988, had given some thoughtful consideration to the application of the guideline case of *Billam* as interpreted in *Berry*. In *Workman*,[88] the court upheld a sentence of five years imprisonment for the rape of a woman with whom the offender had previously had a relationship for some months. The offender had broken into the home of the victim, had pushed a sock into her mouth, overpowered and raped her. He had pleaded guilty after being caught "virtually red-handed", had surrendered himself to the police and confessed to the offence. The court said:

> We have been referred to an earlier decision, the case of *Berry*, where it was said by this Court that rape is perhaps a less serious offence when the victim is not a total stranger but someone known to the defendant, and particularly someone whom the defendant had previously had sexual relations with. But one cannot carry that doctrine too far. One cannot say that if the victim is someone who is known to the defendant in a sexual context he has thereby a licence to rape, or at any rate gets a significant advantage in terms of sentence, now that she has shown herself unwilling to have anything more to do with him.[89]

It is interesting to observe the jurisprudence at work in this case. There was every possibility of an inappropriate response and a different sentencing result in *Workman* given the prior relationship and the invitation extended in *Berry* to treat it as mitigation. In a very short judgment however, that invitation was declined and the court found the sentence passed to be in accordance with the guidelines laid down in *Billam*. It is interesting to compare the easy correction of judicial priorities that occurred in *Workman* with the strained Australian sentencing response considered below.

A more recent case of partner rape is that of *Hopkins*[90] where a sentence of three years was upheld for the rape by a man of his former partner. The two had lived together for seven years before the woman left the offender. They had met and had consensual sexual intercourse since that time. The offender

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88 (1988) 10 Cr App R (S) 329.

89 *Id* at 331.

90 (1994) 15 Cr App R (S) 373. See also *Maskell* (1991) 12 Cr App R (S) 638: a partner rape in the lowest category of seriousness with no circumstances of aggravation, a guilty plea and an earlier frank admission; three years imprisonment.

went to the victim's house and persuaded her to let him in. He made sexual advances which she rejected and then he raped her. Following the incident the offender telephoned the police and told them what had happened. Somewhat curiously, the Court referred only to *Billam* in its decision and not to *Stephen W*. However, a lesser sentence than that in *Workman* was nevertheless justifiable on the basis that there was evidence in the case for substantial mitigation (more than the nebulous existence of prior good character): the offender had telephoned the police himself and pleaded guilty at an early stage.

The most recent application of *Stephen W* in the Court of Appeal is the case of *Robert Leonard T*[91] a case where the parties were still cohabiting and in the course of a continuing relationship when the offence occurred. The parties had eight weeks previously had a child. Before the child was born, the offender had assaulted his wife by punching her legs and arms. Since the birth of the child the offender had sexually assaulted and humiliated his wife on several occasions. That conduct culminated in the offence of rape. The court accepted that the guideline cases indicated that for this type of rape committed by somebody who was living with the victim, the normal sentence on a plea of guilty was four years. The sentence in this case, upheld on appeal, was 30 months with weight being given to the offender's youth (though his age is not mentioned in the judgment), his immaturity, his expressions of contrition, his plea of guilty and his efforts to obtain treatment. The penultimate sentence of the judgment is worth setting out:

> It must be remembered that however tragic the case is from the point of view of this appellant, it is infinitely more tragic for the complainant who had to suffer the conduct which this appellant perpetrated.[92]

The court clearly treated the offender's actions as aggravated by the circumstance that the rape was the last act in a sequence of sexual approaches and humiliations, to all of which the wife had clearly and consistently objected. The case is a particularly interesting one in this context as, according to the studies that have been done, what occurred here is likely to be reflective of the common scenario of cohabiting partner rape.

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91 (1994) 15 Cr App R (S) 318 and for comment see [1993] *Crim LR* 983.

92 (1994) 15 Cr App R (S) 318 at 320.

The case also advances the application of sentencing principle. The English cases of rape by a former husband or partner reported prior to *Robert Leonard T*, essentially involved relationships which had broken down at the time the offence was committed, though there may have been some occasional sexual contact between the parties since separation.[93] Even in the guideline case of *Stephen W*, the wife had indicated that she was shortly to leave her husband. *Robert Leonard T* therefore is a case that tests the strengths of the English response to sentencing on non-stranger rape: the parties in the case were still living together and the wife had temporarily withdrawn her consent to sexual intercourse. The court nevertheless had little difficulty in reaching its decision and identifying the legitimate mitigating factors in a way which was consistent with the former authorities and their application of sentencing principle.

Before proceeding to a consideration of the Australian decisions in like cases, it is instructive to compare the underlying assumptions of the English decisions with those at work in the Victorian decision of *Hakopian*. A point of immediate departure is that in *Hakopian*, though the victim was threatened with a knife, indecently assaulted and abducted, the Victorian Court did not take the opportunity to say, as the English Court in *Stephen W* did, that the fact that the victim was within a particular category can be of no relevance, or at least of only marginal significance, when such further aggravating factors are present. Nor is there to be found in *Hakopian* any statement of principle as fundamental as that enunciated in *Michael Guy C* that the plight of the victim and the need for women to be protected from such behaviour should be a foremost (or indeed any) consideration. As has been pointed out, no amount of consensual sex is likely to lessen the humiliation and degradation associated with rape,[94] let alone the fear and terror generated and the resultant harm suffered, regardless of the relationship between the victim and the accused.

Prior to *Stephen W* changing the focus and emphasis of the sentencing deliberations, the English courts seemed inclined to consider the circumstance of the prior relationship as a mitigating factor. The justification for this latter position was that put at its highest by Mustill LJ in *Berry* and approved in *Thornton*:

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93 See further Case and Comment [1993] *Crim LR* 983 at 984.

94 Cass, *above* n.41 at 203.

> The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be:...To our mind these cases show that in some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship.[95]

As is a feature in these cases, and as has been referred to above in relation to cases of both prostitute and partner rape, a judgment such as this is made with little or no regard to the particular effect on the particular victim and without any general basis in research. Following the decision in *Reg v R*, the English courts easily overcame this stumbling block in reasoning, with minimal damage being done to legitimate sentencing practice in the interim.

When sentencing attention is re-focussed in the way *Stephen W* has effected, then the fact of the prior relationship can be given the type of refreshing perspective as that adopted by Justice Owen in the recent English Court of Appeal decision of *Hutchinson*.[96] His Honour there said, applying *Stephen W*:

> It is said that there were mitigating circumstances in that they had lived together for several years and had two children. Rape is rape whether it is within a relationship, whether it is after the termination of a relationship, or whether it is in fact between strangers. Indeed it might be said that to rape the mother of your children makes the offence that much worse.[97]

It is in this way that the added, rather than the reduced, dimension of the prior relationship may be taken into account in sentencing. This is the challenge for the future development of sentencing principle in these cases: that in assessing the offender's culpability and the harm caused by him to his victim, appropriate weight should be given to these factors (as weight would normally be given to any factor which exacerbated the gravity of the offence). Far from categorising the victim, Owen J's approach accords appropriate

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95 (1988) 10 Cr App R (S) 13 at 15 approved in *Thornton* (1990) 12 Cr App R (S) 1 at 6.

96 (1994) 15 Cr App R (S) 134.

97 (1994) 15 Cr App R (S) 134 at 136. The sentence in *Hutchinson* was reduced on appeal to five years.

sentencing regard to the trauma of the victim who, unbelievably, finds herself in this situation. As one such victim has stated:

> It's the most repulsive feeling in the world to have someone you know, who is supposed to love and care for you, heaving around on top of you.[98]

The court in *Hutchinson* further found that the forgiveness of the victim provided some mitigation. In this context the case of *Hind*[99] is also illustrative of how a logically correct and considered sentencing approach might come closest to arriving at a just sentencing result. In *Hind* the victim of an "appalling offence" continued contact with her attacker (with whom she had previously had a long and intimate relationship) by visiting him in prison. A sentence of six years was substituted on the basis that, *having heard from the victim*, it was clear that she had gone a long way to forgiving the offender and had not suffered the degree of mental trauma usually associated with this type of offence.

It is important to emphasise that these last two cases serve to reinforce the proposition that the existence of any relationship is of only marginal (if any) mitigatory significance, as dictated by *Stephen W.* The courts in *Hutchinson* and *Hind* did not mitigate sentence by reason of the existence of a prior relationship. Rather, these decisions stressed that, in this class of case, the attitude of the victim is very significant, arguably more so than in the more "traditional" rape case. The legitimate rationale for this is that a forgiving attitude on the part of the victim, taken in conjunction with other circumstances, *may* be an indication that she has not suffered the same degree of trauma as a victim of rape by a stranger.[100] This, however, is quite a different proposition to that put by the courts in *Hakopian* and *Harris* and by those who would seek to justify that approach: there was evidence in *Hutchinson* and *Hind* for such a finding and that evidence, rather than some intuitive assumption, came into play as a mitigating factor on the clear understanding that the relationship itself was not the mitigation.

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98 Glasman, *above* n.8 at 395 citing R.Hall, *Ask Any Woman: A London Inquiry into Rape and Sexual Assault*, Falling Wall Press, 1985.

99 (1994) 15 Cr App R (S) 114.

100 See 'Case and Comment: *R v Hutchinson*' [1993] *Crim LR* 718 at 719.

Where there has been a prior relationship - the Australian Response.

While statements of principle and their application appear to be happily coinciding (and developing) in the reported English decisions under the strong guiding influence of *Billam* and *Stephen W*, unhappily the best that can be said of the Australian cases is that the messages are mixed. It is not the case in any of the Australian states or territories, as it may be elsewhere[101] that the non-stranger rapist is entitled, as a statutory right, to more lenient treatment. Yet this may be the effect of what is happening in the fragmented Australian jurisdictions. Despite the promise for the Australian jurisprudence alluded to earlier, what few statements of principle there are to be found on the matter of sentencing are, particularly after *Hutchinson*, disappointing.

In Australia, the Full Federal Court in *Lyttle*[102] accepted everything the trial judge had to say regarding a first offender who, following the break-up of a long standing relationship with the victim, broke into her home at night while she was asleep, refused to leave when asked, committed violence in removing her clothes and holding her down and generally showed no contrition or acceptance of the seriousness of his offence. Nevertheless, the court, with little satisfactory attempt at justification, found the sentence imposed to be manifestly excessive, set it aside and substituted a lesser sentence. On reading the case one cannot help but speculate that the undercurrent of the *Berry/Thornton* principle[103] led to weight being given to the fact of the prior relationship (though it was never stated to be). The court did state in the last paragraph of its judgment that not sufficient weight had been given to the circumstances of the offender. At best one can discover from the judgment, those "circumstances" the court had in mind were the offender's first offender status and the "sad predicament which uncharacteristic behaviour on an

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101 See Geis, *above* n.9 at 297 who reports that in Norway, Denmark and Sweden, for example, rape in marriage is prosecutable but the penalty is milder where the woman has previously had a long-term sexual relationship with the perpetrator. Geis considers that there is an implicit or explicit absorption of the civil law principle of contributory negligence at work here or even an arrogation of an "assumption of risk" to the victim which becomes exculpatory for the offender (latter at 302).

102 (1991) 57 A Crim R 398.

103 At 402.

isolated occasion has caused him".[104] What is absent from the sentencing process is any statement of priorities that might have assisted the court in weighing the relevance of the competing considerations. By way of comparison, the English Court of Appeal in *Billam*, when setting out the relevant aggravating and mitigating factors, considered that previous good character was of "only minor relevance" in sentence.[105]

Another case where tensions are evident in the court's resolution of the conflict between the aggravating circumstances of the offence and the particular circumstances of the offender is that of *R v Lightfoot*.[106] In *Lightfoot* the court had before it, in the words of King CJ, an "undoubtedly serious" crime which involved "a significant degree of physical violence causing the victim a perforated eardrum and [involving] a disregard of her right to refuse sexual intercourse".[107] The offender and his victim had been involved in a sexual relationship for some three years prior to the commission of the offence. Olsson J referred to practicality demanding the notional positioning of the individual case along a "spectrum of degrees of relative seriousness" and illustrated that scale in the following terms:

> ...necessarily [extending] from circumstances ... not accompanied by significant physical and long term psychological trauma to the victim, on the one hand, to extremely brutal and depraved conduct exhibited to a victim who is a *stranger* to the rapist and experiences substantial physical and/or long term psychological harm - often involving situations in which the victim is placed in great fear (eg rape accompanied by brutal and/or depraved physical trauma in the context of abduction, break in to a dwelling at night or pursuit at night in a lonely area, and the like).[108] (Emphasis supplied)

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104 At 405. The original sentence was three years imprisonment with a one year non-parole period. The substituted sentence was two years with a direction that Lyttle be released under s.556A of the *Crimes Act* 1900 (NSW) after six months.

105 Per Lord Lane CJ at 51.

106 Unreported South Australian CCA, 22 December 1993, King CJ, Millhouse and Olsson JJ. On appeal, a sentence of 10 years imprisonment with an eight years non-parole was reduced to 6 years with 4 years non-parole.

107 Per King CJ at 9.

108 Per Olsson J at 12.

This description of itself is noteworthy. First, there is recourse to the assumption that the worst sort of rapes, those at the end of the spectrum, will be perpetrated by a stranger (and this is said in a case where the offender is a non-stranger). This factor is elevated almost to the status of an aggravating circumstance[109] and, again, its aggravating nature is based on the unfounded assumption that stranger rape is more traumatic to the victim: there is certainly no evidence of the assumption referred to in *Lightfoot*.

Secondly, an examination of cases of prior relationship rape in the various Australian jurisdictions reveals that those cases which are most unsatisfactory in their application of sentencing principle example the "worst case" rapes by discriminatory reference to circumstances that are either not present in the instant case or, if present, are deemed not to be of sufficient gravity to warrant their being given meaningful weight. The circumstances that make a rape aggravated are well established[110] and those to which reference is omitted in one case are often to be found in another. For example, in *Lyttle*, the offender *did* break into the victim's house at night. In a Queensland case soon to be discussed the offender abducted his wife, took her to a lonely area and tied her up. Even in *Lightfoot* itself, the violence used on the victim caused a perforated eardrum, but perhaps this was not the accompanying "brutal physical trauma" which Olsson J had in mind. It is difficult in these circumstances not to make the accusation of inherent bias founded on an inconsistency of application of principle. The judicial subconscious would appear to be at work here attempting to weigh up fault and blame for the rape in order to reach a "just" sentencing result for the offender. This weighing process is articulated in the following terms by Olsson J when he goes on to positively identify the factors of relevance in *Lightfoot*:

> • the offence occurred between persons well known to one another in the context of what had been an ongoing turbulent domestic relationship;
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> • whilst the physical ill treatment and assault on the victim was appalling and cowardly it fortunately *does not appear to have* given rise to permanent ill effects or disability;

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109 See also discussion *above* and n 31.

110 See, for example, the matters set out in *Billam, above* n.79.

> • although the distress occasioned to the victim is not to be underestimated or discounted the evidence does not indicate the generation of the long term psychological symptoms so often seen in many rape cases. Indeed it is clear that, although there was some contention as to certain details, the victim has, since the offence, voluntarily socialised, on a one to one basis with the appellant...
>
> The learned sentencing judge seems to have placed the single course of events giving rise to these offences as a position very much towards the most serious categories of this generic type of crime. No doubt he was, in large measure, motivated to do so by the appellant's cowardly, unprovoked assault...
>
> ...[The sentence] does not seem to recognise those mitigating factors, personal to the appellant, which were identified to the learned sentencing judge, including his expressed contrition, his relatively young age, *the developing domestic tension in which he found himself*, the fact that the appellant had no adult antecedent record and the fact that it us unlikely that he will re-offend.[111] (Emphasis supplied)

It examining these comments it is worth recording that the offender was the "young age" of 30; that Olsson J referred earlier in his judgment to the victim having "conceded"[112] that she had seen the appellant on a number of occasions since the attack, one of which, it is deserving of mention, was on his threatening suicide; and that, on the face of the judgment, there does not appear to have been any evidence as to the permanence or otherwise of any ill effects suffered by the victim. Specifically on the most tangible of these identified circumstances of mitigation, the offender's youth, Thomas *Principles of Sentencing* states that "allowance for mitigation is not considered to be an entitlement of the offender".[113] Thomas states that youth is a strong mitigating factor, with rehabilitation its motivating consideration, but notes

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111 *Lightfoot* per Olsson J at 13.

112 Per Olsson J at 3. "Conceded" is a revealing choice of words.

113 D.A.Thomas, *Principles of Sentencing* (2nd ed), London, Heinemann, 1979, at 194.

> It has been said that the age of the offender may be mentioned as a matter of concern as late as 30, though its effect declines progressively.[114]

None of these maters is alluded to by Olsson J in his mitigating for the offender's "relatively young age", a circumstance which, as recognised by his Honour, the trial judge had identified and, presumably, taken into account for what it was worth.

Olsson J was not alone. King CJ also thought that there were extenuating circumstances, amongst which were the offender's age and some ill-defined concept of fault/blame in the relationship between the parties. King CJ said:

> There is no doubt that he was caught up in a tense and emotionally charged relationship. *It is no part of the function of this court to attempt to attribute responsibility for that situation.* There is every reason to accept that this outbreak of violence was the result, as the appellant put it, of the pressure which had built up in the relationship.[115] (Emphasis supplied)

Any mitigation of sentence justified on the basis that somehow the offender was provoked by a difficult relationship to rape his partner is far from properly founded in principle. What must be recognised and then examined for validity is that sentencing weight is being given to the existence of a prior relationship (at least Olsson J overtly stated as much) when there can be no basis for giving the offender any significant advantage in sentencing on this as an independent ground. No basis, that is, unless it is accepted as a starting proposition, with no legislative authority for doing so, that the sentence in these circumstances is to be a lesser one.

One particularly noticeable omission in these cases is the failure to have any explicit regard to guideline decisions that would verify the exact relevance of any potential aggravating and mitigating factors. If initial recourse was had to matters of trite principle, judicial attention in these cases might be correctly focussed from the outset with the consequence of there being less prospect of diversion into sentencing error.

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114 *Id* at 196.

115 *Lightfoot* per King CJ at 10.

Such a guideline case is the 1993 Queensland Court of Appeal decision of *R v Knox*,[116] where the court considered the general sentencing principles for rape. In doing so, the court reviewed the history of rape sentencing in Queensland and found that, in the period 1982-1991, 67 cases had come before the Court of Criminal Appeal. The sentences ranged from three years to life. The court said:

> Looking at the sentences as a whole (that is to say the sixty-seven cases), it is apparent that sentences of more than ten years tend to be accompanied by aggravating features such as the commission of concurrent offences such as sodomy, or abduction or deprivation of liberty, or circumstances such as a brutal attack, the use of weapons, or attacks on very old women or very young girls, or cases where the authority of a father or person in loco parentis has abused the trust of a child.[117]

One of those "67 cases" was the 1991 Queensland Court of Criminal Appeal decision in *R v Spencer*[118] which considered the sentencing approach to be adopted and principles to be applied in a case where an estranged husband raped his wife. In the face of a restraining order against him, the offender abducted his wife using a shot gun, raped her in bushland and then tied her up there. Dowsett J for the court accepted that the offence was a serious case of rape, because of the use of a weapon (his Honour did not specifically refer to the abduction), and said:

> The law now forbids non-consensual sexual intercourse in marriage, *however it is obvious that the complex relationship of marriage must be considered in sentencing* where such an offence is proven. Where the parties are not living together at the time of the offence, different considerations apply from those relevant where they are so co-habiting.
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> ...*Generally, I would expect that if the parties were co-habiting at the time of the rape, this would go in mitigation of sentence, recognising the very special relationship between*

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116 Unreported Qld Ct of Appeal No. C.A. 269 of 1993, 22 October 1993.

117 At p 7.

118 Unreported Queensland Court of Criminal Appeal, C A No. 80 of 1991, 24 June 1991.

> *husband and wife*. If the parties were separated, such mitigation would be of reduced effect, although where there has been emotional disturbance as a result of the marital breakdown, that would be another factor going in mitigation. Those are, however, only general observations, and it might be equally said that where the wife has sought to restrain the husband from offering violence to her, the mitigating effect will be very much reduced. Where a weapon is used, the sentence must reflect the especial gravity of the misconduct.[119] (Emphasis supplied)

Although the sentence in *Spencer*, unlike that in *Lyttle*, was increased,[120] the repeated reference to the fact that the parties were married and the court's distinguishing this case "largely [on the basis] of the broken matrimonial relationship and its consequences for the respondent"[121] from an otherwise comparable case for sentencing purposes (which resulted in a sentence of 10 years which was said to be towards the lower end of the appropriate range, as confirmed by the review in *Knox*), leaves the application of relevant principle less than satisfactory. There is evidence here also of the judicial tendency to be discriminating in the identification of what constitute circumstances of aggravation. In this case, it might have been thought that the *abduction* at gunpoint (in the face of a restraining order) would be a serious aggravating feature - certainly Olsson J in *Lightfoot* and the court in *Knox* would have considered it so and it is hardly a contentious issue - but little is made of this in the *Spencer* sentencing. Is it the "complex relationship of marriage" that renders such treatment of the victim not worthy of serious punishment?

It is difficult to read *Spencer* and not compare it unfavourably with the English *Stephen W*. The focus throughout *Spencer* is on the circumstance of marriage rather than on the circumstances of the offence committed. The order in which the propositions are stated in *Spencer* is indicative of the court's approach to the question of sentencing. In *Spencer*, it is first mentioned that the "special relationship" between husband and wife is mitigation, as is any emotional disturbance caused by the marriage breakdown. Almost secondary considerations are the facts that the rape was committed in the face of a restraining order, that a weapon was used and that the victim was abducted.

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119 At 4-5.

120 A 7 year sentence with a 2½ year recommendation was substituted.

121 *Spencer* at 6.

The tenor of the judgment is as if, contra *Stephen W*, a "different and lower scale of sentencing [does attach] automatically to rape by a husband".[122] Read the two passages from *Spencer* and *Stephen W* together and it may be clearly seen that the emphasis is entirely different: marriage first and circumstances of the offence second in *Spencer*, circumstances first and then see if marriage is relevant in *Stephen W*.

Since the Queensland court's review of rape sentencing cases in *Knox*, in the following period, 1992-1993, there have been a further 17 cases involving sentences for rape that have come before the Queensland CCA. The sentences in those cases have ranged from six to fifteen years. Features such as attacks on young girls by a person in loco parentis, attacks in the victims' own homes, threats of violence and force and actual violence again have lead to sentences of more than 10 years.

Interestingly, a case at the lower end of the scale was a case of non-stranger rape where the offender and the complainant had known each other for several years. In *R v Day*,[123] after leaving a nightclub together, the couple went to the offender's residence to arrange for a lift home. Physical advances to the victim were rejected by her and the offender then raped her. The offender was heavily intoxicated and pleaded not guilty. It was held that the six year sentence was not manifestly excessive. That *Day*, in Queensland sentencing terms, was towards the lower end of the scale and that it was a case of non-stranger rape, may well tell the tale of judicial attitudes towards the gravity of this type of rape. However, what is clearer from these further statistics is that the sentence in *Spencer* - seven years with the aggravating circumstances of a weapon, an existing restraining order and the abduction - is very much at the lower end of the scale.

The Queensland Court of Appeal has recently had occasion to revisit the issue in *R v Stallan*,[124] where Pincus JA said, in a case similar to the English case of *Hind* (in that the victim had expressed support for the accused):

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122 *Stephen W* at 260.

123 Unreported Queensland Court of Criminal Appeal No. 93/247, 13 September 1993.

124 Unreported Queensland Court of Appeal CA No 8 of 1994, 15 March 1995.

> It is difficult and perhaps dangerous to attempt to generalise too much about rape within a relationship. Here there is no doubt that what occurred was rape... Although rape within a de facto relationship, like any other rape must be punished, the existence of the relationship can have a bearing upon the length of the sentence; but it will not always do so. But the circumstances here are such as to make the existence of the consensual sexual relationship, both before and after the rape, highly relevant, as indeed is the consequences of the rape for the victim... Here at least the long term effects seem to have been nil...[125]

In the words of Pincus JA, the rape in *Stallan* occurred during a period of:

> partial estrangement in what seems to have been a stormy and deteriorating de facto relationship...the parties were still living together and, indeed, sharing the same bed.[126]

There was also evidence that the rape had only been reported because of a threat made by people at the local kindergarten that if the victim did not go to the police then they would call in the Department of Family Services. While *Stallan* comes closer to the English cases in attempting an ordering of sentencing priorities and endeavours to establish the sentencing relevance of a subsisting relationship, it is nevertheless hardly an authoritative guide for inferior courts, particular when the emphasis remains fixed on the existence of the relationship as capable of having "a bearing upon the length of sentence" with no indication as to the circumstances in which it will not have that bearing. While the court in *Stallan* considered that the long term effects on the victim "seem to have been nil", there is a number of reasons why she may have been expressing support for the offender, not the least amongst which may have been because he was the father of her two children. One also wonders at the likelihood that there was other violence in the relationship between the victim and the offender.

In the Victorian Court of Criminal Appeal decision of *R v Heywood*[127] the court held that an eight year sentence was manifestly excessive for two counts of rape and attempted rape over a period of hours where the victim was a

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125 At 7-8.

126 At 3.

127 Unreported Vic CCA, No. 265 of 1993, 19 April 1994, Southwell, Orminston & Coldrey JJ.

woman with whom Heywood had previously had a sexual relationship. The case turns most decidedly on the fact that Heywood had somewhat impaired mental functioning which necessitated a reduction in the weight to be accorded to the principle of general deterrence. The court observed that, given the various matters the sentencing judge stated he had expressly taken into account, the starting point for the sentence "must have been very high indeed".[128] However, to come to these conclusions, the appeal court nevertheless found it necessary to spend some pages setting out the circumstances of the particular relationship between the victim and Heywood, which it referred to as a "complex" one and "most unusual".[129] It may be that the sentence in *Heywood* was just in all the circumstances but it is the unnecessary focus on any relationship that may have existed between the offender and his victim, when the necessity for doing so is not entirely clear given the decisiveness for the appeal of the offender's mental condition, that is cause for concern when it comes to the matter of elucidation of sentencing principle.

It is noteworthy also that the only case referred to by the court in its judgment in *Heywood* was the case of *Ramage*[130] (which was one of a number apparently cited by counsel for the offender). In *Ramage* the offender had been charged with eight counts of rape occurring on three separate occasions over a period of four months and involving acts of humiliation and violence. The court in *Heywood* referred to the fact that the victim in *Ramage* was the offender's former wife and went on to say:

> Although there were similarities between that and the present case *in that the prisoner Ramage had pleaded guilty at the earliest opportunity, had exhibited remorse and had no prior convictions*, the offences were, so it was asserted, far more heinous than the instant case.
>
> It may be observed that, given the factual differences which inevitably exist between cases, such references can only be of marginal assistance to a Court. It is unnecessary to mention other

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128 Per Coldrey J at 18.

129 Per Coldrey J at 2 and per Ormiston J at 19 respectively.

130 Unreported Victorian Court of Criminal Appeal, No. 146 of 1993, 15 September 1993.

> cases to which the Court's attention was drawn.[131] (Emphasis supplied)

What has been left unsaid in that passage is that the only case to which the court referred was a case where there was also a prior relationship between the offender and his victim, a notable point of similarity, but one to which reference was not made when the similarities between the two cases were drawn out. If counsel's references generally were of only marginal assistance, why was *Ramage* isolated?

In *Ramage* itself the Victorian Court of Criminal Appeal held that the principle of totality required the reduction of an effective 12 years imprisonment (eight years non-parole) for the eight counts of rape of Ramage's ex-wife, to an effective eight years (five and one half years non-parole). While Crockett J for the majority accepted that the applicant had taken advantage of both his relationship with the victim and the fact that she, as his ex-wife, would find it difficult to report him to the police, and further that the offences committed could only be described as "frightening and humiliating",[132] his Honour nevertheless found the sentences to be excessive having regard to the principle of totality and that:

> There seems to be little doubt that [the offender's] conduct was the product of a release of inhibitions brought about by his drunken condition.[133]

Analogous to the "sad predicament which his uncharacteristic behaviour" had caused Lyttle, like the "developing domestic tension" and "pressure...built up in the relationship" which mitigated in *Lightfoot*, similar to the "broken matrimonial relationship and its consequences" for Spencer, Ramage's "release of inhibitions" was treated as worthy of mitigation.

Ramage specifically addresses the mitigatory effect of the offender's domestic or emotional stress in this situation. Against the deterrent aspect of the sentence, the court accepted that the emotional stress of separation may

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131 *Heywood* at 12.
132 *Ramage* at 4.
133 At 6.

have accounted for the criminal conduct[134] and referred to the observations of Brennan J in *Neal v R*:[135]

> Emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, though its mitigating effect can be outweighed by a countervailing factor (see DA Thomas, *Principles of Sentencing* 2nd ed (1979) at 194, 207). The sentencing court takes account of emotional stress in evaluating the moral culpability of the offender just as it is entitled to have regard to the motive for the offence.

Two points may be made with regard to this proposition. First, as Brennan J recognises, the mitigating effect of emotional stress may be outweighed by a countervailing factor. This provides little assistance. Rather, it returns the sentencing court squarely to its initial dilemma of relative weight: in these cases sentencers have no intuitive set of priorities against which to weigh the relative worth of the "countervailing factors" (other than those founded in Lord Hale's proposition which must now be discarded). There will always be emotional stress in these intensely private matters between former partners. The countervailing factor is that put by the English court in *Robert Leonard T* - that however tragic the case is from the offender's perspective "it is infinitely more tragic for the [victim] who had to suffer [his] conduct". The second point is that the emotional stress, if it is to be given any weight in sentencing, must hark back to the type of justification espoused by Lanham:[136] that there are degrees of blame to be associated with the victim in non-stranger rape and that sentence should be adjusted accordingly. Estrich would judge that sentencing has not advanced from a philosophy of contributory fault and male entitlement which, similarly to Lord Hale's proposition is "not in keeping with *any* times".[137]

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134 *Ibid.*

135 (1982) 149 CLR 305 at 324.

136 Lanham, *above* n. 9.

137 This is the title of a commentary on the statements of Bollen J referred to earlier: see B.A.Hocking, 'The Presumption Not in Keeping with *Any* Times: Judicial Re-Appraisal of Justice Bollen's Comments Concerning Marital Rape" (1993) 1 *Australian Feminist Law Journal* 152.

Towards a more enlightened Australian approach.

The minority judgment of Cummins J in *Ramage* makes an interesting juxtaposition to the majority judgment. In his judgment, his Honour referred to the vulnerability of the victim and the nature and degree of her oppression and subjugation by the offender. His Honour said:

> ...next these rapes were a purposive exercise of oppression and subjugation as well as debasement by one person of another for the purpose of exercise of unlawful dominion. Next, it is an exacerbating factor that the victim was the applicant's former wife, because of her situation of vulnerability...Next there was an abuse of trust because the offences occurred in the home of the victim, in utter disregard of her rights and within hearing or potential hearing of her children. Next, these were repeat offences on three separate occasions over four months, in which the offences escalated in their brutality. Further, the applicant knew what he was doing, as is apparent from his statements to his former wife.[138]

His Honour concluded that, given the nature and quality of these crimes and their repeated occurrence over a period, the sentence was not in error. As Cummins J has exampled, when the emphasis in sentencing is firmly centred on the crimes for which the offender has been convicted and the way in which those crimes have affected the particular victim, then the remarks of the court carry with them the authority of the sound application of principle. It is interesting to note that only the minority judge referred to the report of the victim's psychologist and to the fact that there was evidence that the victim was suffering from post-traumatic stress disorder.[139] This case is a nice example of the difference in result which flows from a failure to identify clearly sentencing priorities.

It is becoming apparent that no authoritative statement of general principle such as that in *Stephen W* is falling easily from the Australian decisions. Of course, thankfully, there will always be individual courts which will stand apart and evidence the ability of the justice system to respond appropriately and reflect legitimate societal and legislative demands for change. The line of

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138 *Ramage* at 11.

139 At 10.

English decisions demonstrates that capability, as do judges such as Slicer J in the Tasmanian decision *R v S*.[140]

In *R v S*, a husband pleaded guilty to the rape of his wife. His Honour held, on the question of mitigation, that the sentencing process should not make allowance for the time which it takes community attitudes to accept a change in the law. His Honour said:

> The existence of marriage cannot be regarded as a matter going to mitigation...It cannot be said that the use of violence in the act of rape can be countenanced when the victim of the violence is the spouse of the attacker. It cannot be said that there is a cultural acceptance of that fact. It cannot be said that the abhorrence of the law to an act of violence upon a spouse is a new attitude.[141]

With that firm foundation of principle, his Honour then went on to reject counsel's contention that a prior sexual relationship could be regarded as a mitigating factor. In fact, his Honour went further and considered that a prior relationship with the rapist may cause greater harm to a victim because "of the betrayal of trust or the humiliation of the abuse of physical power".[142] *R v S* also stands apart for its extensive reference to the line of English authority on the sentencing relevance of a prior sexual relationship. In the absence of their own jurisdiction's decisions to guide them, it is curious that so few Australian cases have looked to the English decisions for assistance.

The problem for Australian sentencers in prior relationship cases is that they are not in a position to trust their intuitive reasoning and there is no statement of guiding principle that establishes priorities for them at a level of general application. As Ashworth has stated,[143] to claim every case is different as Olsson J did in *Lightfoot* is true "but not telling": it is clear, on any superficial examination of like cases, that the sentencer is bound to apportion

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140 [1991] Tas R 273; for comment see R.Browne, 'Developments in Tasmania's Rape Laws'(1991) 16 *Legal Service Bulletin* 286, 311.

141 *Id* at 278-279.

142 *Id* at 280. Another case that stands alone with an unequivocal statement of principle is Harradine, at 5, where the SA CCA said: "The Court has a duty to protect women whether they are strangers to the rapist or whether they are living in a de facto or other relationship with him. Indeed, this relationship had ended and what [the offender] did smacked of revenge or punishment."

143 A.Ashworth, *above* n.60 at 204.

different importance to different factors. The position in Australia is further exacerbated by reason of the fractured nature of Australian jurisprudence. Not only are the courts having individual difficulty reflecting the changes effected by the statutory enunciation that all rape is to be treated equally, but whenever the process does not adapt as rapidly as it might and inconsistencies appear in the application of principle, in the absence of a statement from the High Court, there is no one supervising court to pull principle back into line. It takes something like a *Hakopian* and the consequent storm of public outrage, or observations such as those of Bollen J's, to lead ultimately to a Law Reform Commission or Senate Report, before all judicial attention is focussed on the issue as a live one.

Conclusion

Where the victim and the offender are still unhappily cohabiting, it is appreciated that the court's task, in certain cases, may be a more difficult one and that the factors mentioned by King CJ,[144] for example, could exacerbate that perception of difficulty on consequent sentencing. But difficulties of quantification have never been permitted by the courts to obscure or render nugatory any principle which is reflected in the statute law. And surely the courts' ability in the exercise of sentencing discretion can only be stretched when what is being tested are the boundaries of consensual sexual conduct within an otherwise stable marriage relationship. This is not, however, the class of case with which the Australian courts have been struggling. The boundaries of consensual conduct are not being tested, nor can there be any misunderstanding as to consent (which is not a relevant consideration for sentencing purposes but somehow seems to have become blurred with it under the rubric of a pre-existing relationship), when the victim is punched, dragged, had clothing ripped, when a shotgun or a knife is used, when she is taken somewhere against her will, or her home is broken into. Any mitigation in these cases on the basis of the special relationship of marriage or the prior sexual relationship should be identified for what it is - a judicial non-acceptance of the abolition of the distinction between rape within and outside the marriage or other relationship. Indeed, there is a valid argument that since the abolition of the spousal immunity, even in the more difficult cases, offenders should be treated alike in the absence of particular factors, one of

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144 *Case Stated by the DPP (No 1 of 1993)* at 263.

which cannot be that the offender is not a stranger.[145] This has certainly been the effect of the English approach.

It is far from obvious, despite Justice Dowsett's statements in *Spencer*, that even though the law now forbids non-consensual sexual intercourse in marriage, the complex relationship of marriage "must be considered in sentencing".[146] The statistics tell us that a very high percentage of rapes are not being reported. Against these figures, it must be doubted whether King CJ's "motives" and "tensions" will ever lead women to falsely accuse their partners or ex-partners of rape and put themselves and their families through the turmoil of a rape trial in a legal system they do not consider to be sympathetic. The only answer to the difficulty the courts are having in these cases is for the judiciary to be educated on issues of gender bias and be given the assistance and the tools needed to identify unconscious prejudices that affect their judicial conduct towards women.[147] The implementation of mechanisms to deal with gender bias in the judiciary such as those recently recommended by the Senate Committee on Legal and Constitutional Affairs, chief amongst which were specific judicial education programs and the forming of a Council of Chief Justices to deal with complaints against Judges, are welcomed and encouraged.[148]

As pointed out by the Victorian Law Reform Commission, reformers should be mindful of the recent passage of the various sentencing statutes and be reluctant to propose legislative measures which might not be in accord with the philosophy of those statutes. The Victorian Commission found that the

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145 This seems to have been the view of the New Zealand Court of Appeal in *R v D* [1988] BCL 41 where the court held, in a case of sexual violation of a man of his wife, that the fine imposed by the trial judge was not appropriate and substituted a custodial sentence instead. The court held that the case did not call for any statement of principle, Parliament itself having reflected public opinion in the mandatory sentence for persons convicted of sexual violation. For comment see Brookbanks 'Sexual Violation in Marriage' [1989] *NZLJ* 3.

146 *Spencer* at 4.

147 See Editorial 'Educating the Judiciary on Gender Bias'(1993) *Crim LJ* 155 for a brief discussion of these matters in the context of *Hakopian* and the other comments of Bollen and Bland JJ.

148 Senate Select Committee on Legal and Constitutional Affairs, *above n* 17, at 117 and 122 and see also C.Dore, 'Judges may Face Council After Sex Bias Complaints', *The Weekend Australian*, May 14-15 1994, 1,4.

sentencing question (there in relation to *Harris* and *Hakopian*) would be most effectively dealt with as a matter of review and education for judges by the Judicial Studies Board.[149]

Implementation of this type of recommendation, that sentencing disparity in engendered areas be addressed by judicial education, would seem the most effective way forward. Little is to be gained from a re-examination of sentencing theory or from tinkering with sentencing statutes as the problem is more systemic than either of those responses could be expected to address. Even, for example, inserting a provision into the statutory guideline principles along the lines of a modified Victorian Law Reform Commission recommendation -

> In taking into account the impact of the offence on a complainant in the course of sentencing an offender for a sexual offence, a court must not make any assumption about that impact that is based on the fact that the complainant was, or had been, [in any relationship with the offender][150]

- will only ever go part of the way towards providing a solution unless it is also supported by judicial education on research into victim impact and gender sensitivity generally. Such a statutory response would, in any event, require the corresponding development of sentencing guidelines to meet the differing circumstances that these cases present as, for the present at least, it would seem that the judiciary is (or should be) reluctant to trust its instincts in these cases.

Should it be that the judicial education proposed facilitates a greater sensitivity to the operation of rape laws in the context of victim response to sexual assault, then perhaps the reformist remarks of Slicer J and Owen J which, after all, simply allow the law its full and proper operation, will

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149 Victorian Law Reform Commission, Report No. 46, *above* n.42, 5t 7. The Commission noted that a previous recommendation made in Report No. 13, *Rape and Allied Offences: Procedure and Evidence*, at 14, that judges be kept informed of current research and other material on victim response to sexual assault had not, at that time (July 1992), been implemented.

150 Cf *id* at 8 which the VLRC included on the basis that the Government may have wished to settle community concern without waiting for the Judicial Studies Board.

become less exceptional and more what the public can come to expect from its courts.