Crime in the Intimate Sphere: Prosecutions of Intimate Partner Violence

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I Introduction

The Criminal Law currently plays a marginal role in the legal response to intimate partner violence despite rhetoric to the contrary.[1] In 2001, research examined 694 files in the Brisbane magistrate's court registry relating to applications for Domestic Violence Protection Orders (henceforth referred to as DVOs). In spite of the litany of criminal offences that were alleged in many of the applications only three criminal prosecutions were associated with these applications.[2] Many proactive policing policies aimed at reducing crime focus on matters such as burglaries, rapes and assaults from unknown perpetrators rather than the activities within elements.[3] Historically, as a community, we have avoided looking inside our private

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1 See for example the Queensland Police Service website, its domestic violence section is sub-titled 'Wherever it Hides, Domestic Violence is Still a Crime.' See also Robyn Holder, 'Domestic and Family Violence: Criminal Justice Interventions' (Australian Domestic and Family Violence Clearinghouse, Issues Paper 3, 2001) 1, 2 <http://www.police.qld.gov.au/pr/program/dv/index.shtml > at 3 November 2003.

2 See Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 (1) *Criminal Law Journal* 32, 36. Similar findings have been made in the United Kingdom, see Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (2000) 148.

3 For examples consider Neighbourhood Watch and Police Shop-fronts in shopping malls. Betty Taylor, Director of the Gold Coast Domestic Violence Service, has commented that a recent police personal safety campaign in the Gold Coast area focussed on public street lighting and hotels rather than in making homes safe places (personal communication July 2003).

homes for crime.[4] This previous research demonstrating the lack of lower court prosecutions of intimate harm suggests a question: what is it that draws a matter involving intimate partner violence into the domain of the criminal law? Further, once a matter is drawn into the criminal law, how do judges respond to the offence and is the intimate nature of the violence considered to aggravate or mitigate the penalty? After examining a number of Court of Appeal judgments involving intimate partner violence I suggest that the linking themes in the prosecution of intimate partner violence are threefold. Generally the parties are recently separated, there is serious personal violence or torture alleged and there is a third party present who has witnessed the violence or there is other strong corroborative evidence. This research will examine a number of recent Court of Appeal judgments, focusing on the purported 'ingredients' of successful intimate violence prosecutions. Judicial views of the relevance of the intimate nature of the violence will also be discussed. The cases suggest that judges perceive that the intimate nature of the violence, precisely it's 'domestic' or 'private' context, is an aggravating feature in situations where the prosecuted offence breaches a DVO. Judges also tend to accept that the intimate or emotional context of the relationship should not mitigate sentence. In most of the cases examined judges were reluctant to place weight on any alleged contribution of the victim to the injury.

Note on Language and Method

In this paper I have eschewed use of the term 'domestic violence', this term has suffered criticism in recent times. It has been suggested that the use of the term ultimately hampers further enquiry as it denotes a status relationship as well as a spacial one, separating such violence out from and somehow modifying ordinary violence.[5] Others note that although the term, when it was initially contrived, was both radical and useful, it may now work to trivialise the violence which broadly is occurring in the context of the home.[6] One judge recently noted that he disliked the term 'domestic violence' because the term disguised its criminal nature.[7] It is thus difficult to know how to appropriately name the violence that

4 Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) 76.

5 Isabel Marcus, 'Reframing "Domestic Violence": Terrorism in the Home' in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) 26.

6 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2002) 313. There is also some contention about the space of domestic violence. The legislation, which regulates the provision of domestic violence protection orders in Queensland, is called the *Domestic Violence and Family Protection Act* and has included children and their parents. Recently this legislation has been expanded to include a very broad range of people who can apply for protection orders under that legislation, see Sally Kift, 'A New Era in Violence Protection for Queenslanders' (2003) July *Proctor* 21.

7 *Bromfield v R* (Unreported, Supreme Court of Western Australia, Parker J, 5 December 2002) [45].

is the subject of this paper. Its relationship context and gendered nature is extremely relevant and important to understanding and dealing with it. Rather than trivialising it, its status should be seen to exacerbate its seriousness, it *is* separate from other violence, it is worse. This type of violence is worse and more serious than many other forms of violence because its perpetrators exploit the intimate knowledge they have of their victim and because it frequently exploits a power imbalance between the parties. As a result of these considerations I have used the term 'intimate partner violence' to denote that violence which takes place between those in defacto or marriage relationships or those formerly in such relationships.[8] Previous research has found that most DVOs are applied for by women against their male intimates or previous intimates (rather than by men against women).[9] This research supports the view that violence against women by men in intimate relationships is more likely to occur and generally more serious than violence against men by women. The violence discussed here is very much about gender and relationship and this is played out in the fact scenarios I will discuss below. The reality for women continues to be that they are more likely to suffer violence from their intimate partner (or previous partner) than any other person.[10]

This research examined 30 cases that involved criminal prosecutions of men found to have perpetrated violence on an intimate female partner. These cases will be examined in the following sections of the paper. Towards the end of the paper I discuss eight cases which involved criminal prosecutions of women found to have perpetrated violence on an intimate male partner.[11] It is ultimately possible to draw some broad conclusions about the differences between male and female violence in the intimate sphere and when such violence is prosecuted.

II Male Perpetrators

Recent Separation

In the majority of cases examined where the perpetrator was male[12] the parties were separated at the time of the assault or killing. Usually the

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[8] The cases reviewed in this research all related to violence between those involved in heterosexual relationships.

[9] Heather Douglas and Lee Godden, above n 2, 36.

[10] When women are killed intentionally by another, it will most likely be by the hand of their intimate partner. See Jenny Mouzos *Femicide: An Overview of Major Findings* (Australian Institute of Criminology, Trends and Issues Paper No 124, 1999) 5–6 and Graycar and Morgan, above n 6, 303–306.

[11] The cases examined were those cases available on various databases, primarily Austlii and Westlaw thus the cases cannot be claimed to be empirically representative of criminal prosecutions of intimate violence in Queensland's higher courts.

[12] In 30 of the 38 cases examined the perpetrator was male.

separation had occurred within a few months of the attack. In only six of the 30 cases were the parties still living together. In two of the matters where the parties stated that they were still together they had actually been separated before the offence but had reunited. Within months of the reunion the prosecuted assaults had occurred.[13] It seems that post-separation assaults between intimates are more likely to be prosecuted than those incidences of violence between parties who are involved in an intimate relationship. Clearly the fact of separation is a linking theme for these cases. Mahoney has identified 'separation assault' as a distinct phenomenon.[14] She describes this type of assault as an attack on the woman's body and volition which seeks to achieve a range of effects including retaliation for the separation and an enforcement of his will upon hers in respect of where and with whom she will live.[15] According to Mahoney's research the assaults after separation are frequently extreme and sometimes fatal.[16] Mahoney's views are supported by this research. Two of the post separation attacks in this research were fatal, one resulting from strangulation and one from a hammer blow to the head.[17] A number of other potential post separation fatalities were avoided only as a result of third party intervention.[18]

When this violence is identified as post-separation assault it is often possible to see something positive, that is that women are taking action and leaving the violent relationship. The male violence is retaliation for that action (and effectively the cost of that action). As Mahoney suggests

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[13] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001). The situation in *Hudson's* case was similar; *R v Hudson ex-parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, Jerrard JA, Davies JA, Williams JA, 3 July 2002).

[14] Martha R Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1, 65. See also recent Australian research which found that violence continues after separation especially around child hand-overs, Miranda Kaye, Julie Stubbs and Julia Tolmie 'Domestic Violence and Child Contact Arrangements' (2003) 17 (2) *Australian Journal of Family Law* 93, 97. See also *Foodey* re: violence at child hand-over; *R v Foodey* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies, Jerrard JJA, Helman J, 25 July 2003).

[15] Mahoney, ibid.

[16] Ibid.

[17] See *R v McKinnon* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Mackenzie, Atkinson JJ. 30 May 2002) and R *v Lock* (Unreported, Supreme Court of Queensland, Court of Appeal, Williams JA, Ambrose, Douglas JJ, 13 March 2001) respectively. I note that a retrial was ordered with respect to Lock because of concern about the directions of the trial judge on the defence of diminished responsibility.

[18] See *R v Forster* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Davies JA, Dutney J, 14 November 2002). Forster shot his wife once before having the gun wrestled from him from a passer by. See also *R v Parks ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Philippides JJ, 5 December 2002). Parks' attempt to procure the murder of his previous wife was halted by the intervention of an undercover police officer. See also *R v Melissant* (Unreported, Court of Appeal, Queensland, de Jersey CJ, Atkinson J, Williams JA, 19 March 2003); where the victim was stabbed repeatedly and the perpetrator held a knife at her throat, she screamed and her father heard the screams and intervened. In a number of other matters medical attention saved the life of the victim.

the violence is a response to the woman's act of resistance and struggle against her oppressor.[19] It becomes clear, particularly in post-separation assaults, that the infliction of violence is operating as a quest to regain control of a situation;[20] this probably explains why the responsive assaults are often so brutal. It is interesting to find that post-separation assaults appear more likely to be prosecuted than those where the parties have not yet separated. There are a number of reasons that may help to explain why post-separation assaults are more likely to be prosecuted. It may be because women are more willing to give evidence against the perpetrator; or because police prosecutors have more faith in the victim not transforming into a hostile witness; or simply because the injuries tend to be so extreme. It is likely that all of these reasons help to explain why prosecutions seem to be more likely to take place when the injuries are inflicted post-separation.

Presumably while women struggle to try to continue with a violent relationship — perhaps because of children or fear — they are unlikely to support police involvement. The prospect of continuing the violent relationship while at the same time assisting a prosecution may seem contradictory. Thus until separation, the intimate space or domestic sphere can be conceptualized as a 'protected' space[21] that tends to incorporate violent men. As such violent men within intimate relationships are more likely to be accepted as part of a family and part of the law-abiding community. While they are identified in such a way they are less likely to be criminalised. Once there is separation, however, the protection afforded by relationship dissolves and both the victim and other members of the community, such as police, will be more prepared to treat a violent incident as no longer a family matter and hence public property and therefore as potentially criminal.

Motive and Blame

Male perpetrators did not name separation per se as the trigger for their violence. In the cases examined in this research, where the parties were separated, there appear to be four main reasons offered by men to explain to the police or court why they have inflicted injury on their intimates. Generally male defendants cite concern about the care of children, inability to accept relationship breakdown, sexual jealousy and intoxication as explanations for their violent behaviours.[22]

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[19] See Martha R Mahoney, 'Victimisation or Oppression? Women's Lives, Violence, and Agency' in Martha Fineman & Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (1994) 60.

[20] Ibid.

[21] Lois Bibbings, 'Boys will be Boys: Masculinity and Offences Against the Person' in Donald Nicholsen and Lois Bibbings (eds), *Feminist Perspectives on Criminal Law* (2000) 244.

[22] I note my discussion later in this paper that such explanations, although apparently accepted by the judiciary, do not appear to impact on sentence or conviction.

Sexual jealousy, concern relating to the exercise of rights perceived to be intrinsic to the relationship (for example children and property)[23] and unhappiness about relationship breakdown[24] can be understood to operate as an appeal to be conceived as less blameworthy or even as lacking blame. The offering of these particular explanations represents an attempt by the perpetrator to relocate himself as the wronged party rather than the wrongful party. It is of course an attempt to contradict the criminal character of the violence as somehow justified or excusable. The corollary of such justifications is to identify someone else, usually the victim, as the outlaw or rule breaker. Such justifications often attempt to label the victim as the flirtatious harlot, the home wrecker or the person who refuses to allow the father to exercise his rights (to see children or collect property). While I do not suggest that such explanations are always contrived by the perpetrator for the purpose of shifting blame, in some cases such explanations do appear to be actually calculated to shift the status of the perpetrator from wrongdoer to wronged and thus out of the criminal sphere. For example Ball[25] went to collect property from his wife's house after their separation and while there burned down her house. He argued that the victim, his ex-partner, had been refusing to co-operate in returning his possessions. The police arrived to find him sitting in the burning lounge-room cradling his television. Turner submitted that his offending was triggered by the variation of an access order made by the Family Court.[26] Forster[27] became depressed as a result of his separation from his wife and he shot her while she worked in a florist. He made much of the fact that she had left him 'suddenly', and from his perspective with no reason, after 30 years of marriage. The frenzied knife attack in *Melissant*[28] was argued to be an immediate response to the victim's announcement that the relationship was at an end, in the perpetrator's opinion for no reason. All of these examples illustrate an attempt to shift the blame for the violence.

Similarly when male perpetrators cite sexual jealousy as the reason for violence this can also operate as an appeal to moral blamelessness. Again there is an attempt to shift criminal status elsewhere, usually to the victim. The perpetrator attempts to construct his victim as, for example, flirtatious and promiscuous. The suggestion being that she, rather than

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[23] For example: *R v Denham ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Jerrard JA, Cullinane J, McGill DCJ, 28 February 2003).

[24] For example: *R v Millar* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Jones JJ, 25 September 2002).

[25] *R v Ball* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Muir, Atkinson JJ, 28 May 2001).

[26] *R v Turner* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Muir, Philippides JJ, 15 March 2002).

[27] *R v Forster* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Davies JA, Dutnney J, 14 November 2002).

[28] *R v Melissant* (Unreported, Court of Appeal, Queensland, Atkinson J, de Jersey CJ, Williams JA, 19 March 2003).

he, is the instigator. Cossins has pointed out that in sexual assault trials women's promiscuity and lying are often raised and women's' bodies are constructed as disruptive and problematic.[29] Male perpetrators in many of the cases examined here essentially attempt to construct women as disruptive and problematic. For example in *McKinnon*[30] the defendant believed that the victim was being 'flirty' with a male friend who was visiting her when McKinnon attended at her house. McKinnon subsequently murdered his victim by strangling her. Taiters[31] argued that he was provoked to assault his defacto when she advised him, after he harassed her for such information, that she had slept with another man during a recent period of separation. Meanwhile, S[32] raped his victim after he discovered that she had spent the previous night with another man. These explanations attempt to locate others, usually the victim as the person who is disrupting the community and thus the one to be imagined as the criminal.

Male perpetrators referred to intoxication in a number of the cases[33] to explain their violence towards their intimates. The explanation here is effectively that while the intoxicated perpetrator is a criminal that same person unintoxicated is not. The argument might be that if the courts and the victim can excuse the intoxication then they can, as a corollary, also excuse the associated violence. In any event the violent perpetrator seeks to demonstrate that he is not an outlaw (a criminal) because the behaviour is an aberration. In Queensland there is very little controversy about the impact of intoxication on criminal responsibility. If the intoxication is intended, which it was in all of the cases examined here, then the intoxication will only have an impact on criminal responsibility if the offence includes as an element a specific intent.[34] The judges in the cases examined routinely refused to find that intoxication should have any bearing on the criminal responsibility or sentencing of the offender.[35]

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[29] Anne Cossins 'Saints, Sluts and Sexual Assault: Rethinking The Relationship Between Sex, Race and Gender' (2003) 12 (1) *Social and Legal Studies* 77, 85.

[30] *R v McKinnon* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Mackenzie, Atkinson JJ, 30 May 2002).

[31] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001).

[32] See *R v S* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Thomas JA, Mullins J, 25 September, 2001).

[33] For example see *P*-amphetamines; *R v P* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Philippides J, 12 March 2002). See *Reuben* – alcohol; *R v Reuben* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams, Byrne JJ, 7 August 2001).

[34] *Criminal Code* 1899 (Qld) s28 (3).

[35] See *R v Marshall* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams, Wilson JJ, 10 September 2001). Further, in cases where the perpetrator was Indigenous (eg, *R v Ketchup* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Williams JA, 15 November 2001)) judges refused to find that the fact of intoxication provided a reason to reduce penalty.

Acts of Torture

Young has argued that the criminal law tends to require visual images of injury.[36] In situations where there is no visual image it is possible to imagine that there is no criminal injury. In lower court applications for protection orders there is often no visible residual injury and thus it is possible, for the purposes of the criminal law, to imagine that there is no criminal injury and only a future risk of injury.[37] When there is no visual injury it seems to be more difficult to name behaviour as criminal behaviour. The criminal law has traditionally supported the idea that visible injury is more serious than injury that is not visible. For example in Queensland visual injuries are understood to be more serious injury pursuant to the criminal law.[38] When injuries are visible they are more likely to be prosecuted (although visibility by itself may not be sufficient to ensure prosecution).[39] For the most part the violence in the cases, which were the subject of this research, left visible injuries. Further, in most of these cases the injuries were very serious, often life-threatening. This research suggests that it is frequently extreme forms of injury that are necessary before the perpetrator of violence towards an intimate will be subjected to the criminal law. Why is such extreme violence needed before there can be a prosecution of intimate violence? Sometimes explanations such as discipline and mutual combat may make some injuries effectively 'invisible' to the criminal law because the injury is understood as part of everyday life.[40] However such explanations are more likely to fail when the injury is particularly brutal. Often the key to understanding why particular incidents of violence against intimates are prosecuted is that the specific incident of violence demonstrates *unimaginable* levels of inequality and exploitation between the parties.

Most of the injuries prosecuted in the group of cases examined here are extraordinary and *unimaginable.* They are injuries of an extremely serious nature and nearly all of the perpetrators' actions created visible injuries. Marcus has described the kind of violence that the cases of intimate partner violence routinely expose as terrorism.[41] They could

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[36] Alison Young, *Imagining Crime* (1996), see chapter 1, especially 20.

[37] Douglas and Godden, above n 2, 37. Approximately 60% of matters described in applications for DVOs suggested simple assaults (once an injury is visible it would usually be described as an assault occasioning actual bodily harm, see below n 38).

[38] In Queensland see, for example, Assaults Occasioning Bodily Harm (s329, *Criminal Code* 1899 (Qld)) and Grievous Bodily Harm (s339, *Criminal Code* 1899 (Qld)) note also the definitions in s1 *Criminal Code* 1899 (Qld).

[39] In one example where a woman applied for a protection order police observed her injuries, these consisted of facial cuts however police accepted her statement that she did not want to prosecute. See Douglas and Godden, above n 2, 37.

[40] The violence may be seen as part of a mutual combat, see Linda Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3 (2) *E Law — Murdoch University Electronic Journal of Law* 4.

[41] Marcus, above n 5, 26.

also be appropriately labeled as acts of torture.[42] In its narrow sense the law of torture is understood as the successor to trial by ordeal that was well developed in England by the thirteenth century.[43] The law of torture was traditionally separate from the law of punishment.[44] Torture was understood to be the physical coercion used by the judiciary to gather and extract evidence for judicial proceedings.[45] More broadly, however, torture has come to be understood as the performance of acts that constitute unjustifiable suffering or pain. Further, torture is frequently inflicted as a sadistic expression of vengeance, power and hatred.[46] Torture can be physical or psychological in nature however the overriding purpose of the act is to cause extreme pain and suffering, rather than necessarily the specific physical injury that results. The notion that torture is often related to sadism is particularly relevant in circumstances involving violence between intimates. Sadism is the sexual pleasure derived from inflicting pain and suffering. Scott suggests that once the 'sexual repercussion has spent itself' interest in the cruelty is lost.[47] Parallels can easily be drawn between historical understandings of torture including their purposes and methods of implementation and the character of harm inflicted in the context of the intimate sphere.

The recent introduction of the offence of torture to the criminal law in Queensland reflects the modern understanding of torture discussed above. In section 320A(1) of the *Criminal Code*[48] torture is listed as a crime. It is defined as 'the intentional infliction of severe pain or suffering on a person by an act or series of acts...and includes physical, psychological or emotional pain and suffering...'[49] Torture has been charged in a range of circumstances in Queensland. It has sometimes been charged in situations

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[42] This view of violence in the intimate sphere was suggested by Cobbe, see Peter's reference to an 1878 pamphlet by Frances Power Cobbe titled 'Wife Torture', Edward Peters *Torture* (1985) 143.

[43] John H Langbein, *Torture and the Law of Proof* (1977), 6–7.

[44] Since the *International Covenant on Civil and Political Rights* came into effect on 26 March 1976 torture has been linked to cruel, inhuman or degrading treatment or punishment. See Article 7 available at <http://www.hrweb.org/legal/cpr.html> at 10 November 2003.

[45] Langbein, above n 43, 3; George Ryley Scott, *A History of Torture* (1940) 2.

[46] Scott ibid, 3 and generally chapters 2 and 3. I note that the *International Covenant on Civil and Political Rights*, above n 44, adopts the broad meaning of torture, that definition does not require that the torture be carried out by the state. Further, the purpose could include punishment or intimidation. I note also Peter's complaint that such modern definitions sentimentalise / moralise the notion of torture and that the traditional understanding of torture, judicial torture, is in his view the only form of torture. See Peters, above n 42, 7 and also see 149–50.

[47] Scott, ibid 14.

[48] *Criminal Code* 1899 (Qld)

[49] *Criminal Code* 1899 (Qld) s320A (2). The crime was introduced in 1997 as a result of the case of *R v Griffin* (Unreported, District Court of Queensland, Healy DCJ, 20 November 1996). In that case Griffin had administered electric shocks to the toes and legs of his defacto wife's five-year-old son. He was charged with the only charge available in the circumstances, common assault (s245 Criminal Code 1899 (Qld)) which allowed a maximum penalty of 12 months imprisonment. The judge commented on the inadequacy of the available

where the targets of violence are women.[50] Unlike most other offences of violence in Queensland and in the Common Law, where the main element of the offence is the fact of death or penetration or the type of injury inflicted, the defining characteristic of torture is the pain and suffering of the victim. Thus crimes of murder, rape and assault may or may not involve torture. When crimes such as murder, rape and assault are committed in the circumstances of intimate partner violence, the cases suggest that they frequently involve sadistic forms of torture.

Although, as I noted above, many of the offences in the cases examined in this research can be recognised as acts of torture, generally the specific charges preferred are charged as an alternative offence. It is not clear why other crimes are preferred on the charge sheets. It may simply be because the charge of torture is a relatively new one. It is of interest to note that there is often a link between the forms of torture perpetrated by men on their intimates and traditional forms of torture. Some traditional techniques of torture used to procure confessions included burning, branding with hot irons, continuous whipping and beating, mutilation and ordeal by hot water.[51] All of these various techniques are played out in the cases of intimate partner violence examined in this research. In addition, many of the techniques described could be characterised as sadistic.

Of course acts which brand or scar can be seen to literally mark the victim as a chattel of their abuser (that is signify them as exploited and unequal). Torture by branding was employed in ancient Rome,[52] Scott reports that slaves who had attempted to escape would be branded on their forehead.[53] Again, this is interesting in the context of 'escaping' partners. Rankmore,[54] whose partner had left him shortly before the charged offences, was found guilty of a number of violent offences including *torture.* On the night that the acts of torture had been performed the victim had allowed Rankmore entry into her house. The defendant had then torn off the victim's dress and, straddling her on a bed, had burned her on her arms and legs with a hot iron. He had then threatened to burn her vagina. It appears that he desisted from this when she vomited. On the victim's account he had then raped her but this charge was not successfully prosecuted. On a subsequent occasion Rankmore had come to the victim's house and stripped her and threatened to cut off her breasts and cut her vagina. He had then performed oral sex and raped her before she urinated in shock.

sentence. The then Attorney General, Denver Beanland, discussed this case during his second reading speech of the *Criminal Law Amendment Bill* 1996 which introduced the offence of torture. Beanland pointed out that the criminal code lacked a serious offence of causing pain suffering. See Queensland, *Parliamentary Debates,* Legislative Assembly, 4 December 1996, 4872–3.

50 Office of Women's' Policy, Department of Justice and Attorney General (Brisbane), *The Report of the Taskforce of Women and the Criminal Code* (2001) 103.

51 Scott, above n 45, part three, 'The Technique of Torture'.

52 Ibid 49.

53 Ibid.

54 *R v Rankmore ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Williams JA, Mullins J, 15 November 2002).

In his judgement he also found that the fact that the offences committed by Rankmore amounted to torture and were '...sustained, cruel and relentless' should lead to a higher penalty.[55] The sadistic nature of these events of *torture* is apparent on the facts. Similarly, Williams[56] engaged in torture involving burning. He was found guilty of *grievous bodily harm* as a result of dousing his victim with methylated spirits and setting her alight. She suffered extensive burns, which resulted in a long hospital stay and extensive scarring. Burning alive was historically considered to be an appropriate punishment for sex crimes such as 'whoring', incest and prostitution.[57] The high level of pain and suffering inevitably endured by victims of burning has been documented.[58]

Whipping with belts and straps is also a frequently recurring theme i the cases examined in this research. Both Taiters[59] and Pein, [60] for example strapped their victims with a belt causing bruising. Mutilating with knives is also common both as a traditional torture and apparently as a modern torture for intimates. I describe the effects of the knife injuries in these cases as mutilation not only because mutilation has been recognised as a form of torture but also because the knife injuries in so many of these cases appear calculated to disfigure and to mutilate the body of the victim. The most extreme case involving mutilation in the group of cases I examined is that of *Wilson*.[61] Immediately before he mutilated his victim Wilson had made various threats to her, including that he would 'cut off her lips' and that he would scar her so badly that no man would ever look at her. In response to these threats the victim had obtained a DVO and sought refuge in a women's shelter. She had gone to work from the women's shelter and Wilson had attended at her work place where he had mutilated her face and body with a knife. He had paid particular attention to slashing her face to the point where it was irreparably scarred. In sentencing the appeal judge saw fit to compare the situation to case precedents where defendants had sought to disfigure women's faces and were premeditated to cause maximum fear.[62] Similarly Dempsey[63] was found guilty of *grievous bodily harm* after he had inflicted numerous stab

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55 *R v Rankmore ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Williams JA, Mullins J, 15 November 2002).

56 *R v Williams* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Helman J, 17 April 2002).

57 Scott, above n 45, 158.

58 See for example Scott, ibid 161.

59 *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001).

60 *R v Pein* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Jones JJ, 25 September 2002). Pein was found guilty of assault causing bodily harm.

61 *R v Wilson* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Atkinson J, 1 June 2001).

62 *R v Wilson* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Atkinson J, 1 June 2001) (McPherson JA).

63 *R v Dempsey* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, White, Holmes JJ, 17 April 2001).

wounds to the back and shoulder of his victim while she sheltered under an ironing board. The victim sustained severe wounds to her hands as she attempted to ward off blows to her face. The victim then spent several weeks in hospital recovering from collapsed lungs.[64]

Scott reports that water has also been used to torture people through the ages, although the continuous dropping or pouring of water on the body has been the usual form of water torture employed, there is evidence that forced immersion in hot or cold baths has also been utilised.[65] Taiters provides an example of water torture.[66] He appealed against conviction and sentence in relation to charges of rape and aggravated indecent assault. Taiters had allegedly started his assaults on his victim after she had admitted to him that she had slept with another man. He had tortured her over seven or eight hours. He had urinated on her and then dragged her to the bathroom and immersed her in a painfully hot bath. He had then 'washed' her hair, tearing hair out as he did so. He then took her out of the bath and strapped her about the legs with a belt before putting the belt around her neck. The victim then performed oral sex on Taiters; Taiters argued that this was consensual. In relation to this defence the judge had directed the jury that, '... as a matter of common sense you might think that someone does consent if the alternative is to get belted up...'[67] On appeal Taiters took issue with the above direction as well as with the admission of some other evidence. Justice Davies found that the trial judge's direction with respect to consent was appropriate and found that the evidence should have been admitted as, '...the prosecution case was that, in effect, the appellant treated the complainant like a chattel, reducing her, by his conduct, to a state of abject submission.'[68] The behaviour of the victim was viewed by the Appeal Court judge as 'abject submission' rather than behaviour that supported consent. The resulting injuries actually inflicted were alleged to be 'minor' however the complainant's victim impact statement disclosed that she had suffered considerable pain and suffering at the time of the attacks and constant nightmares since the attacks.[69]

For Taiters it seems clear that the purpose of his attack was precisely to demonstrate his power over the victim by causing pain and suffering. That is, Taiters sought to torture his victim rather than to cause specific injury. In a similar case of M, the victim alleged that M had climbed into her house via a window and then punched her until she was bruised.

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[64] The perpetrator unsuccessfully appealed the conviction.

[65] Scott, above n 45, 171.

[66] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001).

[67] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001) (Davies JA).

[68] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001), (Davies JA).

[69] *R v Taiters* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Philippides J, 26 July 2001).

He had then tied her down with plastic zip ties and raped her. She had escaped with her children to a telephone box and alerted police. The police had returned to her house where they found M in bed asleep. Essentially according to Scott's analysis, his sadistic passion was spent. The police found the zip ties that the complainant alleged had been used to tie her up in the room where M was sleeping. M attempted to argue that she had consented to sex however the appeal judge found that:

> [a] woman who is tied down, having been punched and threatened with a knife, may well be thought by a jury not to be consenting to an act of sexual intercourse that follows, and that was the conclusion the jury reached.[70]

Again any suggestion of consent was negatived. The sadistic nature of both M and Taiters attacks is evident on the facts noted above.

The injuries described above demonstrate the frequently extraordinary and unimaginable character of the intimate violence that is prosecuted. The violence prosecuted is often a specific form of violence that degrades and exploits the victims. Unlike lower levels of violence which may be able to be able to be explained away to prosecutors as the violence of everyday life (through such justifications as discipline and mutual combat) the injuries discussed above uniformly illustrate situations of extreme exploitation. The injuries cannot be explained away and the perpetrator must be understood to be outside the law and thus must be prosecuted.

Corroborative Evidence

None of the cases examined in this research involved a prosecution based solely on the evidence of the victim. However it seems clear that a prosecution of a matter of violence between intimates requires a particularly high level of corroborative evidence to be available before it will even be commenced. This may be tied to the criminal law's need for 'visibility'. As was noted above, injuries that are visible are more likely to be prosecuted. Forms of corroborative evidence can also operate to create a sense of 'visibility' of injury. Such 'visibility' helps in naming the action as criminal. The bystander who intervenes or the medical report with its descriptive detail of injury can make the injury 'visible' to the prosecutor who investigates the case. Further in situations of intimate violence there is a tendency to treat the events which occur in the intimate sphere as invisible to the criminal law. Once third parties come forward to support a victim's claim of injury, imagining the events of the intimate sphere are invisible becomes difficult. Consequently a failure to criminalise becomes hard to justify.

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[70] *R v M* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Thomas JA, Mackenzie J, 1 May 2001) (McPherson JA).

This discussion reminds us of the infamous comments of Bollen J in *Johns*: [71]

> ...I must warn you to be especially careful in considering the evidence in a case where sexual allegations are made. Experience has taught the judges that there have been cases where women have manufactured or invented false allegations of rape or sexual attack. It is a very easy allegation to make. It is often very hard to contradict. Very few people are going to make up a story of sexual attack in a hall with a lot of people so it usually concerns a place where there [are] only two people.

Like cases of sexual assault, intimate violence has tended to need more than the testimony of the injured to support prosecution. In any event, violence between intimates is usually sexual violence in its essence. It is, as I have argued above, often a sadistic form of torture and it often takes place where there are no witnesses present. As has been demonstrated in previous research, many women make allegations of violence in order to obtain DVOs. Frequently, because of the context of the violence, witnesses other than the victim are not available and the complaints are not prosecuted.[72] The problem does not simply rest on characterising the violence as specifically public or private, which is inevitably problematic.[73] The problem is also that the victim's testimony is not sufficient because of the context of the relationship with the perpetrator. In order to understand violence between intimates as crime, the view of an outsider to the relationship is sought. An outsider's testimony can make the injury 'visible' to those who decide whether to prosecute and find guilt. Of course a warning such as that of Bollen J's above is no longer allowed,[74] however it may be that police are currently operating as a filter in a similar way to Bollen J and generally only prosecuting matters where corroborative evidence exists.

Considering the above it is not surprising that police seem particularly willing to encourage a prosecution where the offender has also abused the police officer called to the scene. A number of men in the cases examined here were charged with assaulting the police officers who attended the scene as well as being charged with assaults against their intimate victims.[75] Police evidence is also important corroborative evidence in a

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[71] *R v Johns* (Unreported, Supreme Court of South Australia, 24 August 1992).

[72] Douglas and Godden, above n 2, 41.

[73] Elizabeth M Schneider, 'The Violence of Privacy' in Martha Fineman & Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (1994) 41.

[74] See s632 *Criminal Code* 1899 (Qld), discussed in *Robinson v R* (1999) 73 ALJR 1314 and also note s4A *Criminal Law (Sexual Offences) Act* (Qld) 1978.

[75] For example; *R v Reuben* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams JA, Byrne J, 7 August 2001), and *R v Marshall* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams JA, Wilson J, 10 September 2001).

number of matters. For example Parks[76] was charged with procuring to murder after bargaining with an undercover policeman to kill his wife, and in other cases police gave evidence about witnessing the behaviour which was the subject of the charge.[77] This can be understood as recognition of the abuser as outsider; that is, as outside the law abiding community. Abusing a police officer is often understood, at least by police who decide which matters come to the attention of the criminal law, as the behaviour of a criminal. It seems that it is often this secondary criminal behaviour which pushes the primary assault against the intimate into the criminal domain.

The serious nature of the injury in many of the cases prosecuted lead to the victims being hospitalised. Hospitalisation in turn means that medical evidence of injury is available to the court.[78] As I noted above, Young has discussed the need for visual images of injury [79] in demonstrating crime. The 'visual image' of the injury provided by doctors' testimony in these cases might frequently help to satisfy the necessary level of 'proof' required. Further in several cases evidence was available from third party neighbours or passers-by who witnessed, or intervened to stop, the violence charged.[80] Again such witness testimony can provide, in effect, the 'visible image' of injury.

Corroborative evidence is probably more important to the decision to prosecute in many of the cases examined here than the testimony of the victim. This of course relates back to the concerns stressed by Bollen J, that women may manufacture stories of violence. A concern raised by many women working in the 'domestic violence' sector is that victims often do not want to give evidence. This is less likely to be fatal to the commencement of a prosecution than the lack of corroborative evidence or serious injury. For example Hearn was convicted of assault causing bodily harm. The evidence against him had included photographs of the victim's bruises and lacerations and the testimony of two witnesses about his punching and 'head stomping' his victim. The victim was interstate at the time of the trial and had not given evidence. Hearn appealed on the basis that the convictions were unsafe and unsatisfactory because, among other reasons, the photographs should not have been admitted without the victim's testimony. The Court of Appeal rejected the argument and dismissed the appeal.[81]

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[76] *R v Parks ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Philippides JJ, 5 December 2002).

[77] For example *R v Millar* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Jones JJ, 25 September 2002).

[78] For example *R v Denham ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Jerrard JA, Cullinane J, McGill DCJ, 28 February 2003).

[79] Young, above n 36, 20.

[80] For example *R v Forster* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Davies JA, Dutney J, and 14 November 2002).

[81] *R v Hearn* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, White, Holmes JJ, 17 April 2001).

Ultimately, the cases suggest that in matters of intimate partner violence the victim's testimony is rarely, if ever, sufficient for a prosecution of a crime involving violence between intimates. Along with separation and extraordinary injuries, strong corroborative evidence can help make intimate violence 'visible' so that it can be named as criminal and prosecuted.

III Judicial Perceptions

Intimacy as Aggravation

In Queensland, similarly to most other jurisdictions in Australia, those who are threatened with violence by a previous 'intimate' can apply to the lower courts for a DVO.[82] To obtain such an order the applicant must prove to the court, on the balance of probabilities, that the other person has committed an act of intimate violence or that the applicant is fearful of such violence.[83] If the order is granted certain restrictions will be placed on the respondent. A common restriction is that respondents are not to contact the complainant. In a number of the cases examined in this research the victim had a current DVO in place.[84]

Breaching a DVO is an offence of itself in Queensland but most judges in the cases examined also found that the fact that a protection order had been breached aggravated the other violent offences charged. For example, Rankmore was originally sentenced to a total of nine years imprisonment for torture and other matters. Although Rankmore appealed unsuccessfully against conviction, the Attorney General successfully appealed the sentence and it was increased to a total of 12 years. In increasing the sentence de Jersey CJ referred to the fact of the breach of a DVO to support his decision. Similarly *M* was sentenced to a period of imprisonment of 9 years for offences of rape, deprivation of liberty and other assaults. He unsuccessfully appealed both the convictions and sentences imposed. In deciding not to interfere with the sentence McPherson JA also cited the breach of the DVO (along with the use of 'gratuitous violence on a defenceless woman' and the high degree of planning inherent in the offences).[85] In Wilson, where the victim's face was slashed, there was

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[82] See s 20 *Domestic and Family Violence Protection Act 1989* (Qld).

[83] See s 20 *Domestic and Family Violence Protection Act 1989* (Qld).

[84] In cases involving male perpetrators 11 out of 30 victims had a current DVO against them. There were no cross-applications or mutual orders in place. There were DVOs in place in 3 out of 8 cases involving female perpetrators, in these three matters the female perpetrators also had a current DVO against the victim, that is they all involved mutual or cross applications for orders.

[85] *R v M* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Thomas JA, Mackenzie J, 1 May 2001). M had cut the telephone line and brought plastic zip ties to tie up his victim.

a DVO in place. Prior to the assaults Wilson had made various threats to the victim, all of which had breached an existing DVO and had been reported to police. According to MacPherson JA, these factors aggravated the offence and penalty.[86]

None of the judges in the cases analysed explicitly stated that the intimate context of the relationship between the parties should aggravate the penalty. However a number of the judges in the cases examined were prepared to state that intimacy between the victim and perpetrator should not be seen as a mitigating factor. For example Millar was sentenced to two years for stalking his previous defacto. The offence breached an existing DVO. Millar appealed the sentence arguing that he should be treated more leniently because he had an 'emotional relationship' with the victim. De Jersey CJ noted:

> I would say for my part that that is not a feature that should necessarily lead to a lower penalty being imposed, where the stalking follows the break-up of an emotional relationship.[87]

Similarly, P was convicted of various counts of assault, willful damage and kidnapping and sentenced to 3 years imprisonment to be suspended after serving 12 months. P unsuccessfully appealed against the sentence suggesting that because the victim was still attracted to him the sentence should be more lenient. Williams JA disagreed that that factor should influence the sentence.[88] In the case of J the appellant argued that the trial judge had placed too much weight on the victim impact statement and not enough weight on the context of the relationship, he argued that that the intimate nature of the relationship should reduce penalty. Williams JA disagreed.[89]

In many situations the criminal law recognises that when criminal activity takes place in the victim's home the criminal activity is more reprehensible than when it takes place in a public place or place of business.[90] The fact that many of the assaults discussed above occurred in the home of the victim is usually not specifically suggested to be an aggravation in

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[86] *R v Wilson* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Atkinson J, 1 June 2001) (MacPherson JA). Wilson was found guilty of 'wounding with intent to disfigure' and was sentenced to a term of imprisonment of 13 years.

[87] *R v Millar* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman J, Jones J, 25 September 2002) (De Jersey CJ).

[88] *R v P* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Philippides J, 12 March 2002) (Williams JA).

[89] *R v J* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, McPherson JA, Williams JA, 22 February 2002) (Williams JA).

[90] For example the maximum penalty for housebreaking is higher than the penalty for breaking into a commercial premises. See *Criminal Code* 1899 (Qld) s419 compared with s421.

the cases where the victims are the 'intimates' themselves.[91] In the case of *Denham*, rather ironically, much was made of a purported aggravating feature that the subject assaults occurred in the home of the victim.[92] This was ironic because *Denham* involved an assault on the father of the defendant's previous defacto. The suggestion here being that the less intimate the victim is with their attacker the more 'real' and more serious the crime.[93]

Contribution of the Victim

Commentators have raised concerns that perpetrators often allege that the intimate relationship is one of mutual combat in an attempt to justify or excuse their violence.[94] On many occasions in the cases examined appellants argued that certain behaviours on the part of the victim should be taken into account in their favour. Judges generally reiterated the factors suggested by appellants but did not specifically state whether they saw the matters as favourable to the offender. There was no evidence in the cases to suggest that judges overtly applied notions of mutual combat in favour of the appellants.[95]

For example, in two cases, *Pein* and *Ketchup*, the Appeal Court judges suggested that the behaviour of the victim was a relevant consideration. In *Pein* the victim had returned to stay with her previous defacto, Pein, to assist him with looking after his children during a school holiday period. Pein and the victim slept in the same bed together and had argued about her returning to live with him. After Pein had fallen asleep the victim had woken him up by hitting him, as she had wanted to recommence their argument. In response he had strapped her. The appeal court judge accepted that a factor in the applicant's favour was the fact that 'the complainants

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[91] *R v Melissant* is an exception; *R v Melissant* (Unreported, Court of Appeal, Queensland, De Jersey CJ, Atkinson J, Williams JA, 19 March 2003). The perpetrator here was recorded as a *serious violent offender* for a number of reasons, one of which was that the attack was on 'an unarmed woman in her own home'.

[92] See *R v Denham ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Jerrard JA, Cullinane J, McGill DCJ, 28 February 2003) (especially Jerrard JA).

[93] I note Gail Mason's work on the relevance of relationship to the conception of crime. She has commented that 'real' crime is generally conceptualised as being between strangers. See Gail Mason 'Who is a Stranger?: Victim-Suspect Relationships in Racist and Homophobic Harassment', conference paper presented at *Killing the Other*, ENS Cachan, Paris, 23 January 2004.

[94] Ruth Busch and Neville Robertson, 'The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act 1995' (1997) 17 *New Zealand Universities Law Review* 337, 343.

[95] See for example *R v Johnson* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams JA, Holmes J, 5 August 2002), where the appellant alleged that the victim had provoked him by burning hairs on his arm with a cigarette lighter, he had responded by assaulting her causing bruising and swelling. Also see *R v Dempsey* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, White J, Holmes J, 17 April 2001). Dempsey argued that the victim's hit precipitated the stabbing.

own conduct precipitated the first assault...'[96] Also in the case of Ketchup the appeal court judge found that the fact that the victim was drunk was a relevant factor.[97] However, the fact that the Court of Appeal did not see fit to interfere with sentence or penalty in either of these cases suggests that the practical impact of victim contribution is at best marginal.

IV Women as Perpetrators

This research examined eight cases which involved violence inflicted by female perpetrators. These matters can be distinguished from the cases involving male perpetrators in a significant way. Generally they do not involve torture in the way I have described above. In three of the eight cases women were prosecuted for the unlawful killing of their husbands. Two of the killings involved a single gunshot wound. A third killing was unexplained. In none of these three cases were there any allegations of previous violence and none of the parties had current DVOs in place. Two women who killed may have been motivated by greed and were found guilty of murder.[98] In the third case, Doris Fred was charged with being an accessory to murder when her son Robert killed her husband (also Robert's father). On appeal it was found that the conviction of murder against Doris Fred was unsafe, as it was unclear that she had actually known of Robert's plan to shoot his father.[99] The successful prosecution of Kityayama for the murder of her husband relied on circumstantial evidence. The evidence included the purchase of a saw and a neighbour's evidence about large bags of what the neighbour assumed was decaying meat found at a communal rubbish area.[100]

In the remaining five matters the women fell short of killing their victim. Jill Vea[101] was found guilty of grievous bodily harm when she

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[96] *R v Pein* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Helman, Jones JJ, 25 September 2002) (Jones J). Pein was found guilty of assault causing bodily harm.

[97] *R v Ketchup* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Davies JA, Williams JA, 15 November 2001) (Williams JA).

[98] *R v Kityayama* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Mackenzie, Chesterman JJ, 23 November 2001) and *R v Wehlow* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Williams JA, Wilson J, 25 May 2001).

[99] *R v Fred* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Mackenzie, Mullins JJ, 11 December 2001). Doris Fred's son Robert Fred was found guilty of murder.

[100] *R v Kityayama* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Mackenzie, Chesterman JJ, 23 November 2001). In *Wehlow* it was alleged that the victim shot her husband once and then buried him in a shallow grave; *R v Wehlow* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Williams JA, Wilson J, 25 May 2001). Evidence was almost entirely circumstantial as in *Kityayama; R v Kityayama* (Unreported, Supreme Court of Queensland, Court of Appeal, De Jersey CJ, Mackenzie J, Chesterman J, 23 November 2001).

[101] *R v Vea* (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Wilson, Douglas JJ, 20 February 2001).

inflicted ten stab wounds on her partner, one of which had penetrated his lung. There were mutual DVOs in place at the time of the violence and the judge on appeal accepted that the relationship had been 'turbulent'. Both parties were drunk when the stabbing occurred and Vea had attempted to argue self-defence or provocation. The judge's comments on penalty appeared to support the defences but found that the response was excessive. Similarly Jody Kingelty[102] was initially successfully prosecuted on a charge of attempted murder. Kingelty's current defacto partner had stabbed her previous partner with a cane-cutting knife. There was evidence that the previous relationship had been violent. Kingelty was charged on the basis that she was the getaway driver. In this case Kingelty argued for an extension of time to appeal on the basis that fresh evidence was available. The fresh evidence demonstrated the violent nature of her new partner and her fear of him and she argued that the new evidence supported her contention that she was simply doing the bidding of her new (violent) partner. An extension of time was granted.[103] Roberts[104] was found guilty of unlawfully wounding her defacto with a knife. There was evidence that the relationship was violent. On the night of the stabbing Roberts was drunk and she alleged that her defacto had failed to stop drinking and take care of the children of the relationship. She had stabbed him once.

Except for the possible exception of Kityayama, neither torture nor sadism appears to be a feature of these cases. In the cases where women are the perpetrators of violence, the violence, although serious in its result is not protracted in its infliction. It does not appear designed on its face to cause pain and suffering and there is no indication on the facts of these cases that the violence is sadistic in its nature. In the cases involving male perpetrators of violence, where there were DVOs in place they had been taken out by the female victim against her violent partner. In contrast, where women were prosecuted for violence against their intimate, where there were DVOs in place they were mutual orders or cross-orders. That is, both parties had obtained orders against each other. This suggests that the violence had been previously inflicted (or feared) by both parties and was less one-sided that those cases involving male perpetrators.

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[102] *R v Kingelty* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams JA, Jones J, 20 September 2002). In *Sysel v Dinon* (Unreported, Supreme Court of Queensland, Court of Appeal, McPherson JA, Williams JA, Muir J, 26 April 2002), the defendant had caused damage to household effects of the victim and burned some of his property, she had also slapped him on the face. In *R v Sinnamon ex parte Attorney General* (Unreported, Supreme Court of Queensland, Court of Appeal, Davies JA, Williams JA, Jerrard JA, 3 July 2002), the defendant hit the victim once with a steel picket causing grievous bodily harm. In *Kingelty*, *Sysel* and *Sinnamon* the parties had mutual DVOs against each other.

[103] The result is unknown.

[104] *R v Roberts* (Unreported, Supreme Court of Queensland, Court of Appeal, McMurdo P, Byrne, Philippides JJ, 20 March 2002).

V Conclusion

In this paper I have argued that it is only in limited contexts that violence between intimates is considered to be within the domain of the criminal law. The violent male perpetrator in situations of intimate violence is to be considered to be a criminal in certain, rather limited, circumstances. Generally there appear to be three requirements for the prosecution of intimate violence as a crime. These are: that the parties are separated; that the violence is extreme; and that there is strong evidence of the violence from a third party. The criminal law is more likely to be implemented in situations where the violence inflicted is so extreme that it can be understood as torture. Further, where others who are not involved in the intimate relationship (such as doctors, police or neighbours) 'see' the violence, the criminal law is more likely to be invoked. For their part judges tend to find that the breach of a DVO will aggravate the penalty for intimate violence. However there is no evidence to suggest that judges find that the intimate context of the violence per se will either mitigate or aggravate penalty. Generally judges do not seem to find the contribution of the victim to her injury particularly relevant with respect to penalty. Finally this paper suggests that the violence of women towards their intimates involves a different kind analysis. Most importantly, the violence of women in the cases examined was less likely to involve torture and such high levels of brutality and subjection as the violence of men towards their female intimates.

Most violence in the intimate sphere continues to be ignored, or alternatively, accepted as part of everyday life. Thus, usually, it seems that the intimate sphere remains as a protected space for violent men. Generally it is only when women have finally attempted to take control and move away, the violence is extreme and when it is rendered 'visible' by corroborative evidence that it is prosecuted as a crime. This does not have to be the case. The proactive prosecution experience in places such as the ACT suggests that less serious and less 'visible' forms of intimate violence can successfully be prosecuted.[105] Judges appear to take intimate violence very seriously when it comes before them. In spite of these matters, the cases examined here suggest that the criminal law is invoked only as a last resort. In the majority of the cases the criminal law is used as a reactive and backward-looking instrument. This should not necessarily be the case. This research did not debate the role of the criminal law in the intimate sphere[106] however further discussion is needed about its role.

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[105] See Robin Holder and Nicole Munstermann, 'What do Women Want? Prosecuting Family Violence in the ACT', (Paper presented at Expanding our Horizons: Understanding the Complexities of Violence Against Women Conference, 18 February 2002).

[106] For a discussion of the role of the criminal law in dealing with intimate violence see Heather Douglas and Lee Godden 'Intimate Family Violence: Transforming Harm into a Crime' (2003) 10 (2) *E Law —Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/indices/author/261.html> (at 29 January 2004).

It may be that the criminal law can be used in a more proactive way to stop violence before it reaches the extremely serious levels described in these cases and before women are compelled, for their own protection, to leave their intimates.