The Distinctiveness of Domestic Abuse: A Freedom Based Account

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Violence is the food and drink of criminal law. But as violence comes in different forms and degrees, there is a question about how the criminal law should distinguish between different forms of violence. Some debate has recently emerged which encourages us to think not only about degrees of violence but also about kinds of violence. Different forms of violence, it is argued, are morally distinct from each other. The criminal law, in constructing distinct offenses of violence, ought to reflect those moral distinctions.¹ The way in which violence is perpetrated, the argument goes, is at least as central to distinguishing between offenses as is degree. For example, if disfigurement is a kind of violence distinct from bruising, the criminal law should reflect that distinction. Distinguishing between types is at least as important as, or perhaps even more important than, distinguishing between greater and lesser degrees of disfigurement or greater and lesser degrees of bruising.

Domestic abuse is treated distinctively in the social and political realm, as well as by the institutions of criminal justice. Literature concerning domestic abuse in the fields of criminal justice and criminology is extensive. Yet, substantive criminal lawyers have not focused on offenses against the person in the literature.² That is so even though the literature concerning domestic abuse in the fields of criminal justice and criminology is extensive. By far the most common way in which domestic abuse tends to appear in discussions of substantive criminal law is in relation to the defenses available to victims of domestic abuse who subsequently kill their abuser. Generally, these cases must be exceptional among those who are abused.

¹ See Jeremy Horder, Rethinking Non-Fatal Offenses Against the Person, 14 Oxford J. Legal Studs. 335 (1994); John Gardner, Rationality and the Rule of Law in Offenses Against the Person, 53 Cambridge L.J. 502 (1994).
Part of the reason for this lack of real interest in domestic abuse by substantive criminal lawyers is that there is no specific offense that distinguishes such behavior in the law. Domestic abuse tends to be prosecuted using other offenses, including homicide offenses, sexual or non-sexual offenses against the person, or even breach of the peace. Undoubtedly, these different offenses mark out different kinds of domestic abuse. Yet domestic abuse has a character of its own and is thought of as a social problem (or, by some, a non-problem) of a particular kind. Hence, it is surprising that calls for a distinct offense of domestic abuse are infrequent.\(^3\)

This article hopes to achieve two things. First, it will begin to ground discussion about whether domestic abuse ought to be recognized in the criminal law through the creation of a distinct offense. Does the argument concerning the moral distinctiveness of offenses support the creation of a distinct offense to cover instances of domestic abuse? And if a distinct offense cannot be supported on those grounds, or those grounds alone, how are we to decide whether there should be a distinct offense concerned with domestic abuse? In order to address those questions, it will develop some general thoughts about the project of distinguishing between offenses.

Part I outlines two features that distinguish domestic abuse from other types of violent conduct. First, domestic abuse occurs within the context of an intimate relationship. Second, the abuse is systematic. Part II will suggest that these two features of domestic abuse have the tendency to erode a distinctive kind of freedom that individuals ought to have. Philip Pettit’s account of freedom as non-domination will be used to illustrate this erosion of freedom. Furthermore, it will argue that this erosion of the victim’s freedom is particularly significant because it takes place through the violation of an expectation of trust. Part III will consider an objection to creating a distinct offense of domestic abuse based on the idea that distinct criminal offenses ought to reflect distinctive wrongs. This section will show that although there may be instances of domestic abuse which do not have the consequences outlined in Part II, that does not prevent those consequences from making the wrong of domestic abuse distinctive. Hence, domestic abuse may be considered distinctively wrong even though not all instances of domestic abuse will result in the negative consequences that make it distinctively

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3. The idea of a distinct offense was mentioned, but rejected, in a consultation paper by the UK Government. See Safety and Justice: The Government’s Proposals on Domestic Violence, Cm 5847 (June 2003), available at http://www.homeoffice.gov.uk/docs2/domesticviolence.pdf. For an example of a distinct offense being created, see Cal. Penal Code § 13700 (West 2004).
wrong.\footnote{4} The conclusions will involve a discussion of the potential practical advantages and disadvantages of a distinct offense of domestic abuse, arguing that a distinct offense is unlikely to have very powerful consequences in altering patterns of behavior, but suggesting that there are some reasons to be optimistic about the impact of creating such a distinct offense, at least to some degree, given the way in which criminal evidence works.

I. WHAT IS SIGNIFICANT ABOUT DOMESTIC ABUSE?

Domestic abuse is clearly demarcated from other instances of violence, both in popular perception and institutional response, and this might be thought to contribute to an understanding of what is distinctive about it. Domestic abuse is considered a particular kind of social problem which demands a particular kind of social response that is quite distinct from the response to violence in other contexts. Furthermore, institutional responses to domestic abuse are clearly different from institutional responses to other forms of violence. Cases of domestic abuse are probably less likely to result in arrest.\footnote{5} The victim is often less willing to see a prosecution go ahead\footnote{6} or to testify if the prosecution does proceed than are victims of violence in non-domestic contexts. Domestic abuse may previously have been seen as "less serious" than other instances of violence by the police and prosecuting services, although recent studies suggest that social and institutional evaluation of domestic abuse may currently be in the process of change.\footnote{7} Some jurisdictions mandate,\footnote{8} or at least strongly

\footnote{4} See infra Part III.
\footnote{5} For an overview of the literature in the United States, see Richard B. Felson & Jeff Ackerman, Arrest for Domestic and other Assaults, 39 Criminology 655 (2001).
\footnote{6} According to the Crown Prosecution Service guidelines, developed in 2001, prosecutions will go ahead against the victim’s wishes, especially in serious cases of domestic violence. In her 1998 study, Carolyn Hoyle showed the significance of a lack of victim participation in prosecution decisions. See Carolyn Hoyle, Negotiating Domestic Violence: Police, Criminal Justice and Victims (1998). However, lack of victim participation should not make the evidentiary burden insurmountable in all cases. See Louise Ellison, Prosecuting Domestic Violence without Victim Participation, 65 Mod. L. Rev. 834 (2002).
\footnote{7} Felson and Ackerman’s study suggests that the reason for the apparent leniency is not tolerance for domestic abuse, but rather lack of cooperation on the part of victims. See Felson & Ackerman, supra note 5; see also Lynette Feder, Police Handling of Domestic and Nondomestic Assault Calls: Is There a Case for Discrimination, 44 Crime and Delinquency 335 (1998).
\footnote{8} For example, the Utah Code provides that in addition to the arrest powers described in Section 77-7-2, when a peace officer responds to a domestic violence call and has probable cause to believe that an act of domestic violence has been committed, the peace
recommend, arrest and/or prosecution in domestic abuse cases, which may explain some changes in trends in policing. This shows that institutions treat violence in the domestic context differently from violence in other contexts, although, of course, this may be in part an attempt to ensure that violence in the domestic context is taken "as seriously" as violence in other contexts.

Despite the fact that institutional responses to domestic abuse are clearly distinct from responses to other forms of violence, there is very little legal recognition of any distinction between domestic abuse and non-domestic violence, at least as far as offense categories are concerned. The offenses prosecuted in cases of domestic abuse are identical to those prosecuted in violence outside of the domestic context.

The fact that the institutions of criminal justice have been seen as relatively ineffective in controlling domestic abuse can contribute to the case for a distinct offense, as we shall see. To preempt a fuller argument, it may be that the historic failure to respond properly to domestic abuse should encourage the legislature to consider creating an offense simply for the reason that it would encourage better practice in policing and prosecution. However, that case will be strengthened if there is something distinctively wrongful or harmful about domestic abuse. For this reason, criminological studies into domestic abuse ought to be supplemented by normative analysis. Empirical research alone cannot tell us what constitutes the particular wrong of domestic abuse, if anything. That is a moral question rather than a purely empirical question, albeit, as explained later, one whose answer may build upon empirical observation.

The principal way in which domestic abuse is distinguished from other forms of violence has to do with the social context in which violence occurs. The term "domestic" may suggest that the primary distinguishing mark of domestic abuse is its location: it occurs in the family home. However, that is not the best way to understand how domestic abuse is distinctive. Domestic abuse is clearly not marked by the occurrence of violence in the home—violence in the course of a domestic burglary is not domestic abuse and violence that takes place between husband and wife in public may be considered domestic abuse. Domestic abuse takes place in the context of an intimate relationship between the abuser and the abused. The existence of a relationship between the persons is its distinctive

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feature. To regulate domestic abuse is to regulate relationships, not locations.9

This also suggests that, as far as domestic abuse goes, there is no important distinction to be made between the public and the private sphere. That distinction may be important when it comes to regulating freedom of expression, for example, but it is not relevant to distinguishing between different forms of non-consensual violence. To that extent, this article builds upon the insights of feminist scholars who have mounted a critique of the traditional liberal distinction between public and private.10 Domestic abuse is not exclusively a private matter, both in the sense that it ought to be the subject of political concern11 and in the sense that it may occur in public. It is only private in the sense that the relationship may be said to be particularly private. For this reason, the word “domestic” in the phrase “domestic abuse” is perhaps unfortunate. There is nothing particularly domestic about domestic abuse. Despite this weakness, this article will continue to use the term “domestic abuse” due to its familiarity.

Domestic abuse, then, is characterized by the fact that violence occurs within the context of a relationship. One difficulty in determining the boundaries of the idea has to do with demarcating which relationships count for the purpose of domestic abuse and which do not. There may be violence between spouses, between parents and children, between non-married partners, between siblings,12 or between those in more distant familial relationships. However, violence may also take place in the context of other ongoing relationships, such as between work colleagues or between friends. While the latter instances of violence may share some of the characteristics of domestic abuse, they do not fall within the paradigmatic idea of domestic abuse. While the term “domestic” is misleading, it does indicate something else that is generally regarded as significant in understanding domestic abuse—the abuse occurs within the context of the family or related relationships. As

9. The word “domestic” in the phrase has also been criticized for making the violence seem “cosy”. See Lacey, Wells, & Quick, supra note 2, at 630.


11. On the changing social and political climate which made domestic abuse part of public concern, see Nicola Lacey, Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law, in Unspeakable Subjects, supra note 10.

12. Whether this case falls within the popular paradigm of domestic abuse is controversial, but we shall see some reasons why it should so fall below.
suggested above, if cases of violence at work, bullying at school, or violence between friends turn out to constitute the same kind of wrong as domestic abuse, there is no particular wrong of domestic abuse. Domestic abuse would merely be an instance of a broader wrong, the domestic context making a difference that is not sufficiently significant to be marked out by the distinction between offenses.

However, while the relationship between the accused and the victim is one central distinguishing feature of domestic abuse, there are other features of such abuse that mark it out socially. Perhaps the most important of these is that violence in the domestic context is generally seen as being much more likely to be repetitive and systematic than violence in the non-domestic context, and indeed that is considered a reason why the institutional and other social responses to domestic violence ought to be distinct from responses to other forms of violence.

The repetitive nature of the abuse is also part of the paradigm of domestic abuse. There is no doubt that a single instance of violence within the context of a relationship may be very serious. However, at least part of the reason for this is that a particular instance of violence is often predictive of further instances of violence in the context of a relationship. An instance of violence may be seen as indicative of further underlying features of the relationship, particularly of male dominance. A recent Home Office study reports that the average number of incidents of assault perpetrated on a victim of domestic violence is around five per year. A single assault within the context of a relationship is probably not sufficiently distinct from single assaults in other contexts to justify criminalization as a distinct offense. Furthermore, there are good reasons, grounded in the presumption of innocence, for the criminal justice system not to label the perpetrator as a systematic abuser on the basis that one incidence of violence in the domestic context is an

13. The criminal law does not often criminalize systematic behavior, but see the Protection from Harassment Act, 1997, c.40 (Eng.).
indication of a pattern of abuse. The victim of a single instance of violence in a domestic context ought, of course, to have recourse to the law, but the proper offense to charge, in such a case, is assault.

Therefore, there are two central features of domestic abuse. The first is that the abuse occurs within the context of an intimate relationship. The second is that the abuse is systematic. These features of domestic abuse help to explain problems that criminal justice agencies have encountered when dealing with domestic abuse, as well as revealing some of the reasons why their responses have tended to be inadequate.

First, the unwillingness of the police to intervene in intimate relationships is commonly cited to explain the failure of the criminal justice system to properly regulate domestic abuse. This may be in part a rational response by criminal justice agencies. If the relationship between the accused and the victim is ongoing, it will often be difficult to secure a conviction. Convictions in such cases normally depend on the victim providing evidence against the accused, which she may be reluctant to do. This may be because of the victim’s fear of the accused or because the victim actively wants the prosecution not to go ahead. Of course, the police may play a role, short of securing convictions, which helps to control domestic abuse.

However, as a consequence of these perceived inadequacies of the criminal justice system, responses to domestic violence sometimes focus on negotiation within the domestic context in an attempt to prevent re-offending without having to resort to the processes and agencies of criminal justice at all. Some scholars are critical of this approach, however, claiming that restoration within the private sphere fails to properly recognize both the nature of domestic abuse and the social context which helps to foster and support it.16

But, it may also be the case that domestic abuse fails to attract an appropriate response from the police for reasons that are more difficult to rationalize. It may still be that domestic abuse is thought of as “less serious” than other instances of violence. There may be an extent to which the police see regulating intimate relationships as beyond their central role; a lack of training might leave police officers with little confidence in their ability to respond adequately and effectively to violence in intimate relationships.17

Secondly, the systematic nature of domestic abuse is often seen as particularly problematic in terms of prosecution and conviction. It has generally been regarded as an impediment in prosecution that


17. For a balanced view, see Hoyle, supra note 6, at 98–99.
the courts are unable to "see" the systematic nature of abuse for the reason that any instance of violence is often prosecuted either in isolation or as one of a short series of instances. This may lead to lenient sentences where the particular instance of violence that results in prosecution and conviction is not very severe in isolation, but appears much more severe in context. It is often difficult to prove beyond reasonable doubt that any particular injury suffered by the victim was an instance of domestic abuse, particularly where the victim is unwilling to testify or does not provide very effective evidence. It is therefore likely to prove difficult to convict the accused of the full range of abusive conduct even where that conduct constitutes a series of criminal offenses. Even where a conviction is achieved, it becomes difficult to impose the kind of sentence that would effectively protect the victim from further abuse.

Once again, there may well still be practices of prosecutors and of courts which are more difficult to rationalize. As with the police, there may still be a tendency to treat domestic abuse as less serious for the purposes of prosecutorial decision-making and sentencing than assault on strangers. In some cases it may be that prosecutors and sentencers are motivated to save relationships that are not worth saving either by deciding not to prosecute or by imposing light sentences. This has sometimes led to legislation which mandates prosecution, even against the wishes of the victim, and severe sentences in domestic abuse cases.

II. FREEDOM AND DOMESTIC ABUSE

The combination of the two distinctive features of domestic abuse—it occurs within an intimate relationship and is systematic—make it distinctively wrong. A particular kind of freedom is often undermined by domestic abuse, and this effect of domestic abuse is a significant reason to create a distinct offense for dealing with domestic abuse. It should be noted, at this stage, that this constitutes only an indication of an approach that may be taken—an approach that rests on generalizations from empirical research that may turn out to be wrong.

Domestic abuse tends to be characterized by the fact that it is systematic, and this perception of domestic abuse is supported by empirical data. High levels of repeat violence are reported and are often coupled with violent threats and other forms of psychological abuse. Domestic abuse, then, is properly characterized not merely as

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an incident of violence in the context of an intimate relationship, but rather as a course of conduct perpetrated in the context of an intimate relationship. This feature of domestic violence is key to understanding the values that it attacks.

Philip Pettit has developed a concept of freedom that can be used to show how this is so. Pettit argues that, in order to determine how free someone is, the significant question concerns not the range of options that the person has, but rather the extent to which, and the way in which, the person’s range of options tracks their interests. Options, Pettit notes, can be restricted either arbitrarily or non-arbitrarily. Restriction of an option is non-arbitrary, in Pettit’s view, when that restriction is “forced to track the interests and ideas of the person suffering the interference.”

What freedom requires is protection against arbitrary control over options rather than against non-arbitrary control over options.

The first thing worth noting about this conception of freedom is that it is only indirectly concerned with options. The important question is not what options a person in fact has, but rather the conditions under which others can control his options. In line with the republican tradition in which Pettit places himself, this concept of freedom is most appropriate to show why slavery undermines freedom. As Pettit argues, the slave may in fact have a broad range of options, but another, the master, is in the position to arbitrarily control that range of options; the master may diminish or increase them as he sees fit. That the slave is not regarded as free cannot be a result of the lack of options that he has; he may have a benevolent master who in fact grants him a broad range of options. Even under such conditions, however, the slave is not free, for his options are under the control of another. Freedom, Pettit concludes, is to be in a condition of non-domination rather than non-interference.

There are two ways in which Pettit’s analysis of freedom is misleading. First, the idea that restrictions on options ought to reflect the “interests and ideas” of the agent is vague and problematic. Surely, the value of a person having an option is dependent not simply upon his interests and ideas, but on his legitimate interests and ideas. This criticism is restricted to the context of political theory and will not be developed here. Secondly, and more importantly for our purposes, Pettit sees his conception of freedom as supplanting rather than supplementing the traditional liberal view of freedom as non-interference. However, we ought to distinguish between the

20. Pettit’s view is usefully scrutinized and fleshed out in H. Richardson, Democratic Autonomy: Public Reasoning about the Ends of Policy Chap. 3 (2002).
question of how free someone is and the question of whether a particular restriction on freedom has a negative impact upon them. Restrictions on options are surely restrictions on freedom, although some restrictions on our options might not have disvalue and may even have value.

It is sometimes argued that having an option can never be bad as one can always choose to not exercise that option. But that is not true. Having an option may have disvalue without the exercise of that option. Being a slave may be bad, but being a slave owner is bad as well. In being a slave owner, one has a degree and kind of control over another that one ought not to have or want to have. Having that kind of control defines one's relationship to others in a way that has active disvalue. In becoming a slave owner, my freedom increases, but that increase in freedom is of disvalue to me. As that increase in my range of options does not track my interests, Pettit does not see it as an increase in freedom at all. That is surely wrong. My freedom has expanded, albeit not in a way that is valuable to me.

Now, my claim in this section is that very many warranted and properly constructed criminal offenses are concerned with protecting freedom against the reduction of options. However, what distinguishes domestic abuse is that it may well be concerned with freedom of the kind characterized by Pettit as non-domination. Domestic abuse can result in the victim not only having a limited range of options, but also having her options subject to the unwarranted and arbitrary control of another person. The victim may also have her ability to recognize her range of options, assess them, and choose between them diminished arbitrarily by that other person. The victim of domestic abuse, on this account, is a person whose options, and capacity in relation to her options, are controlled by another; the abuser has the kind of power over the victim's options that he ought not to have and deprives the victim of the kind of perceptual and evaluative control over her options that is required for true freedom.

One example of this is the typical phenomenon in cases of domestic abuse where the perpetrator responds with extreme jealousy to his partner meeting other people. In such cases, the wrong that

22. For an expanded account of the potential disvalue of an increase of freedom, see Victor Tadros, Criminal Responsibility Chap. 7 (Oxford: UOP, 2005).
23. For additional grounds for this position, see Gerald Dworkin, The Theory and Practice of Autonomy Chap. 5 (1988).
is done is not just that the partner's liberty to meet certain people is limited, but also that she does not know who it is that she is entitled to meet and who she is not entitled to meet. The fact that the perpetrator responds in an irrational fashion to her social life is not only restrictive of the options that she has for social interaction. After all, there may be those who live in isolated areas who suffer equally on that score. It also restricts the extent to which her social life is within her control or is sensitive to her character and choices. This has an impact not only on the relationships that she is not permitted to pursue, but also on those that she is permitted to pursue.

Furthermore, this impact is strengthened by the fact that victims of domestic abuse tend to overestimate the degree of power and control that perpetrators have over their lives; they see the perpetrator as omnipotent. It is common for victims of domestic abuse to fail to recognize that there are options available to them to move on from the abusive relationship. Undoubtedly, this perception is sometimes accurate, but there is also a reported tendency for victims to underestimate the liberty that they have. From this we can see that the wrong that is done through domestic abuse is not just that the defendant denies the victim options, but also that he denies her the freedom to recognize and exploit the options that she has.

Finally, victims of domestic abuse tend to blame themselves for instances of violence by the perpetrator, and such a tendency is likely to discourage such victims from seeking professional help. Clearly, such a tendency does not involve a diminution in the victim's liberty, as traditionally understood. However, the fact that such an evaluation is clearly, and tragically, absurd is also evidence of a diminution of freedom in the distinct sense used here. Perhaps such self-blame is the result of the misperception that the relationship with her abuser is within her control or of a desperate hope that it will be so; that she has, or will have, dominion over what happens to her; or that she is, or will be, in a relationship of mutual respect and trust. But the absurdity of self-blame in such circumstances indicates the extent to which this is not so. It also indicates that the victim's capacity for evaluation tends to be undermined by domestic abuse, but that capacity is central to a fully autonomous life.


26. Id.

27. See Royal College of Psychiatrists, *supra* note 15.


29. On the relationship between the capacity for evaluation, autonomy and responsibility, see Tadros, *supra* note 22, at Chap. 2.
The reliability of the socio-psychological literature on domestic abuse is clearly central to the plausibility of this claim. The psychological literature provides at least significant evidence that victims of domestic abuse perceive that their options are dominated by their abusive partners, such that they experience the perpetrator as having control over their options. Sometimes, it is suggested, this appears to create the impression in the mind of the victim that what appeared to be an option is in fact not an option. If this is to be believed, the ability of the victim to assess and choose has been undermined by the perpetrator. Once again, it is not, or not only, the existence of choice that is reduced by the perpetrator of domestic abuse, but rather it is the psychological state required to make choices that is diminished. Paradoxically, then, the victim of domestic abuse appears to blame herself for the abuse at the same time as overestimating the power that her abuser has over her.

As suggested earlier, this is still insufficient to mark out domestic abuse as morally distinctive, for it may be that such psychological effects are caused in other social contexts. There are other sources of autonomy and integrity that are threatened in a comparable way by wrongdoing. For example, many people may develop autonomy and integrity at work. Such development may be threatened by bullying in the workplace. Many people may regard a peaceful home environment as important in a similar way, but that may be undermined by abusive and noisy neighbors. This may suggest that there ought to be a more general offense which includes such long term abuse within it.

Does this press criminalization of the creation of the experiences that victims of abuse suffer, rather than tying the offense particularly to the context of relationships? There is a further reason why this should not be done. It may be that abuse outside of an intimate relationship can result in the same diminution of autonomy that is characteristic of victims of domestic abuse, but the context of a relationship is particular in another way. Long term relationships, be they with sexual partners or between parents and children, are often at least hoped to be the site of intimacy and trust, features which are

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central to the development of autonomy and personal integrity, but which are also valuable in themselves.

That is not to say that autonomy and personal integrity cannot develop outside those relationships or that other forms of relationship are not equally important and legitimate in the lives of some people. But the trust and intimacy of long term relationships is central to the development of autonomy and integrity in many lives. In recognizing the significance of such relationships, the state does not foreclose other possibilities. It merely reflects the current source of much that is of value in our society.

Intimacy is valuable in itself. It is central to the depth of one’s relationships. Intimacy requires trust. The expectation of trust in intimate relationships is obviously dashed through abuse. There is good reason to suppose that this tends to erode the self-esteem that is required for autonomy and integrity in one’s life in a particularly powerful way.

Hence, although there is certainly some merit to the idea that there are different ways in which autonomy and integrity are undermined by systematic abuse beyond the context of intimate relationships, there is also good reason to suppose that domestic abuse is distinctive both in its nature and its consequences. Not only does the freedom of the victim tend to be eroded in a distinctive way, but this is done through the demolition of trust, which is a central value of intimate relationships.

Intimate relationships are often central to an individual’s perception both of their autonomous identity and of their value, yet that perception is often undermined by domestic abuse. Consequently, there is at least some good reason to consider domestic abuse as a particular kind of offense. Such a diminution of freedom, in Pettit’s sense, through destruction of a relationship that is intended to be built on trust, is common in cases of domestic abuse and constitutes good reason to distinguish domestic abuse from other kinds of assault.\(^3\)

Now, the argument developed so far might give rise to a concern that has become familiar in discussions about the use of psychological evidence of the effects of domestic abuse in the context of criminal defenses. There has been skepticism in that context about whether there is such a thing as battered woman syndrome and the

31. For an argument of how criminal offenses should implicitly reflect the diminution of what is valuable in human life in the context of the offense of rape, see Lacey, supra note 10. See also Victor Tadros, No Consent: A Historical Critique of the Actus Reus of Rape, 3 Edinburgh L. Rev. 317 (1999). Of course, that is not to say that the criminal law should become involved whenever there is a diminution of such intimacy. As discussed later, the value of intimacy can help to ground the wrong of domestic abuse in spite of this.
implications of such a syndrome if indeed it is properly identified. None of the argument so far is intended to support the diagnosis of such a syndrome.

It may be that such terminology wrongly characterizes victims of domestic abuse and thereby stigmatizes them.\footnote{32} However, there is some reason to be cautious about such claims. The fact that those suffering from domestic abuse show a tendency to misperceive and improperly evaluate their circumstances ought not necessarily be regarded as stigmatic, particularly given the explanation for that tendency. The fact that such misperception and improper evaluation is common ought to suggest that they are also ordinary human responses to systematic violence in the domestic context. Recognizing a syndrome, however, does not necessarily suggest otherwise.\footnote{33} Furthermore, skepticism about the use of such medical terms might itself flow, in part, from a worrying tendency with regard to having a syndrome in addition to any lack of capacity that may result from such a syndrome. These consequences may be stigmatic by themselves.\footnote{34}

That said, there are undoubtedly some flaws in the original methodology and the conceptual framework that Lenore Walker used when developing the concept of battered woman syndrome, which have been exposed in the literature.\footnote{35} Such criticisms require at least a substantial revision of the way in which battered woman syndrome is to be understood or, possibly, the abandonment of the concept. Many of those criticisms, however, are leveled specifically at the use of the concept of battered woman syndrome as evidence to support defenses for battered women who kill their abusive partners, which is not intended here. That battered women often fail effectively to evaluate the options that are available to them, overestimate the power that their partner has over them, and blame themselves for the violence that they suffer have not been shown to be false and are well supported by social and psychological studies. Whether these phenomena are sufficient to ground a syndrome is another question which is beyond the scope of this article.

\footnote{32} The claim is very common, so common as to have become almost casual. See, e.g., Anne M. Coughlin, Excusing Women, 82 Cal. L. Rev. 1 (1994); Joshua Dressler, Battered Women Who Kill Their Sleeping Tormenters, in Criminal Law Theory: Doctrines of the General Part (S. Shute and A.P. Simester ed., 2002).

\footnote{33} For a similar point, see Jeremy Horder, Killing the Passive Abuser: A Theoretical Defence, in Criminal Law Theory, supra note 32.

\footnote{34} For a more extended discussion on the relationship between lack of capacity and stigma, see Tadros, supra note 22, at Chap. 5.

\footnote{35} See Schopp, Sturgis, & Sullivan, supra note 30; Faigman & Wright, supra note 30.
III. THE PRINCIPLES OF DEFINITION

So far two distinctive features of domestic abuse have been identified: the context of an intimate relationship and its systematicity. This article has argued that the socio-psychological effects of domestic abuse tend to diminish the freedom of the victim in a distinctive way. This section will consider an objection to creating a distinct offense of domestic abuse on these grounds. There are instances of domestic abuse which indeed have these consequences, but there may also be instances of domestic abuse that do not. When identifying criminal wrongs, however, we ought to be searching for what is intrinsically wrong about a certain form of conduct. A mere tendency to have a particular negative effect is insufficient to mark out a distinct wrong that is worthy of recognition by the creation of a new criminal offense. Against this, it can be argued that an element may be definitional of a particular kind of wrong without being present in all instances of that wrong. That there are cases of domestic abuse that do not undermine freedom and integrity does not necessarily mean that the erosion of freedom and integrity is not central to identifying the definitional features of the wrong.

Domestic abuse normally involves some kind of extant criminal offense being committed. Given that, why create a new criminal offense? One common reason that is given for distinguishing between offenses has to do with fair labeling. When the accused is convicted of a criminal offense, he is not only labeled as a criminal in general; he is labeled in relation to a particular offense. It is, therefore, important that his conduct is identified in the appropriate way, and properly defining criminal offenses is the most obvious way to do this.

One way in which we might begin to think about the principles that govern the definition and classification of criminal offenses has to do with the distinction between different kinds of wrong. Two wrongs may differ from each other either in degree or in kind. Stealing £100 is wrong to a different degree from stealing £10, but stealing money is a different kind of wrong from punching someone in the face. The special part of the criminal law, it might be argued, ought to track the differences that exist between kinds of wrong. The principle of fair labeling, it might be claimed, requires that offense definitions communicate kinds of wrong rather than mere degree. On this account, to justify the creation of a distinct offense of domestic abuse, it must be shown that domestic abuse is different in kind from other criminal wrongs rather than just different in degree.

It should be noted that it is not inappropriate for the criminal law to distinguish offenses on the basis of degree as well as of kind. As
Andrew Ashworth puts it, the principle of fair labeling requires “that offenses are subdivided and labeled so as to represent fairly the nature and magnitude of the law-breaking.” It might be fair to represent differences in the magnitude of criminal offending even where there is no difference in the nature of that offending. Hence, there might be good reason to have an offense of petty theft to distinguish it from grand theft simply on the basis of the value of what is stolen. So even if domestic abuse is merely assault multiplied, that would not rule out the creation of a distinct offense on the grounds of fair labeling. Nevertheless, if domestic abuse is wrongful in a distinctive way, that would at least fortify the case for a distinct criminal offense.

How are we to identify kinds of criminal offending? Two features that mark out domestic abuse from other kinds of wrongful conduct have already been identified, but merely identifying such features does not establish a difference in kind. We might distinguish assaults of blue-eyed people from assaults on others, but there is no difference in the kind of wrong perpetrated as between assaults on those with blue eyes and assaults on others. Wrongs must be distinguished on the basis of characteristics that are significant.

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

Domestic abuse has always been understood to be distinct from other kinds of violence, but for the wrong reasons. It has been treated as less serious, or even as justified or excused violence. Perhaps it will be argued that the proper response to this fact is to encourage the criminal justice system to treat domestic abusers in the same way as other violent offenders, which would militate against a distinct offense. In response, when assessing the moral significance of a


37. Hence it is misleading for Ashworth to claim that distinctions between criminal offenses must reflect kinds and degrees of wrongdoing that are “widely felt.” Ashworth, supra note 36, at 89.
feature of criminal offending, we ought to be careful not to ignore historical and social factors. At least in this context, Nicola Lacey is right that theoretical scholarship in criminal law ought properly to be connected to scholarship in criminal justice and social history. The very fact that domestic abuse has been treated as less serious than other forms of assault might help to justify the creation of a distinct offense. There are at least three further reasons why this might be so.

First, the creation of a distinct offense might be a way to encourage similar treatment of domestic abusers and other perpetrators of violence. The creation of a new offense, with the appropriate publicity and prosecuting and sentencing guidelines, might encourage officers in the criminal justice system who think and act as though domestic abuse is "less serious" to reassess their views or, at least, change their behavior.

Second, the creation of such an offense will send out a message to perpetrators and victims of domestic abuse that such criminal offending is to be taken seriously and is the proper subject of public condemnation. There may be a tendency among abusers and victims to see domestic abuse as outside the realm of the criminal justice system altogether, and the creation of a distinct offense may help to change those beliefs.

Third, the creation of a new offense might be a way for the state to recognize past failures of the criminal justice system to regulate domestic abuse in a proper way. The creation of a new offense, with the appropriate sentencing guidelines and publicity, would be a way to express the fact that the state no longer tolerates domestic abuse, whereas doing nothing might indicate to some that the state accepts the status quo. Of course, the creation of a distinct offense is not the only way in which this could be achieved. Sentencing guidelines for existing offenses perpetrated in the domestic context and legislation concerning arrest and prosecution might be other ways to achieve the same thing.

Thus, even if there is no significant difference in the nature of the wrong committed between domestic abuse and various other kinds of criminal violence, a distinct offense might be created simply to mark the fact that domestic abuse has not been properly policed by the criminal justice system in the past. Socio-historical research into


39. See Mirrlees-Black, supra note 15, at Chap. 7. Her research finds that only seventeen percent of victims of domestic assault considered that a crime had been perpetrated against them. Id.
domestic abuse is relevant, then, in supporting the case for a distinct offense. That research has shown both just how common domestic abuse is and the inadequacy of the response to such abuse by the criminal justice system. Those facts are relevant in defending the case for a distinct offense.

These arguments for a distinct offense, however, are only intended to supplement the main claim that domestic abuse is wrongful in a sufficiently distinctive way to merit criminalization. So far, that argument has been developed using some empirical claims about the socio-psychological effects that domestic abuse tends to have, and the suggestion that these effects diminish the freedom of the victim in a particular respect. The point is not only that the victim's options are reduced, but also her control over those options and her ability to appreciate and evaluate them. Furthermore, this diminution is especially significant when it occurs in the context of an intimate relationship. Now the article will consider a complex objection to creating a distinct offense of domestic abuse on these grounds. The objection concerns both the use of such socio-psychological research and an argument concerning the intrinsic nature of wrongs.

It is sometimes claimed that the experience of those suffering wrongs can tell us relatively little about the nature of wrongs. For example, in the context of the law of rape, John Gardner and Stephen Shute rightly point out that the mere fact that a particular event is experienced as a violation does not entail that it is a violation. Rape is a particular kind of wrong because the victim is violated rather than because she experiences that violation. After all, it may be that some actions are seen as a violation which are not in fact violations and that other violations go unnoticed. That a violation has occurred is quite distinct from the experience of that violation. This is shown most clearly from the fact that a person can be raped without knowing that they have been, such as when the victim is made unconscious through drugging.40

This might lead one to the suggestion that in order to investigate whether there should be a distinctive offense of domestic abuse we ought to ignore the effect of domestic abuse on victims. This might be a consequence of the fact that victims may systematically over or under react to domestic abuse. A consequence is that the nature and significance of the wrong, if any, cannot be understood simply by investigating the effects of domestic abuse.

Nevertheless, we should not be too quick to dismiss the value of empirical research into the experience of victims of domestic abuse.

We should distinguish the victims’ evaluations of their circumstances from the general psychological effects of those circumstances on the victims. To generalize from the argument by Gardner and Shute, the fact that victims evaluate a particular form of conduct as a distinct and significant wrong obviously cannot lead us directly to recognize it as such. The perception of victims that they have been wronged in a significant way may put us on notice that we should consider the wrongfulness of what was done to them, but victims do not have special authority to evaluate wrongs. Victims may be systematically misled, as Western society was once systematically misled into thinking that interracial marriage was wrong.

However, that a particular response is common among victims of a certain kind of behavior might at least put us on notice that a certain kind of wrong has been perpetrated, even if that response is not sufficient to demonstrate the distinctiveness or significance of that wrong. In this context, the fact that it is not uncommon for victims of domestic violence to experience a diminished sense of freedom, not only through the practical consequences of that violence but also through psychological erosion, ought to lead us to consider whether the wrong of domestic violence constitutes a special kind of attack on the freedom of the victim.

This might give rise to a further objection. It might be argued that although domestic abuse tends to have certain psychological consequences, it will not necessarily have those consequences. If we only identify the consequences that conduct tends to have, we do not identify any intrinsic feature of that conduct that could help to identify it as a distinctive wrong.

Once again, compare Gardner and Shute on rape. The particular wrong of rape is identified, Gardner and Shute claim, if one can perceive such wrongful conduct in the absence of any of the harmful consequences of that conduct. Hence, they argue that the “pure” case of rape is the case of rape which is “entirely stripped of distracting epiphenomena” such as the victim’s psychological reactions.\(^{41}\) That would be the case if the rape went entirely unnoticed by the victim—if she was unconscious during the episode and never found out. Harms such as the psychological trauma of victims can only be judged as rational or understandable if they are understood as responses to the pure wrong of rape. “If nothing was wrong with being raped apart from the fact that one reacted badly afterwards, then one had no reason to react badly afterwards.”\(^{42}\)

Similarly, we might seek to identify what is wrong with domestic abuse in the absence of the psychological trauma that is suffered by

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41. *Id.* at 197.
42. *Id.*
victims. Perhaps it will be claimed that the “pure” case of domestic abuse is the case in which the victim is not traumatized by the abuse—where she does not suffer the kind of psychological reaction that is common in cases of abuse—but that would be a mistake. The fact that there may be cases of this sort should not incline us to think that psychological trauma is not central to what is wrong with domestic abuse. That there are instances of domestic abuse without psychological trauma does not make psychological trauma merely epiphenomenal to the wrong of domestic abuse, just as the fact that there are trunkless elephants does not make trunks merely epiphenomenally related to elephants in the way that dirt is a mere epiphenomenon of elephants.

This idea is reflected in the nature of concepts in general. A family of particular instances may properly fall under one conceptual umbrella, where there are overlaps between each instance under that umbrella but no single feature that is present in all instances that is sufficiently distinctive to define the ambit of the concept. In the context of distinguishing criminal offenses, the same argument holds water. It is not necessarily an objection to the creation of a distinct criminal offense that there is no set of necessary and sufficient conditions that define the wrong that the offense is intended to track. A criminal offense might quite properly reflect overlapping values, or vices, whereby two instances of behavior that fall within that offense do not share all of the salient and distinctive elements that make any particular token of the offense wrongful. For example, it is not necessarily problematic to include both intentional but provoked killings and reckless killings within the category of manslaughter, even if these killings are wrong in quite different ways. That the killing was intentional (although provoked) is constitutive of the wrongfulness of the defendant’s conduct where the defendant utilizes the defense of provocation, even if an intention to kill is a not necessary condition for properly convicting any defendant of manslaughter.

It might be, however, that there is a paradigm of an offense where conduct which is sufficiently close to the paradigm is also worthy of conviction of that offense even if a significant element of the paradigm case is missing. Therefore, it might be that the paradigm of assault involves physical harm, even if psychological harm or the threat of physical harm is sufficient in some cases where physical harm is not present. Once again, in the paradigm case, physical harm

is constitutive of the wrongfulness of the defendant's conduct even if it is not a necessary condition of properly convicting any defendant of assault. That is not to say, of course, that Gardner and Shute are mistaken in their analysis of rape in particular, although the infliction of psychological trauma is best thought paradigmatic of the wrong of rape. What is clear is that the idea of pure cases ought not to be considered a method by which the nature of criminal wrongs can be investigated in general.

Finally, it might be objected that if the wrong that is being perpetrated by domestic abuse is the diminution of freedom in the distinctive way suggested by this article, that should also be a condition of being convicted of any new offense. The prosecution, it might be argued, ought to have to show not only that there was systematic abuse within an intimate relationship between the defendant and the victim, but also that the victim's freedom was undermined as suggested earlier.

This ought not to be required of the prosecution. First, it is worth noting that many other criminal offenses have a loose association with the harm which they are ultimately intended to prevent. For example, section 19 of the Firearms Act of 1968 makes it a criminal offense to carry a firearm together with ammunition in a public place without lawful authority or reasonable excuse. Now obviously the central reason why that offense was created is the potential use of the firearm rather than mere possession. That firearms kill and maim is used to justify the possession offense, but mere possession itself does not kill and maim. However, that is no objection to the definition of the offense. That possession offenses do not always lead to the harm that they are intended to control does not mean that possession ought not to be criminalized at all. A very strict reading of the harm principle might lead some to the conclusion that such offenses are contrary to principle. The harm principle may not be a proper principle of criminal law at all, but, even if it is, it does not seem difficult to provide an argument that possession offenses such as this help to prevent harm. Consider even the psychological harm that would be done were everyone to know that possession of firearms and ammunition in public places was permitted!

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44. Firearms Act, 1968, c. 39 (Eng.).
46. That is not to say that possession offenses have not been extended far too widely. See Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, in *Defining Crimes: The Special Part of the Criminal Law* (Anthony Duff & Stuart Green ed., forthcoming 2005). Furthermore, consideration has to be given to the presumption of innocence, a principle which is at least sometimes violated by some possession offenses. See
Consider section 28 of the Offenses Against the Person Act of 1861, which makes it an offense to unlawfully and maliciously burn, maim, disfigure, disable, or do grievous bodily harm to any person by explosive substance. Consider disfigurement alone for a moment. There is good reason to think that it is wrong to disfigure another, but disfigurement is significantly wrong because of the particular value that people generally attach to their physical appearance. Now, if there are cases of disfigurement which cause no distress, say because the victim likes the look of his scars, surely that is not a reason to acquit the assailant of the offense created by section 28.

Similarly, in this case, the fact that there are instances of domestic abuse that do not lead to the diminution of freedom in the way that I have suggested does not entitle the perpetrators of such abuse to an acquittal. The diminution of freedom is central to the wrong, and yet the natural tendency of such conduct to lead to that diminution is sufficient to justify conviction. The defendant has perpetrated conduct which often leads to such a diminution of freedom. Indeed, such an effect is arguably paradigmatic of domestic abuse. That such a diminution does not in fact come about cannot save him from being liable for the same offense as those whose conduct has the relevant harmful consequence.

IV. CONCLUSION

The response of the criminal justice system to domestic abuse has long been considered problematic, and for good reason. Domestic abuse initiatives, such as training programs for police officers, show that progress can be made in this area. Creating a nominate offense of domestic abuse can only make a small contribution to improving the situation further. Ensuring that the substantive criminal law expresses an appropriate categorization of offenses is important, and other decisions, such as policing, prosecution, and sentencing decisions reflect offense categorization at least to some degree. However, changes in the way in which offenses are categorized, even quite radical changes, may well not have much of an impact on policing, prosecution rates, conviction rates, or sentencing in the context of domestic abuse.

47. Offenses Against the Person Act, 1861, c. 100 (Eng.).
48. None of this should be interpreted in favor of a strict version of the correspondence principle. The consequences of one's actions are often relevant in attributing criminal responsibility. See Tadros, supra note 22, at Chap. 3 (arguing why this is so).
49. See, e.g., Jennifer Temkin, Rape and the Legal Process 186 (2d ed. 2002)
However, even if the impact of a new offense in improving the lives of victims of domestic abuse would be modest, that is not to say that a new offense should not be created. There are what we might call "symbolic" as well as practical reasons for creating a new offense. By creating such an offense, at least if it is done in the appropriate way, the state acknowledges the seriousness of domestic abuse and its history of failure in dealing with such abuse.

Nevertheless, we can speculate about one or two ways in which the creation of a new offense might have a practical, as well as a symbolic, impact. First, nothing advocated in this article ought to be thought of as necessarily ruling out other approaches within or outside of the criminal justice process. Clearly, if other methods of tackling the problem of domestic abuse are effective in reducing the frequency with which the conduct is perpetrated, there is good reason to use those methods. Other methods might include using existing offenses or using institutions outside the criminal justice process altogether. Obviously, any new offense ought to be a supplement to existing offenses rather than a replacement, and the existence of a new offense should not be thought to preclude prosecution using existing offenses. A distinct domestic abuse offense is another string to the bow of the criminal justice system and can supplement social responses to domestic abuse beyond that system.

That being said, as has been implied, there are some reasons to use the criminal justice process that go beyond its effectiveness in tackling rates of offending in the most direct way. The criminal justice process has unique power to mark a public recognition of the wrongful nature of a particular kind of conduct and to stigmatize those who perpetrate that conduct. Taking domestic abuse outside the criminal justice system is likely to create or reinforce the perception that domestic abuse is less "serious" than other kinds of assault, when what has been argued here is that domestic abuse is often very serious, and serious in a way that distinguishes it from other kinds of assault.

It is against this background that we should consider one important evidential issue that might lead us to conclude that a specific offense could have some, albeit probably relatively slight, impact on conviction rates. Superficially, there seems a straightforward reason not to pin too much hope on an offense that is concerned with a course of conduct. The argument is as follows. Achieving a conviction for any single assault in domestic abuse cases

50. This deals with the problems mentioned by the British government in Safety and Justice, supra note 3.
is often difficult enough. This is particularly so given the reluctance of some victims of domestic abuse to testify.\textsuperscript{51} Proving a course of conduct is likely to be all the more difficult. Hence, the argument goes, a new offense is very unlikely to prove useful to prosecutors.

On the other hand, there will be cases in which it is easier to prove a course of conduct by the defendant against the victim than it is to prove a single incident. Consider a victim who, seven times in the last year, has been admitted to a hospital with bruising. Each time, when asked how the bruising came about, she reports that the injury was accidental. There is evidence from the neighbors that sometimes there are aggressive fights, but no further evidence of violence exists. The victim refuses to testify. Now, for any one of the seven incidents it might be impossible to prove beyond reasonable doubt that the bruising was caused by an assault on the victim by her partner. In each case taken individually it might be plausible that the bruising was caused by an accident, as the victim reported. However, despite this, there might be proof beyond a reasonable doubt that more than one incident was caused by an assault on the victim by her partner. Where there are seven instances of bruising, there may be no reasonable possibility that six of them were the result of an accident, even if there is a reasonable doubt about the cause of any one of the seven.

Now, in order to convict the accused of assault, it would normally have to be proved that one particular incident was an assault. At least in Scots law,\textsuperscript{52} a conviction for any offense requires that the date, time, and circumstances of the offense must be specified in the indictment. While there is some flexibility as to how this is done, there is no authority for a conviction where the prosecution has not made out, beyond a reasonable doubt, that the circumstances of the offense, as specified in the indictment, occurred. To prove that a defendant has engaged in a course of conduct of domestic abuse against the victim, however, it might not be necessary to prove beyond a reasonable doubt which incidents were assaults, rather than accidents. Even where the victim refuses to testify, there may be sufficient evidence in such cases to convict the accused of an offense of domestic abuse, characterized by a course of conduct, when there is insufficient evidence to convict him of any single assault.

\textsuperscript{51} Mandating prosecution against the wishes of the victim may have some impact on recidivism. See Coker, supra note 18. Some argue that mandating prosecution in such circumstances is problematic—the victim becomes a victim not only of her partner, but also of the state. However, if freedom is diminished by domestic abuse in the way suggested, merely fulfilling the wishes of the victim is likely to be too crude a way of respecting the victim's autonomy.

\textsuperscript{52} For a further discussion, see Albert V. Sheehan & David J. Dickson, Criminal Procedure 122–23 (2d ed. 2003).
Of course, the evidential problem would be lessened still further, in such a case, if a conviction of assault was possible without proving which event constituted the assault, but there may be difficulties in jumping over the evidential hurdles in a case presented in this way. If there is insufficient evidence to prove beyond a reasonable doubt that any particular incident was an assault, it would be a breach of the presumption of innocence to warrant the conviction of the defendant for an assault. But that argument cannot apply to the case of domestic abuse. There, the nature of the offense has to do with engaging in a course of abuse against the victim, and, on the facts suggested above, there is proof beyond a reasonable doubt that the defendant was engaged in such a course of conduct against the victim.

In summary, we should not think that the only good reason for creating a new criminal offense is to identify a particular, distinctive kind of wrong. There is a broader range of concerns that ought to guide the way in which criminal offenses are identified and divided up. First, the social context of a particular kind of conduct cannot be ignored. The fact that a certain kind of conduct has not been properly recognized, or that it is not properly recognized today, can constitute a reason for creating a new criminal offense. States have a duty to protect the vulnerable, the less vocal, and minorities—particularly those who have suffered historically. A lack of public recognition of the wrong perpetrated, or of the consequences of that wrong, can, therefore, be as much a reason to criminalize as public recognition.

Furthermore, that a particular kind of conduct generally has a certain kind of consequence may be enough reason to criminalize that kind of conduct distinctively, even if that kind of conduct does not always have those consequences. This is true of domestic abuse. It may be that not all victims of domestic abuse experience a reduction in freedom in the way this article has suggested, but that it is a reasonably frequent consequence of domestic abuse may be sufficient to mark out domestic abuse as sufficiently distinct to warrant criminalization independently of other kinds of assault. Those reasons stand even if such an experience of a loss of freedom may come about in other ways.

If this is a good reason to mark out domestic abuse as sufficiently distinctive to warrant an independent offense, thought needs to be given to the practical implications of the creation of a new offense. We should not be overly optimistic about the impact that the creation

53. For a thorough analysis of evidential problems and solutions where a single assault is prosecuted, see Ellison, supra note 6.
54. For an account of the relationship between the nature of a criminal offense and the presumption of innocence, see Tadros & Tierney, supra note 46.
of a new offense might have on offending rates. However, there is at least some reason to think that a new offense might help to overcome some of the evidential hurdles that are faced by those prosecuting domestic abuse. The problem of domestic abuse, no doubt, ought to be tackled by a broad ranging set of reforms in the criminal justice system as a whole and beyond. Some of those reforms are underway and, at least to a degree, have promoted more effective and adequate responses to domestic abuse. There is some good reason to think that the creation of a new offense might have at least some part to play in such a program of reform.