

# APPLYING PRESSURE: IMPROVING ENFORCEMENT OF STRANGULATION LAWS

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## INTRODUCTION

“Strangulation has been identified as one of the most lethal forms of domestic violence.”<sup>1</sup> Once an abuser’s hands are around their partner’s neck, death is knocking at the door. A victim of domestic violence who has experienced strangulation becomes 750% more likely to be murdered by their abuser.<sup>2</sup> Domestic violence is entirely about power and control; strangulation is the ultimate show of control, intended to immobilize and terrorize a partner.<sup>3</sup> Most abusers strangle, not to kill, but to demonstrate they are physically and mentally capable of killing.<sup>4</sup> With constant pressure applied to the neck, a victim can be rendered unconscious in as little as 6.8 seconds.<sup>5</sup> Loss of bladder and bowel control can

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\* J.D. Candidate, University of Toledo College of Law (2023). I would like to thank my faculty advisor, Dean Rick Goheen, as well as my note & comment editor, Ziena Hatem, for their support and feedback throughout the writing process. I would further like to thank my husband, Scott, and daughters, Audrina & McKenna, for their unwavering love and support.

1. *About Us*, TRAINING INST. ON STRANGULATION PREVENTION, <https://www.strangulationtraininginstitute.com/about-us/> (last visited July 26, 2023).

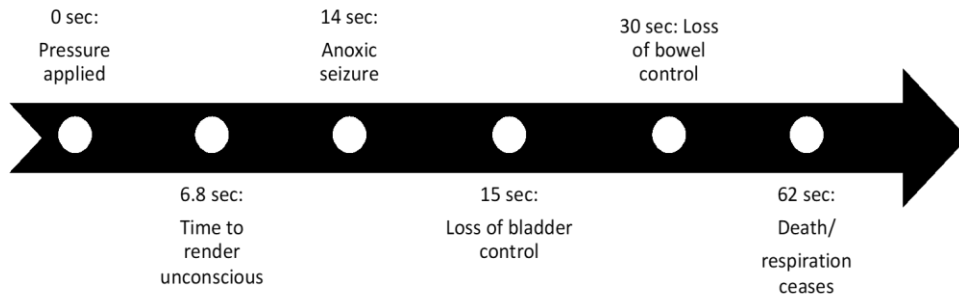
2. Derek Cantu, *Do States in the Midwest Have Statutory Language Specifying Strangulation as a Felonious Assault?*, CRIM. JUST. & PUB. SAFETY (Nov. 16, 2021), <https://csgmidwest.org/2021/11/16/question-of-the-month-november-2021-state-laws-on-strangulation/>.

3. Amy Reckdenwald et al., *Forensic Documentation of Non-Fatal Strangulation*, 67 J. FORENSIC SCIS. 588, 593 (2022).

4. *Id.*

5. Ruth Carter et al., *Physiological Consequence of Strangulation, Occlusion of Arterial Blood Flow: Seconds to Minute Timeline*, FAM. JUST. CTR. ALL., <https://www.familyjusticecenter.org/resources/physiological-consequences-of-strangulation-seconds-to-minute-timeline/> (last visited July 26, 2023).

occur within fifteen (15) to thirty (30) seconds.<sup>6</sup> Death can occur in as little as one (1) to two (2) minutes.<sup>7</sup>



In response to such startling statistics, one might assume it would require an immense amount of pressure to cause death by strangulation so quickly. Yet, for perspective: it takes twenty (20) pounds of pressure per square inch to open a soda can, but only eleven (11) pounds of pressure per square inch to completely occlude the arteries in the neck.<sup>8</sup> Meaning, it requires less pressure to obstruct blood flow from the heart to the brain than it does to open a soda can. This reality explains why victims often have no visible external injuries resulting from strangulation assaults.<sup>9</sup> Traditionally, without physical evidence (such as visible injuries), non-fatal strangulation cases have proven difficult to prosecute.<sup>10</sup>

Non-fatal strangulation is “one of the best predictors for the subsequent homicide of victims of domestic violence.”<sup>11</sup> As the seriousness of the crime has become better understood, legislators have worked tirelessly to codify strangulation as a felony.<sup>12</sup> In April 2023, Ohio passed its strangulation law, making it the fiftieth and final state to recognize strangulation as a felony offense.<sup>13</sup>

6. *Id.*

7. *Id.*

8. Nikki Richardson et al., *NonFatal Strangulation and Domestic Violence*, EMGUIDEWIRE’S PODCAST (Nov. 8, 2019, 5:10 AM), <https://emguidewire.libsyn.com/strangulation-and-domestic-violence>.

9. *Id.*

10. *Id.*

11. Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 CRIM. JUST., Fall 2011, at 32, 34.

12. Cantu, *supra* note 2.

13. In April 2023, Ohio joined the other 49 states in recognizing non-fatal strangulation as a felony offense. See Micaela Marshall, *Ohio Joins the Rest of the Country with ‘Strangulation Law*, SPECTRUM NEWS 1 (Jan. 4, 2023, 7:30 AM), <https://spectrumnews1.com/oh/columbus/news/2022/12/22/ohio-may-soon-join-the-rest-of-the-country-with--strangulation-law->.

States have employed a variety of approaches to codify strangulation laws, but “[t]he effect of these different approaches on the actual implementation of the statutes by the criminal justice system and their ultimate effect on the health and safety of potential victims of strangulation is not yet clear.”<sup>14</sup> Some states have enacted standalone strangulation laws, where others have incorporated the act of strangulation into existing statutes.<sup>15</sup> While the gravity of the crime is undisputed, there is a great deal of education and training the criminal justice system needs in order to effectively utilize the laws.

This article begins with a brief explanation of what strangulation is and why it is important this crime be prosecuted as a felony offense. It then discusses the variety of legislative approaches states have taken to codify strangulation laws and analyzes the effectiveness of the methods that have been employed, comparing the strengths and weaknesses each offer. This article also seeks to identify and address evidentiary challenges impeding prosecution under existing laws. Finally, this article explores possible solutions that can be utilized to bolster strangulation laws, hold offenders accountable, and prevent strangulation victims from becoming homicide victims.

## I. DEFINING NON-FATAL STRANGULATION

The terms “strangle” and “choke” are often used interchangeably by law enforcement, victims, medical practitioners, and legal professionals.<sup>16</sup> However, strangulation and choking are not synonymous and should be distinguished clinically.<sup>17</sup> “Strangulation is generally defined as the sustained impairment of air or blood flow through the neck as a result of external pressure.”<sup>18</sup> Manual strangulation is performed by applying pressure with hands around the neck.<sup>19</sup> Choking is an internal obstruction of the airway by a foreign body.<sup>20</sup> To illustrate the difference: a person may choke (internally) on a piece of hard candy, but a person cannot be strangled (externally) by that same piece of candy. Choking is internal and accidental; strangulation is external and intentional.<sup>21</sup> In *United States*

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14. Kathryn Laughon et al., *Review and Analysis of Laws Related to Strangulation in 50 States*, 33 EVALUATION REV. 358, 364 (2009).

15. *Id.*

16. *What Florida Judges Should Know When Faced with Non-Fatal Strangulation*, FLA. COURTS 1, <https://www.flcourts.gov/content/download/719180/file/Strangulation%20Benchcard%20-%204%20pages%20v.%202%20FINAL.pdf> (last visited Aug. 12, 2023).

17. Michael Armstrong Jr. & Gael B. Strack, *Recognition and Documentation of Strangulation Crimes: A Review*, 142 JAMA OTOLARYNGOLOGY – HEAD & NECK SURGERY 891, 892 (2016).

18. *Id.*

19. *Id.*

20. *Id.*

21. Gael B. Strack & Michael Agnew, *Investigation of Strangulation Cases*, TRAINING INST. ON STRANGULATION PREVENTION AND THE CAL. DIST. ATT’YS ASS’N, 21, 23 (2013), [https://www.strangulationtraininginstitute.com/wp-content/uploads/2015/07/California-Strangulation-Manual\\_web3.pdf](https://www.strangulationtraininginstitute.com/wp-content/uploads/2015/07/California-Strangulation-Manual_web3.pdf).

v. *Rice*, the court articulated that “[a] person cannot commit the act of strangling without knowing or intending it.”<sup>22</sup>

It is important to use the correct terminology in order to bring awareness to the seriousness of strangulation and to change the way the criminal justice system treats strangulation cases. In some cases, prosecutors have called expert witnesses to explain the technical definition of “strangulation” and explain to juries how that term is distinct from “choking.”<sup>23</sup> According to sociologist and researcher Adam Pritchard, “the use of inaccurate and inconsistent terms to measure strangulation is problematic and suggests that criminological research and the justice system’s ability to detect and respond to strangulation have room for improvement.”<sup>24</sup>

Strangulation is a severe form of interpersonal violence used to exert coercive control over, immobilize, and terrorize a partner.<sup>25</sup> It sends a message to the victim that the offender holds life and death in their hands. Most abusers strangle not to kill, but to show that they can kill.<sup>26</sup> Strangulation is an especially important risk factor as to the homicide of women.<sup>27</sup> As previously mentioned, research has shown that a woman’s risk of homicide increases 750% if she has been strangled in the past.<sup>28</sup>

“[Ten] percent of all violent deaths in the United States are attributable to strangulation.”<sup>29</sup> Non-fatal strangulation can cause a variety of internal and external injuries.<sup>30</sup> “The seriousness of the internal injur[ies] may take hours to be appreciated, and delayed death has been reported.”<sup>31</sup> Often, strangulation does not result in visible injuries and many victims do not seek medical treatment.<sup>32</sup> Common non-visible injuries include loss of consciousness, nausea, hoarseness or loss of voice, shaking, memory loss, throat pain, difficulty breathing, and headaches.<sup>33</sup> Victims of strangulation are at higher risk of experiencing depression,

22. *United States v. Rice*, 36 F.4th 578, 583 (4th Cir. 2022).

23. *State v. Perry*, 159 A.3d 840, 843 (Me. 2017). *See also* *State v. Ryan*, No. 108143, 2019 WL 7190609, at \*4 n.1 (Ohio Ct. App. Dec. 26, 2019) (explaining the distinction between “strangulation” and “choking”).

24. Adam J. Pritchard et al., *Improving Identification of Strangulation Injuries in Domestic Violence: Pilot Data from a Researcher-Practitioner Collaboration*, 13 FEMINIST CRIMINOLOGY 160, 164 (2018).

25. Reckdenwald et al., *supra* note 3, at 593.

26. *Id.*

27. *See generally* Nancy Glass et al., *Non-fatal Strangulation is Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329 (2008) (discussing strangulation in relation to attempted or completed homicide of women).

28. Cantu, *supra* note 2.

29. Armstrong Jr. & Strack, *supra* note 17, at 891; Kelsey McKay, *A Closer Look at Strangulation Cases*, 44 THE TEX. PROSECUTOR 19, 20 (Jan.-Feb. 2014), [https://static1.squarespace.com/static/606defabe6d03164680836fc/t/6172d4c5108fe840fb5ead41/1634915525376/TDCAA\\_strangulation+article.pdf](https://static1.squarespace.com/static/606defabe6d03164680836fc/t/6172d4c5108fe840fb5ead41/1634915525376/TDCAA_strangulation+article.pdf).

30. Armstrong Jr. & Strack, *supra* note 17, at 894.

31. *Id.*

32. *Id.* at 891.

33. Lee Wilbur et al., *Survey Results of Women Who Have Been Strangled While in an Abusive Relationship*, 21 J. EMERGENCY MED. 297, 301 (2001); Armstrong Jr. & Strack, *supra* note 17, at 895.

suicidal ideation, insomnia, anxiety, and post-traumatic stress disorder.<sup>34</sup> When visible injuries do present, these include defensive wounds (like scratch and bite marks), incontinence, swelling (of the lips, tongue, and neck), drooling, vomiting, bruising, abrasions, and petechiae.<sup>35</sup> Petechiae are pin-point red spots that result from the rupturing of small blood vessels near the surface of the skin.<sup>36</sup> It could be a single pin-point dot on the victim or group of dots on the earlobe, in the eye, on the eyelid, or behind the ear.<sup>37</sup> Like many of the other visible injuries associated with strangulation, petechiae is a telling injury, but one that is often overlooked because it can be hidden by freckles, makeup, or dark skin.<sup>38</sup>

The medical community recognizes the need for ongoing research in the area of non-fatal strangulation.<sup>39</sup> Existing research has documented that strangulation has the potential to cause severe internal injuries, including neck fracture, injury to the larynx (voice box), tracheal (windpipe) fractures, lung issues, and brain damage.<sup>40</sup> Delayed death may occur when strangulation results in torn arteries in the neck, swelling of the lungs, tracheal injury, or brain injury.<sup>41</sup> If a victim has been strangled to the point of unconsciousness, they are at the highest risk of dying from choking on their own vomit, stroke or blood clots within twenty-four (24) to forty-eight (48) hours after the attack.<sup>42</sup> It is imperative that the seriousness and potentially fatal nature of strangulation assaults are recognized.<sup>43</sup> Continued research will lead to a more robust body of forensic medical data. That data will then serve to provide the criminal justice system with a more comprehensive understanding of the effects of strangulation and improve the overall response to strangulation.<sup>44</sup>

## II. THE NECESSITY OF STAND-ALONE FELONY STRANGULATION LAWS

In order for the public to understand strangulation as the chief marker for intimate partner homicide, prosecutors must lead the way in treating strangulation as a serious felony.<sup>45</sup> Therefore, strangulation should be a presumptive felony.

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34. Armstrong Jr. & Strack, *supra* note 17, at 895.

35. *Id.* at 893-95.

36. McKay, *supra* note 29, at 20.

37. *Id.*

38. *Id.*

39. Ellen Taliaferro, et al., *Walking and Talking Victims of Strangulation. Is there a New Epidemic? A Commentary*, 21 J. EMERGENCY MED. 293, 294 (2001).

40. Hannah H. Spungen, et al., *Symptoms and Physical Exam Findings in Sexual Assault-Related Non-Fatal Strangulation*, 23 W. J. EMERGENCY MED. 268 (2022); Nicole Verdi, *Releasing the Stranglehold on Domestic Violence Victims: Implications and Effects of Rhode Island's Domestic Assault Strangulation Statute*, 18 ROGER WILLIAMS U. L. REV. 255, 266 (2013).

41. *Id.* at 269.

42. RACHEL LOUISE SNYDER, *NO VISIBLE BRUISES: WHAT WE DON'T KNOW ABOUT DOMESTIC VIOLENCE CAN KILL US* 65 (Bloomsbury Publishing, 2019).

43. Pritchard et al., *supra* note 24, at 165.

44. *Id.*

45. Casey Gwinn, *Strangulation and the Law in The Investigation and Prosecution of Strangulation Cases* 5, 14 (Training Institute on Strangulation Prevention and The Cal. Dist. Att'y Assoc., 2013).

Rachel Louise Snyder has spent much of the past decade researching domestic violence.<sup>46</sup> Louise reports that “every jurisdiction that has prosecuted strangulation as a felony with a multidisciplinary team has seen a drop in homicides.”<sup>47</sup> Statutes that allow strangulation to be prosecuted as either a misdemeanor or felony are less than ideal. In states where strangulation can be filed as a misdemeanor or felony, the majority of cases end up being filed as misdemeanors.<sup>48</sup> Subsequently, at least some offenders are not being held accountable and punished to the degree they should be.<sup>49</sup>

Some researchers argue that human behavior is unpredictable: some killers never strangle and some stranglers never commit murder.<sup>50</sup> However, “[s]tatistically, we now know that once the hands are on the neck, the very next step is homicide.”<sup>51</sup> Critics of strangulation laws raise arguments that these crimes could be prosecuted under existing felony assault laws.<sup>52</sup> Some feel that general intent strangulation statutes are flawed because they allow for prosecution without objective proof of physical injury.<sup>53</sup> Yet another argument raised is that stand-alone strangulation statutes foster excessive charging and provide prosecutors with more leverage to secure guilty pleas.<sup>54</sup> These arguments may appear to have some validity on their face, but they lack merit considering the serious nature of the crime. Strangulation laws work to protect victims, prevent future homicides, and promote public safety.<sup>55</sup>

### III. THE LEGISLATIVE HISTORY OF STRANGULATION STATUTES IN THE UNITED STATES

Statutes are the starting point where criminal acts are defined.<sup>56</sup> Criminal statutes vary from state to state and the elements of a crime that must be proven vary based upon the statutory language found in criminal codes.<sup>57</sup> Generally,

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46. Rachel Louise Snyder, *The Particular Cruelty of Domestic Violence*, THE ATL. (May 8, 2019), <https://www.theatlantic.com/family/archive/2019/05/no-visible-bruises-domestic-violence/588631/>.

47. SNYDER, *supra* note 42, at 68.

48. Amy Reckdenwald et al., *The Effectiveness of a Coordinated Response Toward Nonfatal Strangulation in Facilitating Evidence-Based Prosecution*, 32 CRIM. JUST. POL’Y REV. 1, 3 (2021).

49. *Id.*

50. SNYDER, *supra* note 42, at 67.

51. *Id.*

52. Nicole Verdi, *Releasing the Stranglehold on Domestic Violence Victims: Implications and Effects of Rhode Island’s Domestic Assault Strangulation Statute*, 18 ROGER WILLIAMS U. L. REV. 255, 274 (2013).

53. *Id.* at 275.

54. *Id.* at 274-75.

55. Kelly Francis, *Minnesota’s New Domestic Abuse Strangulation Statute*, 65 BENCH & BAR OF MINN. 26, 28 (2008).

56. JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 129 (8<sup>th</sup> ed. 2019).

57. *Criminal Law*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (last visited Aug. 13, 2023).

criminal acts contain two components: the “actus reus” and the “mens rea.”<sup>58</sup> The actus reus is the physical act of the crime; the mens rea is the mental component of the crime.<sup>59</sup> Generally, the prosecution has the burden of proving every element of a crime beyond a reasonable doubt.<sup>60</sup> Therefore, strangulation statutes must define the physical act of strangling as well as the mental state required for culpability.

Over the past two decades, states have recognized the need for strict felony strangulation laws.<sup>61</sup> However, due in part to lack of education and understanding, coupled with the absence of visible injuries, police and prosecutors have failed to treat strangulation as a serious crime.<sup>62</sup> Today, strangulation is regarded as “one of the most lethal forms of domestic violence.”<sup>63</sup> States have taken varied legislative approaches in creating strangulation statutes.<sup>64</sup> Many have codified stand-alone laws while others have amended existing assault or battery statutes to include strangulation.<sup>65</sup> It is unclear how the different legislative approaches specifically affect prosecution outcomes.<sup>66</sup> What is evident is that the specific language used in strangulation statutes greatly impacts prosecutors’ ability to bring charges and see them through to conviction.<sup>67</sup>

From a policy perspective, felony strangulation laws are intended to deter offenders from primary strangulation offenses and to punish those who strangle.<sup>68</sup> Deterrence and fundamental fairness require people be given clear notice of what conduct to avoid.<sup>69</sup> Criminal statutes should be understandable to reasonable law-abiding persons.<sup>70</sup> Laws that best achieve the goals of deterrence and punishment have the following in common: (1) They have eliminated the requirement to prove specific intent, instead requiring only general intent to strangle; (2) definitions are included in the statutes that provide prosecutors the clear legal meaning of strangulation; and (3) the statutes are written to allow for the prosecution of offenders outside traditional family and domestic relationships, including dating partners, minors, and other non-household members.<sup>71</sup>

Within criminal law, the concepts of “specific” and “general” intent are difficult to grasp and do not have universally accepted definitions.<sup>72</sup> Some courts have distinguished the concepts by defining “general intent” crimes as those that

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58. *Id.*

59. DRESSLER & GARVEY, *supra* note 56, at 129.

60. *Criminal Law*, *supra* note 57.

61. Cantu, *supra* note 2.

62. Armstrong & Strack, *supra* note 17, at 896.

63. *Id.*

64. Laughon et al., *supra* note 14, at 364.

65. *Id.* at 363.

66. *Id.* at 364.

67. *Id.*

68. *Id.*

69. DRESSLER & GARVEY, *supra* note 56, at 91.

70. *Id.*

71. Laughon et al., *supra* note 14, at 367-68.

72. DRESSLER & GARVEY, *supra* note 56, at 167.

require no further proof of a mental state beyond a willingness to commit the act.<sup>73</sup> In contrast, “specific intent” crimes require proof the defendant intentionally committed the act and intended to cause a particular result.<sup>74</sup> Analyses of several felony strangulation statutes indicate that general intent requirements are preferred.<sup>75</sup> In Kathryn Laughon’s “Review and Analysis of Laws Related to Strangulation in 50 States,” she explains, “[e]liminating the need to discuss injury greatly simplifies prosecution of strangulation.”<sup>76</sup> This is especially true due to the lack of visible injuries associated with strangulation.<sup>77</sup> In San Diego, California, a study of 300 strangulation victims revealed that 50% of victims presented with no visible injuries.<sup>78</sup> Another 35% of victims presented with injuries too minor to photograph.<sup>79</sup> Only 15% of victims had visible injuries that could be photographed and used as evidence in criminal prosecutions.<sup>80</sup> Prosecution is more difficult where the law requires proof of specific intent to cause great bodily injury or intent to kill as opposed to laws requiring only general intent to commit the act of strangulation.<sup>81</sup> At trial, when prosecutors present a weapon, such as a gun or knife, juries understand intent simply by the common use of the weapon. However, when offenders use their hands and leave few or no visible injuries, juries struggle to find proof of intent.<sup>82</sup> In states like Minnesota, where prosecutors are required to prove intent, criminal justice personnel have found it difficult to bring charges in the absence of visible injuries.<sup>83</sup>

A definition of strangulation should be articulated in each state statute. While medical definitions are useful amongst medical professionals, confusion may arise when medical definitions are used to define the act of strangulation in the legal context. Including a clear, thorough, legal definition directly in strangulation statutes assists prosecutors. A simple definition articulating strangulation as, “occluding blood flow to the brain and/or interfering with the victim’s ability to breathe,” will make the statutes easier to understand for those without medical training.<sup>84</sup> The Violence Against Women Act of 2013, (“VAWA”) provided a comprehensive definition of strangulation.<sup>85</sup> That same year, Congress used VAWA’s definition when assault by strangulation was added to the federal assault statute.<sup>86</sup> The definition in the United States Code reads:

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73. *Id.*

74. *Id.*

75. Laughon et al., *supra* note 14, at 364.

76. *Id.*

77. Strack & Gwinn, *supra* note 11, at 35.

78. Reckdenwald et al., *supra* note 3, at 589.

79. *Id.*

80. Casey Gwinn & Gael Strack, *Background Information for a California Strangulation Statute in The Investigation and Prosecution of Strangulation Cases* app. - 81, app. - 83 (Training Institute on Strangulation Prevention and The Cal. Dist. Att’y Assoc., 2013).

81. Laughon et al., *supra* note 14, at 364.

82. *Id.*

83. *Id.*

84. *Id.* at 365.

85. 18 U.S.C. § 113(b)(4)-(5).

86. 18 U.S.C. § 113; *United States v. Lamott*, 831 F.3d 1153, 1155 (9th Cir. 2016).



- (4) the term “strangling” means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and
- (5) the term “suffocating” means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether the conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.<sup>87</sup>

What makes this definition comprehensive is the clarification that strangulation consists of impeding or obstructing a person’s normal blood flow or airflow, and that this act can be completed without any visible injury and without specific intent (beyond intent to strangle).

While strangulation frequently occurs in family and domestic violence situations, it is vital that strangulation laws be broadly written to allow for the prosecution of all offenders who strangle, regardless of their relationship to the victim.<sup>88</sup> The focus of this article is on strangulation within intimate partner relationships, but all strangulations should be taken very seriously and prosecuted accordingly. It is beyond the scope of this article, but worth exploring in future research, whether states might look to have general strangulation laws in addition to domestic violence specific laws. States might also look to include sentence enhancements based upon the relationship between offender and victim. If statutes are limited to domestic and family violence, protection for victims will be limited in scope.<sup>89</sup> Legislative language should allow for prosecution of not only family members and intimate partners, but also non-household and non-family members. Strangulation statutes should apply to the broadest range of offenders and victims as possible.<sup>90</sup>

#### A. *Analysis of a State Strangulation Statute – Minnesota*

To understand the variety of legislative approaches states have utilized to enact strangulation laws, it is helpful to become familiar with existing statutes and the developing body of case law interpreting the statutes. In 2005, Minnesota became one of only six states that had enacted a felony strangulation statute.<sup>91</sup> For the purpose of analysis, the Minnesota law will be discussed due to the fact that the law has been in place for nearly twenty years and because case law involving the statute has had adequate time to evolve.

In Minnesota, prior to 2005, strangulation was charged as a misdemeanor and offenders received little or no jail time.<sup>92</sup> The new law made strangulation a felony

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87. 18 U.S.C. § 113(b)(4)-(5).

88. Laughon et al, *supra* note 14, at 365-66.

89. *Id.*

90. *Id.* at 368.

91. Francis, *supra* note 55, at 27.

92. *Id.*

offense, punishable by up to three years in prison, a \$5,000 fine, or both.<sup>93</sup> The Minnesota criminal code defines strangulation as “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.”<sup>94</sup> At first glance, the definition appears clear. However, three facets of the statute combined with the legal definition of strangulation are problematic. First, the law requires the victim of strangulation be a family or household member, excluding victims who do not fit into those classifications. Second, the State carries the specific burden of proving the offender’s intent to impede breathing or circulation, rather than proving intent to strangle. Third, the law narrowly articulates the precise means by which an offender can impede breathing.

Inconsistencies in application of the law by Minnesota law enforcement and prosecutors have been documented.<sup>95</sup> The requirement that the victim be a family or household member obligates the State to present relationship evidence at trial. Convicted stranglers in Minnesota have repeatedly alleged improper introduction of relationship evidence as grounds for appeal.<sup>96</sup> Additionally, strangulation victims who are not legally family or household members are not protected under the law. The specific intent requirement in the Minnesota statute requires that the State prove “the defendant acted with the intent to produce the specific result of ‘impeding normal breathing.’”<sup>97</sup>

*State v. McCoy* provides an example where the appellant challenged his conviction, alleging the State presented insufficient evidence to prove he specifically intended to impede breathing.<sup>98</sup> McCoy argued that although his actions ultimately resulted in the victim’s inability to breathe, he had only accidentally placed his knee on her throat and lacked the required intent to impede her breathing in order to sustain his conviction.<sup>99</sup> The court disagreed and upheld the conviction.<sup>100</sup> As Minnesota case law has developed over the past several years, some of the challenges to prosecution have been resolved. When necessary, Minnesota courts have interpreted statutory language to provide clarity. For example, in *State v. Serrano-Santana* the defendant appealed his conviction, arguing that although he grabbed the victim by the throat and cupped his hand over her mouth, she could still breathe.<sup>101</sup> According to the defendant, “his ‘actions did not impede her normal breathing’ within the meaning of section 609.2247.”<sup>102</sup> The

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93. *Id.*

94. MINN. STAT. § 609.2247 (2023).

95. Francis, *supra* note 55, at 28.

96. *See* *State v. Taylor*, No. 62-CR-11-437, 2012 WL 4475706, at \*1 (Minn. Ct. App. Oct. 1, 2012); *State v. Williams*, No. 62CR109760, 2012 WL 1914080, at \*6 (Minn. Ct. App. May 29, 2012); *State v. Kiazolu*, No. 06028426, 2008 WL 2168127, at \* 2 (Minn. Ct. App. May 27, 2008).

97. *State v. McCoy*, No. 02-CR-10-7531, 2012 WL 539140, at \*3 (Minn. Ct. App. May 15, 2012).

98. *Id.* at \*2.

99. *Id.* at \*4.

100. *Id.* at \*1.

101. *State v. Serrano-Santana*, No. 62-CR-19-6526, 2021 WL 1962886, at \*6 (Minn. Ct. App. Aug. 10, 2021).

102. *Id.*

Court looked to legislative intent and the plain meaning of the words, holding that to “impede” breathing only required that a person’s normal course of breathing be hindered.<sup>103</sup> The court went on to articulate, “[t]he fact that the statute requires only the blockage of the nose or mouth for a strangulation to occur indicates that a strangulation victim could still be able to breathe even while being strangled within the meaning of the statute.”<sup>104</sup> The defendant’s conviction was upheld.<sup>105</sup>

Finally, the very narrowly defined means by which an offender can impede breathing, “by applying pressure on the throat or neck or by blocking the nose or mouth of another person” excludes alternative methods offenders might employ to impede the breathing of their victim.<sup>106</sup> Such methods might include, but are not limited to, sitting or stepping on a victim’s chest or abdomen.

WATCH, an organization that monitors how courts handle domestic violence cases, analyzed the strengths and weaknesses of the Minnesota law.<sup>107</sup> In their 2007 report, WATCH cited the law for enhancing victim safety, holding offenders accountable, and increasing overall awareness of the seriousness of strangulation.<sup>108</sup> The report also cited inconsistencies and challenges to enforcement.<sup>109</sup> The report focused on the use of inconsistent language, including omission of the word “strangle” from the complaint.<sup>110</sup> Lack of documentation of physical evidence and the absence of medical treatment were additional factors that created gaps in charging and prosecuting.<sup>111</sup> The fact that victims of domestic violence often recant and refuse to participate in the prosecution of their offenders makes physical evidence and medical expert testimony vitally important in obtaining convictions.<sup>112</sup> WATCH revisited the impact of the Minnesota strangulation law in their 2009 report.<sup>113</sup> The 2009 report cited the law’s continued positive impact on victim safety and offender accountability.<sup>114</sup> It pointed out a greater number of convictions, but noted that in reviewing criminal complaints, improvement was needed in the use of appropriate language to accurately document the assaults.<sup>115</sup> The strangulation statute was also cited as providing leverage for convictions on other domestic violence charges that may be easier to prove.<sup>116</sup>

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103. *Id.*

104. *Id.* at \*18.

105. *Id.* at \*19.

106. MINN. STAT. § 609.2247 (2023).

107. Francis, *supra* note 55, at 27.

108. Heather Wolfgram, *The Impact of Minnesota’s Felony Strangulation Law*, WATCH (Jan. 2007), [https://www.theadvocatesforhumanrights.org/Res/Strangulation\\_cover\\_final1-24-07.pdf](https://www.theadvocatesforhumanrights.org/Res/Strangulation_cover_final1-24-07.pdf).

109. *Id.*

110. *Id.*

111. *Id.*

112. Gael B. Strack & Michael Agnew, *Investigation of Strangulation Cases in The Investigation and Prosecution of Strangulation Cases* 21, 30 (Training Institute on Strangulation Prevention and The Cal. Dist. Att’y Assoc., 2013).

113. Marna L. Anderson, *WATCH Report Part II: The Impact of Minnesota’s Felony Strangulation Law*, WATCH 3 (May 2009), <https://2mj284.a2cdn1.secureserver.net/wp-content/uploads/2015/02/Scan0014.pdf>.

114. *Id.* at 16.

115. *Id.*

116. *Id.*

*B. Statutory Strengths and Weaknesses*

Each of the fifty state strangulation statutes could be analyzed according to individual strengths and weaknesses. There are evident recurring strengths written in statutes and similar weaknesses in others. Case law in each state evolves to address problematic issues. Common problematic issues include: (1) the use of the word “choke” in the statutory language,<sup>117</sup> (2) statutes that apply only to family/household members or those who have had a “[d]ating relationship,”<sup>118</sup> and (3) statutes that use the language of “attempted strangulation.”<sup>119</sup>

Why are these issues problematic? First, it has been established that choking and strangulation are distinct acts.<sup>120</sup> Second, statutes applying only to family members or intimate partners exclude many cases of strangulation from being filed based upon the relationship between offender and victim. For example, the definition of “household member” is typically limited in application to intimate partners and does not extend to children and parents.<sup>121</sup> Therefore, a teenager strangled by her parent could not see her offender prosecuted in several states.<sup>122</sup> Third, according to the Institute on Strangulation Prevention, for many years, medical experts, courts, and law enforcement referred to strangulation assaults as “attempted strangulation.”<sup>123</sup> The belief was that true strangulation meant death and anything less must not have been strangulation. Experts in the field refer to this language as a bad habit that should be eliminated.<sup>124</sup> Based upon research and the current state of the law, any intentional effort to apply pressure to a victim in order to impede breathing or blood flow should be viewed as a strangulation assault.<sup>125</sup> The offender did not “attempt” an assault, he completed it.

Conversely, effective strangulation statutes: (1) eliminate the requirement of proof of injury, (2) require only general intent to strangle, (3) make strangulation an automatic felony with no lesser misdemeanor charges available, and (4) carry stiff penalties with increased penalties for repeat offenders.<sup>126</sup> Because strangulation injuries are often invisible, eliminating the need to prove injury greatly simplifies this aspect of prosecution.<sup>127</sup> Requiring only general intent to strangle, as opposed to laws requiring specific intent to injure, impede breathing, or kill the victim, are easier for juries to understand.<sup>128</sup> Laws that do not include lesser misdemeanor charges send a strong message that the offense is taken

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117. IDAHO CODE ANN. § 18-923 (West 2018).

118. *Id.*

119. *Id.*

120. Strack, *supra* note 112, at 23.

121. State v. Schulz, 264 P.3d 970, 973-74 (2011).

122. *Id.* at 974-75; IDAHO CODE ANN. § 18-923 (West 2018).

123. Gerald W. Fineman, *Prosecuting Strangulation Cases in The Investigation and Prosecution of Strangulation Cases* 39, 44 n. 13 (Training Institute on Strangulation Prevention and The Cal. Dist. Att’y Assoc., 2013).

124. Gwinn, *supra* note 45, at 13.

125. *Id.*

126. *Id.* at 16.

127. Laughon et al., *supra* note 14, at 364.

128. Gwinn, *supra* note 45, at 10.

seriously. Finally, statutes carrying long prison sentences reflect the seriousness of the offense. Longer sentences for repeat offenders reflect the need to punish criminal behavior and hold offenders accountable for their actions.<sup>129</sup> States can learn lessons from each other's legislative processes and outcomes, guiding the evolution of strangulation laws across the country. Understanding the strengths and weaknesses of various strangulation laws will help legislators create statutes that can be used by police and prosecutors to accomplish the overarching goals of felony strangulation laws: to deter stranglers, to protect victims, and to punish those who strangle.

While all states have strangulation laws, the laws do not implement themselves. It appears States have been somewhat slow in developing coordinated responses, including strangulation-specific training and guidance on how to handle these cases, throughout the criminal justice system. California, specifically San Diego County, has produced some of the greatest resources for strangulation training and education.<sup>130</sup> In 1995, two young mothers in San Diego were murdered by their intimate partners within two months of each other.<sup>131</sup> Both women had been in relationships with histories of domestic violence, including incidents of strangulation.<sup>132</sup> In response to the tragic deaths of the two young mothers, the San Diego City Attorney's Office and San Diego Police Department determined that it was essential for police and prosecutors to be at the forefront of aggressive strangulation intervention.<sup>133</sup> San Diego City Attorney, Casey Gwinn, and Assistant City Attorney, Gael Strack, conducted a study of 300 strangulation cases.<sup>134</sup> The city attorneys' findings were shocking. "Strangulation turned out to dramatically increase the chances of domestic violence homicide."<sup>135</sup> But only 15% of the victims in the study had visible injuries that could be documented by photograph and used as evidence.<sup>136</sup> The findings of their study launched the most comprehensive effort in the United States to educate legal and medical professionals, law enforcement, and the community at large as to the dangers of strangulation.<sup>137</sup> In 2011, Strack and Gwinn helped to launch the Training Institute on Strangulation Prevention.<sup>138</sup> Based in San Diego, the institute conducts in-person and online strangulation trainings for doctors, nurses, judges, police, prosecutors, and victims.<sup>139</sup> In 2013, Strack and Gwinn submitted briefs to the

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129. *Id.* at 16.

130. *See About Us*, STRANGULATION TRAINING INST., <https://www.strangulationtraininginstitute.com/> (last visited Aug. 20, 2023). *See also Family Justice Center Alliance*, FAM. JUST. CENT., <https://www.familyjusticecenter.org/resources/> (last visited Aug. 20, 2023).

131. Strack & Gwinn, *supra* note 11, at 32-33.

132. *Id.* at 32.

133. *Id.* at 33; SNYDER, *supra* note 42, at 66.

134. SNYDER, *supra* note 42, at 66.

135. *Id.*

136. *Id.*

137. Gael B. Strack et al., *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 304 (2001).

138. STRANGULATION TRAINING INST., <https://www.strangulationtraininginstitute.com/> (last visited Aug. 13, 2023).

139. *Id.*

Supreme Court that outlined the dangers associated with strangulation.<sup>140</sup> Subsequently in 2014, the United States Sentencing Commission recognized strangulation as “a marker of dangerousness,” recommending up to ten years of additional prison time for those convicted of strangulation offenses.<sup>141</sup>

Without coordinated response protocols, charging and prosecuting strangulation has proven difficult.<sup>142</sup> Offenders must be held accountable, but this is extremely challenging in cases where prosecutors lack corroborating evidence and encounter uncooperative victims with few (if any) visible injuries.<sup>143</sup> More than legal reform is required to improve the response to strangulation.<sup>144</sup> Evidence-based prosecution in combination with strangulation-specific training is necessary.<sup>145</sup> If concerted efforts are not made to understand strangulation, strict statutes and harsh penalties will do little good. There is a great need for further research in this area: the ability to gather quality data about the prevalence and response to strangulation has been hampered by a lack of systematic training on screening for strangulation among first responders, resulting in a lack of documentation of strangulation cases.<sup>146</sup> Strangulation is likely underreported in part due to the rapid development of strangulation laws without similar efforts to train first responders and those in the criminal justice system.<sup>147</sup>

#### IV. EVIDENTIARY CHALLENGES TO PROSECUTION OF STRANGULATION

In addition to statutory challenges, prosecutors also face evidentiary challenges in strangulation cases. Some of the most common hurdles prosecutors encounter in strangulation cases include lack of visible injury, uncooperative victims, and hearsay issues.<sup>148</sup> Prosecutors are also tasked with presenting their cases before judges and juries who often have very little, if any, education on strangulation and lack understanding of the complexities surrounding domestic violence.<sup>149</sup> Strangulation injuries are more difficult to detect than injuries from

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140. SNYDER, *supra* note 42, at 67.

141. *Id.* at 67-68; Carvana Cloud, *Investing as a Community: Analyzing Strangulation Cases & Implementing a MDT Strangulation Protocol to Reduce Domestic Violence Homicides*, 53 THE PROSECUTOR 4, 6 (2019).

142. *See generally* STRANGULATION TRAINING INST., <https://www.strangulationtraininginstitute.com/> (last visited July 28, 2023) (discussing tools and resources on strangulation training).

143. Reckdenwald et al., *supra* note 3, at 589.

144. Pritchard et al., *supra* note 24, at 161.

145. *See generally* Brigitte P. Volochinsky, *Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training*, 4 INQUIRIES JOURNAL/STUDENT PULSE, no. 10, 2012 (discussing the combination of strangulation training and evidence-based prosecution to strangulation prosecution).

146. Pritchard et al., *supra* note 24, at 164.

147. *Id.* at 162.

148. Bridgette P. Volochinsky, *Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training in The Investigation and Prosecution of Strangulation Cases* app. - 7, app. - 7 (Training Institute on Strangulation Prevention and The Cal. Dist. Att’y Assoc., 2013).

149. Amy Reckdenwald et al., *The Effectiveness of a Coordinated Response Toward Nonfatal Strangulation in Facilitating Evidence-Based Prosecution*, 32 Crim. Just. Pol’y Rev. 1, 4 (2021).

other forms of domestic violence.<sup>150</sup> Lack of visible injuries often results in minimization of strangulation assaults by judges, juries, and even the victims themselves.<sup>151</sup>

*A. Lack of Visible Injury & Victim (Un)Cooperation*

Courts have held that internal injuries, without visible injuries are sufficient to constitute bodily injury.<sup>152</sup> Even a momentary blackout suffered by a victim constitutes bodily injury.<sup>153</sup> In the absence of visible trauma, prosecutors have traditionally relied heavily on victim testimony to obtain conviction.<sup>154</sup> However, victims of domestic violence are often very reluctant to testify against their abusers.<sup>155</sup> The dynamics of domestic violence relationships are complex and varied. Some victims are reluctant to testify from the very beginning and protect their abusers.<sup>156</sup> Others are at first willing to aid in prosecution and then change their mind during the criminal justice proceedings.<sup>157</sup> Studies report between 80-85% of domestic violence victims recant.<sup>158</sup> A victim may recant due to fear of the abuser. Victims may also recant because they believe the abuser's promises to change and reform behavior.<sup>159</sup> Domestic violence victims may be mistrusting of the justice system or fear revictimization. It is important to remember that incidents of strangulation "commonly occur[] multiple times within a violent relationship as a method of control."<sup>160</sup> In fact, "sixty percent of domestic violence victims are strangled at some point during the course of an abusive relationship – often repeatedly, over years."<sup>161</sup> One study revealed that up to 68% of abused women reported being strangled by their partners.<sup>162</sup> Of those who experienced strangulation, 37.8% reported being strangled multiple times over the course of the relationship.<sup>163</sup> Victims of domestic violence are often trapped in an endless cycle of power and control.<sup>164</sup>

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150. *Id.* at 3.

151. Strack & Gwinn, *supra* note 11, at 33.

152. *People v. White*, No. 2-20-0577, 2021 WL 6102109, at \*3-4 (Ill. App. Ct. Dec. 22, 2021).

153. *Ricks v. Commonwealth*, 778 S.E.2d 332, 336 (Va. 2015); *Dawson v. Commonwealth*, 758 S.E.2d 94, 98 (Va. 2014) (affirming "bodily injury" occurred when the defendant applied pressure to the victim's neck and she "felt like she was drowning and everything started going black.")

154. Volochinsky, *supra* note 145, at 3.

155. Volochinsky, *supra* note 148, at app. - 11.

156. Volochinsky, *supra* note 145, at 5.

157. *Id.* at 3.

158. *Id.*

159. *Id.* at 4.

160. Reckdenwald et al., *supra* note 3, at 589.

161. SNYDER, *supra* note 42, at 65.

162. Reckdenwald et al., *supra* note 3, at 589.

163. Volochinsky, *supra* note 148, at app. - 10.

164. *Id.* at 9.

### B. Hearsay

Because victims are often reluctant to participate in criminal justice proceedings, prosecutors shifted and began relying heavily on hearsay in domestic violence cases.<sup>165</sup> In the domestic violence context, hearsay is testimony from a witness, reciting out of court statements made by the victim.<sup>166</sup> This type of testimony is extremely beneficial when it comes from a medical professional who examined the victim of a strangulation. Hearsay testimony can paint a powerful picture for the jury.<sup>167</sup> The use of hearsay testimony has been extremely effective, but the Supreme Court has determined that in many instances, this evidence violates the defendant's sixth amendment rights, specifically, their rights under the Confrontation Clause.<sup>168</sup> Between 2004-2008 the Supreme Court heard three cases that dramatically altered the doctrine of the Confrontation Clause.<sup>169</sup> In *Crawford v. Washington*,<sup>170</sup> *Davis v. Washington*,<sup>171</sup> and *Giles v. California*,<sup>172</sup> the Supreme Court issued rulings intended to protect a defendant's sixth amendment rights by limiting hearsay evidence.<sup>173</sup> Within the realm of domestic violence, these rulings limited the types of hearsay evidence that can be presented at trial to help the prosecution prove its case.

Courts have been divided on whether strangulation victims' statements to medical professionals are admissible at trial when the victim is unavailable to testify.<sup>174</sup> Admissibility hinges on whether the medical testimony overcomes the bar on hearsay by meeting the medical treatment exception.<sup>175</sup> Only statements that are relevant to diagnosis or treatment qualify for admission under this exception.<sup>176</sup> *Giles* supports the general rule that statements made to health care professionals during the course of treatment and recorded in medical records are generally not testimonial because the primary purpose of such statements is not to produce evidence for use at trial.<sup>177</sup> Therefore, when medical personnel are responding to an ongoing emergency (treating a strangulation victim) and their primary purpose in obtaining information is to diagnose and treat the victim, the medical expert's

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165. Volochinsky, *supra* note 148, at app. - 10.

166. FED. R. EVID. 801.

167. Volochinsky, *supra* note 145, at 6.

168. *See generally* *Crawford v. Washington*, 541 U.S. 36 (2004) (stating that hearsay may violate the Confrontation Clause and a defendant's sixth amendment rights).

169. *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Giles v. California*, 554 U.S. 353 (2008).

170. *Crawford v. Washington*, 541 U.S. 36 (2004).

171. *Davis v. Washington*, 547 U.S. 813 (2006).

172. *Giles v. California*, 554 U.S. 353 (2008).

173. *See* *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *Davis v. Washington* 547 U.S. 813, 833-34 (2006); *Giles v. California*, 554 U.S. 353, 377 (2008).

174. *See* *McLaury v. State*, 305 P.3d 1144, 1150 (Wyo. 2013) (holding that victim's statements to SANE nurse qualified for admission under the medical diagnosis exception to the hearsay rule).

175. *McLaury v. State*, 305 P.3d 1144, 1145 (Wyo. 2013).

176. FED. R. EVID. 803(4); *Morones v. State*, 466 P.3d 300, 303 (Wyo. 2020).

177. *Giles v. California*, 554 U.S. 353, 380 (2008).



testimony likely will be admissible in court.<sup>178</sup> These statements are often admissible because they are made under circumstances where the declarant is unlikely to lie.<sup>179</sup>

Whether statements made to medical professionals are testimonial or serve a forensic purpose are sometimes close calls.<sup>180</sup> However, courts often allow hearsay under the medical treatment exception in cases of strangulation.<sup>181</sup> A court could find that a forensic nurse may properly testify as a fact witness or expert witness (if qualified), when the probative value of the testimony outweighs concerns of unfair prejudice.<sup>182</sup>

In *Morones v. State*, the defendant and victim were dating partners involved in a physical altercation.<sup>183</sup> During the altercation, the victim lost consciousness and awoke with the defendant standing over her with his hands around her neck.<sup>184</sup> During treatment for her injuries, the victim revealed that she had been strangled by her boyfriend.<sup>185</sup> The Sexual Assault Nurse Examiner (“SANE”) testified at trial and the defendant was convicted.<sup>186</sup> *Morones* appealed his conviction on the grounds that the SANE nurse’s testimony was improper and did not fall under the hearsay exception.<sup>187</sup> The Court disagreed and affirmed his conviction, holding that the victim’s statement was plainly relied upon for diagnosis and treatment.<sup>188</sup> In other cases, like *Morones*, courts have allowed SANE nurses to testify to a victim’s injuries and that those injuries are consistent with the act of strangulation.<sup>189</sup>

*Hord v. Commonwealth*, provides an example where a SANE nurse was qualified as an expert witness.<sup>190</sup> The defendant was accused of strangling his girlfriend.<sup>191</sup> The victim was examined by a SANE nurse who took her story, examined her for injuries, and collected evidence.<sup>192</sup> The victim described what had happened to her, including being strangled by the defendant.<sup>193</sup> At trial, the SANE nurse testified regarding the dangers of strangulation.<sup>194</sup> In spite of the

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178. *McLaury v. State*, 305 P.3d 1144, 1145 (Wyo. 2013).

179. *United States v. Kootswatewa*, 893 F.3d 1127, 1132 (9<sup>th</sup> Cir. 2018).

180. *See State v. Tsosie*, 516 P.3d 1116, 1146 (N.M. 2022).

181. *See Moore v. Maryland*, No. 1869, 2020 WL 7650273, at \*3 (Md. Ct. Spec. App. Dec. 23, 2020).

182. FED. R. EVID. 403.

183. *Morones v. State*, 466 P.3d 300 (Wyo. 2020).

184. *Id.* at 302.

185. *Id.* at 304.

186. *Id.* at 303.

187. *Id.*

188. *Id.* at 306-07.

189. *People v. Watson*, Nos. 353605, 356971, 2022 WL 2379323, at \*4 (Mich. Ct. App. June 30, 2022).

190. *Hord v. Commonwealth*, No. 2014-CA-002087, 2015 WL 5644151, at \*2 (Ky. Ct. App. Sept. 25, 2015).

191. *Id.* at \*1.

192. *Id.*

193. *Id.* at \*3.

194. *Id.* at \*2.

defendant's appeal challenging the nurse's qualification as an expert, the court held that the nurse's training and experience qualified her to testify regarding the effects of strangulation.<sup>195</sup>

The existing body of research on the prosecution of strangulation comes to a consistent conclusion: "[E]vidence to corroborate the strangulation is essential to the prosecutor's ability to hold offenders accountable."<sup>196</sup> The strength of evidence in domestic violence cases is critical. Aside from evidentiary issues, other obstacles exist. As discussed, prosecutors must overcome victim recantation and hearsay rules. Additional obstacles may present on a case-by-case basis: gender bias exists within the criminal justice system toward victims of domestic violence, juries who do not understand the dynamics of domestic violence and wonder why victims simply do not leave their abusers, and judges who have not been adequately trained in domestic violence cases and may be biased against these victims.<sup>197</sup>

Therefore, even with strong evidence, prosecutors face an uphill battle. (Speculation exists that victims with visible injuries are taken more seriously, whereas those without visible injuries must work much harder to convince law enforcement and the court of their assault.) Another layer of complexity is added in that strangulation injuries often result in delayed presentation.<sup>198</sup> If a victim feels betrayed by the justice system—that they are having to prove their assault—how likely will that victim be to report delayed injuries and risk revictimization by the system charged with protecting them? For all these reasons, prosecution focused on the presence of visible injuries and victim cooperation is simply unworkable.

#### V. PROPOSED RECOMMENDATIONS & SUGGESTIONS

More than legal reform is required to improve the response to strangulation. New laws and changes in statutory language have made it easier for prosecutors to charge strangulation in a consistent way, but there has been little guidance on how to effectively prove the crime.<sup>199</sup> For example, in 2009, Texas enacted a powerful strangulation statute designed to protect victims and increase offender accountability.<sup>200</sup> However, over a decade later, without requisite framework for law enforcement and prosecutors, strangulation cases are not being properly investigated because law enforcement does not know what evidence to look for or what questions to ask victims.<sup>201</sup> Cases are not being charged because prosecutors do not understand the evidence or feel they have sufficient evidence to meet their burden of proof.<sup>202</sup> Consequently, charges are dropped and cases are dismissed.<sup>203</sup>

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195. *Id.* at \*3.

196. Reckdenwald et al., *supra* note 149, at 3.

197. *Id.* at 4.

198. Reckdenwald et al., *supra* note 3, at 593.

199. McKay, *supra* note 29.

200. TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West 2021).

201. Cloud, *supra* note 141, at 7.

202. *Id.*

203. *Id.*

What is happening in Texas is not an anomaly; it is fair to say many states have experienced similar challenges.<sup>204</sup>

So how can states improve their response to strangulation? WATCH made several principled suggestions in their 2009 report.<sup>205</sup> The report encouraged the creation of special teams of prosecutors who would specifically strive to obtain convictions on strangulation charges.<sup>206</sup> The report also called for periodic training for criminal justice personnel throughout the state on investigating and prosecuting strangulation cases under state statute(s).<sup>207</sup> Yet another recommendation involved providing law enforcement who respond to domestic violence calls with a strangulation checklist.<sup>208</sup> This checklist could include: questions to ask victims and witnesses, a reminder to document and photograph injuries, and appropriate referrals for medical examination and victim assistance.<sup>209</sup> The aforementioned proposals have merit. Additional recommendations aimed to improve successful prosecutions of strangulation include evidence-based prosecutions of strangulation, offering no-cost SANE forensic exams to victims, and developing coordinated community responses to combat strangulation.<sup>210</sup> Communities embracing a holistic approach to improving their response to strangulation will benefit from employing multiple proposals and recommendations.

#### A. Evidence-Based Prosecution

Evidence-based prosecution, also known as “victimless prosecution,” is part of a workable solution to hold offenders accountable.<sup>211</sup> “Evidence-based prosecution in domestic violence strangulation cases is the process of using ‘independent corroborative evidence to prove elements of the crime without relying on the victim’s testimony.’”<sup>212</sup> This approach is utilized in homicide cases, where prosecutors work to prove the case without the victim.<sup>213</sup> Evidence-based prosecution includes five types of evidence utilized to hold offenders accountable: 911 recordings, photographs, physical evidence, medical evaluation forms, and expert testimony.<sup>214</sup>

While each type of evidence adds something unique to the prosecution’s case, all five forms of evidence are not required to obtain a guilty verdict. The more evidence the prosecutor has in her arsenal, the more likely she is to meet her burden of proof and secure a conviction. Each of the following types of evidence offer something distinct in a strangulation case:

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204. *Id.*; see also Laughon et al., *supra* note 14, at 364.

205. Anderson, *supra* note 113, at 17.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Pritchard et al., *supra* note 24, at 174.

211. Volochinsky, *supra* note 145, at 7.

212. *Id.*

213. *Id.*

214. *Id.*

- **911 Recording:** Perhaps the most important piece of evidence used in prosecution, the 911 recording offers the victim's first-hand account of what just transpired. Questions asked by 911 operators are admissible in court as they address an ongoing emergency.<sup>215</sup> "[A] recording of the victim's voice may show that her voice was hoarse, that she was coughing, or that she was having difficulty breathing."<sup>216</sup> 911 calls allow a jury to hear the voice of a scared and emotional victim at the time the offense took place. 911 recordings also contain excited utterances that are typically admissible at trial.<sup>217</sup>
- **Photographs:** Photographs are important to document injuries, no matter how slight. They allow the judge and jury to see what the victim went through. Pictures might document fingerprints, scratches, and defensive wounds. Victims of strangulation often vomit and lose bladder and/or bowel control.<sup>218</sup> Pictures of body fluids at the scene of the crime may help to prove the victim was strangled.<sup>219</sup>
- **Physical Evidence:** Items such as torn clothing, and any other physical evidence collected at the scene, will help prosecutors establish context for the assault.
- **Medical Evaluation Forms:** These forms are essential for proving strangulation as there are often no visible injuries left on strangulation victims. When photographs are not available, medical evaluation forms detail strangulation symptoms the victim experienced. They also allow for documentation of internal injuries victims experience as the result of strangulation.
- **Expert Testimony:** Expert witnesses serve two distinct functions in strangulation cases. First, they educate the judge and jury about the severity of strangulation and help them to understand the seriousness of the offense. Second, the expert can testify regarding the dynamics of domestic violence. They can help the judge and jury begin to understand the cycle of violence victims experience. Additionally, the expert can testify regarding their medical diagnosis of the victim, even if

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215. Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 547 U.S. 813 (2006); Giles v. California, 554 U.S. 353 (2008).

216. Volochinsky, *supra* note 145, at 8.

217. *Id.*

218. *Id.*

219. *Id.* (analyzing a study of 300 strangulation cases, it was revealed that only half of the victims in the study had visible injuries suggesting strangulation. Of those with visible injuries, only 15% of the injuries were prominent enough to produce pictures that could be used as evidence in court); Allison Turkel, *Understanding, Investigating and Prosecuting Strangulation Cases*, 41 DEC PROSECUTOR 20, 20-21 (2007).

the victim refuses to cooperate or testify against the offender.<sup>220</sup>

All five types of evidence provide powerful tools prosecutors use to hold offenders accountable. A combination of even two or three types of evidence makes strangulation cases stronger.<sup>221</sup> Providing strangulation training for law enforcement and medical personnel will help first responders recognize strangulation assaults and improve evidence collection. Further, utilization of forensic medical examinations for strangulation victims will provide photographs, medical forms, and expert testimony that can be used in evidence-based prosecution. Arming prosecutors with strong evidence will lead to higher conviction rates, making strangulation laws more effective in deterring and punishing offenders with the ultimate goal of reducing intimate partner homicides.

### *B. Utilization of Forensic Medical Examination for Strangulation Victims*

Forensic medical exams are an important, under-utilized part of a coordinated response to strangulation. Forensic medical examinations serve two very important functions: they provide medical care for victims and provide prosecutors with multiple forms of evidence that can be used to hold offenders accountable.<sup>222</sup> Maricopa County, Arizona utilizes evidence-based prosecution and offers forensic examinations for victims.<sup>223</sup> Between 2012-2014 the County saw its domestic homicide rate drop by 30%.<sup>224</sup> Experts at the Strangulation Institute attribute this drop in the homicide rate to county-wide strangulation training and the use of forensic nurses in examining strangulation victims.<sup>225</sup> Prior to the use of forensic exams, only 14% of strangulation cases were prosecuted.<sup>226</sup> When data was last collected in 2016, nearly 62% of strangulation cases were being prosecuted.<sup>227</sup>

Quality forensic medical documentation is an essential piece in holding offenders accountable. Armed with knowledge and specialized training, forensic nurses, commonly referred to as SANE nurses, are equipped to administer forensic exams.<sup>228</sup> SANE nurses “comprehensively document forensic medical history related to the assault . . . , collect corroborating evidence of the strangulation, collect photographic documentation of the related injuries, and participate as expert

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220. Volochinsky, *supra* note 145, at 8.

221. *Id.*

222. The dual role of SANE nurses was recognized by the court in *Morones v. State*, 466 P.3d 300, 304 (Wyo. 2020).

223. Alexa N. D’Angelo, *Maricopa County Domestic-Violence Deaths Drop After Policy Change*, THE REPUBLIC (Mar. 2, 2015), <https://www.azcentral.com/story/news/local/phoenix/2015/03/02/county-attorney-strangulation-protocol/24001897/>.

224. SNYDER, *supra* note 42, at 68.

225. *Id.*

226. *Id.*

227. *Id.*

228. See Gila River Medical Group, *S.A.N.E.*, GILA RIVER HEALTH CARE, <https://grhc.org/sane-types-of-exams/#:~:text=Our%20SANE%20nurses%20can%20do,safety%20and%20follow%20up>. (last visited Aug. 13, 2023).

witnesses in court.”<sup>229</sup> SANE nurses are (1) skilled in identifying injuries, especially those commonly overlooked by law enforcement; (2) trained to recognize signs and symptoms associated with non-visible injuries; and (3) equipped to order appropriate tests often needed to detect delayed presentation of injuries.<sup>230</sup> SANE nurses are also skilled in identifying visible injuries on victims with darker skin tones.<sup>231</sup> Victims of domestic violence deserve this high level of care and attention.

Medical personnel, including SANE nurses, need strangulation-specific training. Just as the SANE program was developed after identifying a deficiency in treating sexual assault victims, specialized strangulation training is needed to identify symptoms and injuries that may go unnoticed by other healthcare professionals. Courts are more inclined to qualify physicians and SANE nurses as experts if they have attended strangulation trainings.<sup>232</sup> In *State v. Plott*, a forensic nurse testified as an expert witness.<sup>233</sup> The defendant appealed the nurse’s classification as an expert claiming there was not enough indicia of reliability associated with the expert testimony as it related to identifying strangulation.<sup>234</sup> The nurse expert had attended over fifty trainings on domestic violence and strangulation.<sup>235</sup> The defendant’s objection to her classification as an expert was overruled.<sup>236</sup>

In their forensic roles, physicians and nurses counsel victims on the process of reporting the assault. During the exam, victim’s often recount—and the examiner is able to document—the strangulation and events leading up to it. “[N]urses have been named the most trusted professionals for [more than] sixteen years in a row.”<sup>237</sup> It stands to reason that strangulation victims may be more comfortable sharing the details of their assault with a nurse during the course of medical treatment than with a police officer or prosecutor. SANE nurses, also referred to as forensic nurses, maintain the chain of custody for evidence and testify as expert witnesses in court.<sup>238</sup> Forensic nurses make particularly good witnesses in strangulation cases because of their medical background, experience evaluating victims and documenting evidence, as well as their willingness to testify.<sup>239</sup> Forensic nurses can help paint a picture of the assault for the judge and

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229. Reckdenwald et al., *supra* note 149, at 6.

230. Reckdenwald et al., *supra* note 3, at 593.

231. *Id.*

232. *See State v. Plott*, 80 N.E.3d 1108, 1135 (Ohio Ct. App. 2017). *See also People v. Oliver*, No. 339826, 2018 WL 2324104, at \*5 (Mich. Ct. App. May 22, 2018).

233. *State v. Plott*, 80 N.E.3d 1108, 1135 (Ohio Ct. App. 2017).

234. *Id.*

235. *Id.*

236. *See also State v. Wagner*, 509 P.3d 731, 733 (Or. Ct. App. 2022); *State v. Tsosie*, 516 P.3d 1116, 1134 (N.M. 2022); *State v. Ryan*, No. 108143, 2019 WL 7190609, at \*3 (Ohio Ct. App. Dec. 26, 2019).

237. Cloud, *supra* note 141, at 10.

238. Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of Sane Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 280 (2013).

239. Strack & Gwinn, *supra* note 11, at 34.

jury, as well as educate the court on strangulation and the dynamics of domestic violence. This information helps to convey, in an impactful way, the nature of violent relationships and what the victim experienced during the assault.<sup>240</sup> *State v. Perry* provides an example of a recent case where expert testimony was held to have been properly admitted.<sup>241</sup> The testimony provided by a SANE nurse helped the jury understand evidence, specifically as it pertained to the technical definition of strangulation.<sup>242</sup> Additionally, by testifying to the physiological effects and symptoms associated with strangulation, the expert assisted the jury in determining an issue of fact—whether the alleged conduct constituted strangulation as defined by statute.<sup>243</sup>

One of the greatest obstacles to offering forensic exams for strangulation victims has been cost.<sup>244</sup> Victims may avoid medical treatment because of fear they cannot afford treatment. Local funding needs to be prioritized and secured in order to provide exams at no cost to victims. In May 2021, Washington became the first state that passed a bill to cover the cost of forensic examinations for strangulation victims.<sup>245</sup> The bill, which passed the House and Senate unanimously, provides a unique perspective on treating domestic violence as a public health issue.<sup>246</sup> Forensic examinations cost up to \$1,400.<sup>247</sup> Prior to the passage of the bill, strangulation victims had to pay out of pocket, unless the strangulation also involved a sexual assault.<sup>248</sup> Washington recognized the lethality of strangulation and that access to exams had been an obstacle in the prosecution of abusers.<sup>249</sup> The law allows for the cost of a forensic exam to be paid by the state.<sup>250</sup> “[D]ata will be collected related to the exam to keep track of those exams [being] used to assist in prosecution.”<sup>251</sup> It is believed that data collection will lead to improved resources for strangulation cases.<sup>252</sup> Washington leads the way in recognizing the physical and psychological effects of strangulation. Allowing victim compensation to reimburse for forensic examinations will provide a more victim-centered response in what Washington legislature correctly labels as “the most dangerous of domestic violence felony cases.”<sup>253</sup> San Diego County and Arizona also have offered exams

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240. Reckdenwald et al., *supra* note 3, at 588.

241. *State v. Perry*, 159 A.3d 840, 845-46 (Me. 2017).

242. *Id.* at 846.

243. *Id.*

244. Jason Cruz, *New Law Protects Victims of Nonfatal Strangulation*, ALL. FOR HOPE INT’L (May 13, 2021), <https://www.allianceforhope.com/new-law-protects-victims-of-nonfatal-strangulation/>.

245. WASH. REV. CODE ANN. § 7.68.803 (LexisNexis 2023); Jason Cruz, *New Law Protects Victims of Nonfatal Strangulation*, ALL. FOR HOPE INT’L (May 13, 2021), <https://www.allianceforhope.com/new-law-protects-victims-of-nonfatal-strangulation/>.

246. Jason Cruz, *New Law Protects Victims of Nonfatal Strangulation*, ALL. FOR HOPE INT’L (May 13, 2021), <https://www.allianceforhope.com/new-law-protects-victims-of-nonfatal-strangulation/>.

247. *Id.*

248. *Id.*

249. *Id.*

250. WASH. REV. CODE ANN. § 7.68.803 (LexisNexis 2023).

251. Cruz, *supra* note 244.

252. *Id.*

253. 2021 Wash. Sess. Laws 269; § 7.68.803 (Official Notes).

at no cost to victims via grant programs.<sup>254</sup> Under VAWA, jurisdictions are required to provide exams to sexual assault victims free of charge and without any out-of-pocket expense.<sup>255</sup> VAWA should be amended to provide the same medical treatment for strangulation victims.

### C. A Coordinated Community Response

Continued and improved efforts need to be made in the areas of research and response to strangulation.<sup>256</sup> Specialized training is now helping thousands of professionals across the country improve their investigation, documentation, and prosecution of strangulation cases. The United States Department of Justice has recognized the seriousness of strangulation and provided funding for the Family Justice Center Alliance to launch the Training Institute on Strangulation Prevention.<sup>257</sup> The Institute has trained thousands of professionals in-person as well as online via webinars and conferences.<sup>258</sup> Its website provides valuable resources for medical and criminal justice professionals alike.<sup>259</sup> “Training[s] encompass all aspects of strangulation including lethality, recognizing signs and symptoms, identifying and understanding the anatomy and medical aspects, investigating cases for legal prosecution, presenting cases in criminal trials, and preparing to use experts in court.”<sup>260</sup>

Utilizing resources like the Training Institute on Strangulation Prevention, communities can benefit from offering multidisciplinary education and trainings at the local level. Trainings offer an opportunity to connect experts and practitioners who can work together through a research-based, multi-agency approach to recognize, document, and prosecute strangulation cases.<sup>261</sup> When agencies unite to address strangulation, they maximize community resources to assist victims.<sup>262</sup> Community taskforces can develop effective policies and protocols aimed at ultimately reducing intimate partner homicide. Additionally, they can collectively tackle issues such as (1) addressing the prevalence of strangulation in their community, (2) creating documentation forms to be utilized by law enforcement and medical professionals (deciding what questions to ask

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254. *Sexual Assault Response Team*, PALOMAR HEALTH, <https://www.palomarhealth.org/forensic-health-services/sart> (last visited July 29, 2023); *Summary of Payment Program*, SAFETA, <https://www.safeta.org/page/azpayment/> (last visited July 29, 2023).

255. Jenifer Markowitz, *Billing Process: An Overview*, NAT'L SEXUAL VIOLENCE RES. CTR. (2014), [https://www.nsvrc.org/sites/default/files/nsvrc-publications\\_sane-mobile-app\\_billing-process-overview.pdf](https://www.nsvrc.org/sites/default/files/nsvrc-publications_sane-mobile-app_billing-process-overview.pdf).

256. Pritchard et al., *supra* note 24, at 166.

257. See *Family Justice Center Alliance*, FAM. JUST. CENT., <https://www.familyjusticecenter.org/resources/> (last visited Aug. 20, 2023); see also STRANGULATION TRAINING INST., <https://www.strangulationtraininginstitute.com/> (last visited Aug. 20, 2023).

258. See *Family Justice Center Alliance*, FAM. JUST. CENT., <https://www.familyjusticecenter.org/resources/> (last visited Aug. 20, 2023).

259. *Id.*

260. Reckdenwald et al., *supra* note 149, at 8.

261. Pritchard et al., *supra* note 24, at 167.

262. Cloud, *supra* note 141, at 8.



victims and how to fully document injuries), (3) establishing methods for collecting and preserving evidence for prosecution, (4) obtaining public funding for forensic medical examinations, and (5) removing barriers victims face in accessing local resources.

As a result of specialized trainings and partnerships, communities that have implemented collaborative efforts in addressing strangulation have experienced dramatic increases in felony filings.<sup>263</sup> With improved investigations and prosecution, strangulation convictions are also being upheld at the appellate level.<sup>264</sup> Protocols are being updated, best practices are being implemented for the investigation and prosecution of strangulation cases, specialized medical forms and new tools are being developed to help medical professionals document injuries, and legislation to facilitate the prosecution of strangulation cases has passed in all fifty states.<sup>265</sup> Doctors, forensic nurses, domestic violence detectives, and other professionals are qualifying as experts and are testifying in court about strangulation dynamics.<sup>266</sup> As strangulation cases are being prosecuted, appellate case law is now supporting the coordinated response of police, prosecutors, and medical professionals as they work to bring awareness to the seriousness of strangulation, hold offenders accountable, and lower the number of intimate partner homicides.<sup>267</sup>

#### CONCLUSION

All strangulation cases must be meticulously assessed because strangulation is one of the most accurate predictors of future homicide in domestic violence. A holistic approach, embracing a coordinated response, is necessary to the enforcement of strangulation statutes. Strong statutes, evidence-based prosecution utilizing forensic medical examinations, and a coordinated response will help to reach the goal of decreasing strangulations and preventing intimate partner homicide. Statutes are not effective if not enforced. To improve enforcement, continued research and education are needed as laws evolve and awareness improves. Evidence-based prosecution, utilizing forensic medical examinations of strangulation victims as part of a coordinated response to strangulation, will help to achieve the aforementioned goals, ultimately reducing intimate partner homicides.

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263. Tracy Prior, *San Diego County's Strangulation Protocol: Improving Evidence Collection to Win the War*, 52 THE PROSECUTOR 14, 15 (Oct. 2018).

264. See *Oliver v. State*, 516 P.3d 699, 711 (Okla. Crim. App. 2022); *State v. Palmer*, No. 27-CR-17-22612, 2019 WL 5304174, at \*7 (Minn. Ct. App. Oct. 21, 2019); *Winborn v. State*, 100 N.E.3d 710, 715 (Ind. Ct. App. 2018).

265. Pritchard et al., *supra* note 24, at 174-75.

266. *State v. Wagner*, 509 P.3d 731 (Or. Ct. App. 2022).

267. Reckdenwald et al., *supra* note 149, at 18.

