

STRANGULATION AS A FELONY OFFENSE: A NEW PENALTY UNDER W. VA. CODE § 61-2-9D

*Robert Lee Bolton III**

I. INTRODUCTION..... 18

II. BACKGROUND 19

 A. *W. Va. Code § 61-2-9d: Overview of Legislative History* 19

 B. *Challenges of Applying W. Va. Code § 61-2-9d* 23

III. ANALYSIS 28

 A. *Methods for Determining Proper Cases Going Forward* 28

 B. *Suggestions for Potential Future Issues* 31

IV. CONCLUSION 32

I. INTRODUCTION

On February 2, 2016, a bipartisan group of eleven West Virginia delegates introduced House Bill 4362,¹ aimed at creating a separate criminal offense for the act of strangulation.² The West Virginia Legislature passed it on March 5, 2016, and the governor signed it into law on March 9, 2016.³ Until the new law took effect on June 3, 2016,⁴ West Virginia was one of a minority of states to lack such a statute.⁵ Although West Virginia is now part of a growing number of jurisdictions

* J.D., Wake Forest University School of Law, 2014. The Author is Magistrate of Taylor County, West Virginia, and an Adjunct Professor of American Government at Fairmont State University. He can be reached at rl.bolton3@gmail.com. He would like to thank all of the chief and assistant prosecutors, defense counsel, law enforcement personnel, and members of the West Virginia Legislature who agreed to be interviewed for this Article. All named parties cited granted permission to do so. A special thanks to the editors of the *West Virginia Law Review* for their collaboration during the editing of this Article.

¹ H.B. 4362, 82d Leg., 2d Reg. Sess. (W. Va. 2016).

² W. VA. CODE ANN. § 61-2-9d (West 2017).

³ W. Va. Legislature: Senate Comm. on the Judiciary, 2016 Bill Summaries 137 (2016).

⁴ *Bill Status – 2016 Regular Session: House Bill 4362*, W. VA. LEGISLATURE, http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=4362&year=2016&sessiontype=RS (last visited Sept. 28, 2017).

⁵ Gael B. Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 CRIM. JUST. 32, 35 (2011).

to punish strangulation as a felony,⁶ the statutory language and elements of the crime vary widely by state.⁷ Now, over a year since the law's passage, this Article will attempt to appraise its initial effectiveness and recommend some changes regarding its future application.

When the West Virginia Legislature meets in future sessions, it will likely consider revisions to this new law. As it does so, it should weigh the approaches of other state legislatures in deciding the severity of punishment and providing clarifying language. West Virginia courts now face the challenge of interpreting what actions constitute a qualifying offense for conviction. When comparing the standards used in the judiciaries of other states, their approaches are diverse. If the West Virginia Legislature pursues measures to clearly define the statutory elements necessary for a conviction, it will mitigate the potential for disparate approaches. In Section II, this Article will trace the background of the new law and analyze the positions of other states and West Virginia in applying strangulation laws. In Section III, it will offer some possible solutions to the challenges currently facing the court system.

II. BACKGROUND

A. *W. Va. Code § 61-2-9d: Overview of Legislative History*

Upon House Bill 4362 taking effect, it created section 61-2-9d of the West Virginia Code. Currently, the section reads as follows:

(a) As used in this section:

- (1) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition;
- (2) "Strangle" means knowingly and willfully restricting another person's air intake or blood flow by the application of pressure on the neck or throat;

(b) Any person who strangles another without that person's consent and thereby causes the other person bodily injury or loss of consciousness is guilty of a felony and, upon conviction thereof, shall be fined not more than \$2,500 or imprisoned in a

⁶ Associated Press, *States Cracking Down on Strangulation Attempts*, USA TODAY (last updated May 13, 2012, 11:33 AM), <https://usatoday30.usatoday.com/news/nation/story/2012-05-13/strangulation-crackdown-law/54935268/1>.

⁷ See generally NAT'L. DIST. ATT'YS ASS'N, CRIMINAL STRANGULATION/IMPEDING BREATHING (last updated Nov. 2014), www.ndaa.org/pdf/strangulation_statutory_compilation_11_7_2014.pdf (compiling the statutory language concerning strangulation in each state).

state correctional facility not less than one year or more than five years, or both fined and imprisoned.⁸

In the years immediately prior to House Bill 4362's passage, the West Virginia Legislature made other efforts to criminalize strangulation. The most successful initiative was in 2015, when House Bill 2240⁹ passed both houses unanimously,¹⁰ but Governor Earl Ray Tomblin vetoed it.¹¹ The original draft of the proposed legislation would have amended section 61-2-9(a)'s provisions on malicious wounding:

(a) If any person maliciously shoot, stab, cut, *strangle* or wound any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony and, upon conviction, shall be punished by confinement in a state correctional facility not less than two nor more than ten years. If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500.¹²

In contemplating what constituted strangulation, it was significantly less terse than its successor, stating in the new definition:

(e) As used in this section, "strangle" means intentionally knowing, 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.¹³

⁸ W. VA. CODE ANN. § 61-2-9d (West 2017).

⁹ H.B. 2240, 82d Leg., 1st Reg. Sess. (W. Va. 2015).

¹⁰ David Beard, *Delegate Kurcaba's Bills Vetoed by Gov. Tomblin*, DOMINION POST, <http://www.dominionpost.com/Delegate-Kurcaba%E2%80%99s-bills-vetoed> (last updated Apr. 2, 2015, 10:32 PM).

¹¹ Letter from Earl Ray Tomblin, Governor, Vetoing W. Va. H.B. 2240, to Natalie Tennant, Sec'y of State (Apr. 1, 2015) (on file with Sec'y of State's Office).

¹² *Committee Substitute for H.B. 2240*, W. VA. LEGISLATURE, http://www.wvlegislature.gov/Bill_Text_HTML/2015_SESSIONS/RS/amendments/HB2240%20COM%20SUB%202-16.htm (last visited Sept. 28, 2017) (emphasis added).

¹³ *Id.*

By the end of the editing process, the enrolled committee version was substantially the same as that of the next year's House Bill 4362.¹⁴ The legislature made modifications to the language regarding what constituted criminal conduct¹⁵ and added a new section in 61-2-1 *et al.* The changes in the statutory language were a recognition of the concerns voiced in committee hearings and floor debates by legislators and legal commentators.¹⁶ The inclusion of the word "substantial" was a compromise between potential critics and advocates of the bill. The potential critics were prepared to argue that the majority of strangulation accusations do not result in significant injury¹⁷ or are the result of incidental contact by alleged victims to deflect or deter further abuse.¹⁸ Advocates, on the other hand, desired a law that specifically protected strangulation victims, who bear a much higher risk of later being murdered¹⁹ by their abusers than do victims of domestic violence where strangulation is absent.²⁰

In addition, other states frequently used the language in the original version of House Bill 2240's subsection (e) for misdemeanors, rather than felony offenses.²¹ More importantly, the amended version

¹⁴ *H.B. 4362 Sen. Jud. Am. #1, W. VA. LEGISLATURE*, http://www.legis.state.wv.us/legisdocs/chamber/2016/RS/com_amends/HB4362%20S%20JUD%20AM%20_1.htm (last visited Sept. 28, 2017).

¹⁵ *Id.* (adding substantial physical pain, illness, impairment of physical condition, or loss of consciousness).

¹⁶ *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 436 (W. Va. 1995) (legislature's modification of prior bills' language suggests a rejection of those ideas contained within which were removed); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 632 (1990).

¹⁷ Dean Hawley, George E. McClane, & Gael B. Strack, *A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 303, 305 (2001) [hereinafter Hawley, *Criminal Legal Issues*].

¹⁸ Interestingly, one prosecutor noted that in addition to the expected shoving away of an aggressor by making incidental contact with the neck, some defensive martial arts use chokeholds as a method of protection. Telephone Interview with Matthew Harvey, Prosecuting Attorney, Jefferson County, W. Va. (May 23, 2017) (notes of interview on file with author). Another question raised was whether a law enforcement officer can be prosecuted for using a chokehold on a disorderly person. Telephone Interview with Michael Cochrane, Sante Boninsegna, Jr., and Gregory Bishop, Prosecuting Attorneys, Wyoming County, W. Va. (July 21, 2017) (notes of interview on file with author).

¹⁹ Hawley, *Criminal Legal Issues*, *supra* note 17, at 317.

²⁰ *See generally* CAROLYN REBECCA BLOCK ET AL., *THE CHICAGO WOMEN'S HEALTH RISK STUDY: RISK OF SERIOUS INJURY OR DEATH IN INTIMATE VIOLENCE, A COLLABORATIVE RESEARCH PROJECT* (2000) (explaining the additional concern that strangulation is an exceptionally intimate form of violence given the parties' close proximity).

²¹ *See* N.Y. PENAL LAW § 121.11(a) (McKinney 2017).

removed the somewhat awkward language of subsection (e) prohibiting consideration of an intent to kill or protractedly injure vis-à-vis subsection (a).²² It also removed the lower *mens rea* of recklessness and, instead, required strangulation be a knowing and willful act.²³ Finally, the amended versions of House Bill 2240 and House Bill 4362 imposed a slightly higher penalty than was available under the original by removing the option of up to one year in jail and a fine of up to \$500 in lieu of prison—requiring, instead, at least one year in prison and a fine of up to \$2,500.²⁴

Despite having broad legislative support, the bill suffered a gubernatorial veto.²⁵ In his veto message, Governor Tomblin noted that “there are numerous criminal offenses in the West Virginia Code that already prohibit and punish strangulation,”²⁶ believing that the felonious wounding mentioned in section 61-2-9(a) already encompassed strangulation. When the West Virginia Legislature met again during the next regular session, the revised version of the bill was reintroduced. The only substantive difference between House Bill 2240 and House Bill 4362 was that the latter added an exemption for consensual strangulation by inclusion of the phrase “without that person’s consent.”²⁷ This was a concession that some individuals willingly engage in sexual activity involving choking or oxygen deprivation.²⁸ This time, Governor Tomblin signed the law, acknowledging criticism from the year prior and the likelihood of a veto override if he failed to do so.²⁹

²² W. VA. CODE ANN. § 61-2-9d (West 2017).

²³ *Id.*

²⁴ *Id.*

²⁵ Letter from Earl Ray Tomblin, *supra* note 11.

²⁶ *Id.*

²⁷ H.B. 4362, 82d Leg., 2d Reg. Sess. (W. Va. 2016).

²⁸ J.H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (1895); George E. Buzash, *The "Rough Sex" Defense*, 80 J. CRIM. L. & CRIMINOLOGY 557, 563 (1989); Devin Meepos, *50 Shades of Consent: Re-Defining the Law's Treatment of Sadomasochism*, 43 SW. L. REV. 97, 104–05 (2013).

²⁹ Erin Beck, *Victim Advocates, Police Say Strangulation Bill Will Save Lives*, CHARLESTON GAZETTE-MAIL (Mar. 10, 2016), <http://www.wvgazette.com/news/20160310/victim-advocates-police-say-strangulation-bill-will-save-lives>.

B. Challenges of Applying W. Va. Code § 61-2-9d

Within days of the statute taking effect, prosecutors, defense counsel, and courts across the state were applying the provisions of the new law.³⁰ Still, they were often left to ponder over its text.³¹

While the statute provides that bodily injury causing “substantial physical pain, illness or any physical impairment” without consent³² is the threshold for conviction, the statute gives no further explanation of what distinguishes “substantial physical pain” from a minor injury or sensation of pain³³ that would only result in a charge of domestic battery.³⁴ One can obviously receive a minor cut, abrasion, or point of pressure on the skin that is extremely unpleasant, but ultimately inconsequential. Complete loss of consciousness and death are the only physical symptoms that definitively meet the standard for a strangulation conviction. While one would expect substantiality to meet Justice Stewart’s dictum on other matters that one “know[s] it when [they] see it,”³⁵ in reality, the answer is far from obvious.³⁶ The closest hint at the intent of the legislature by reference to surrounding text is in section 48-

³⁰ Interview with John L. Bord, Prosecuting Attorney, in Grafton, W. Va. (May 18, 2017) (notes of interview on file with author). In the course of the interview, Mr. Bord relayed to the author that in the first week after implementation, the online edition of the West Virginia Code available at the state legislature’s website, the official printed code, and the online legal research websites all lacked the provision, leaving prosecutors with no option but to copy directly from the bill as they edited law enforcement’s criminal complaints.

³¹ A search of WestlawNext with a variety of terms rendered no results of primary authority directly on point for interpretation of the law. The few initially promising results were mostly discussions of tortious activity, typically interpreting insurance policy terms or separate criminal offenses.

³² W. VA. CODE ANN. § 61-2-9d(b) (West 2017). Lack of consent is defined as coming from forcible compulsion or incapacity. *Id.* § 61-8B-2(b).

³³ *Id.* § 61-2-28(a) (“Domestic battery. — Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than twelve months or fined not more than \$500, or both fined and confined.”).

³⁴ Katherine Moore, *No More Simple Battery in West Virginia: The Newly Amended § 61-2-9 and § 61-2-28*, 117 W. VA. L. REV. ONLINE 21 (2015). It is important to note that simple battery and domestic battery returned to the common law standard of intentional physical contact of an insulting or provoking nature. S.B. 442, 83d Leg., 1st Reg. Sess. (W. Va. 2017).

³⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³⁶ Justice Ginsberg, in analyzing an analogous federal standard in 18 U.S.C. § 113(b)(1), noted that “the ‘substantial bodily injury’ requirement remains difficult to satisfy...” *U.S. v. Bryant*, 136 S.Ct. 1954, 1969 n.5 (2016).

27-1002 of the West Virginia Code, which allows for immediate arrest without prior obtainment of a warrant in domestic violence incidents where the victim displays:

(b)(1) One or more contusions, scratches, cuts, abrasions, or swellings; missing hair; torn clothing or clothing in disarray consistent with a struggle; observable difficulty in breathing or breathlessness consistent with the effects of choking or a body blow; observable difficulty in movement consistent with the effects of a body blow or other unlawful physical contact.³⁷

These, however, are physical indicia that have long been in place for domestic violence misdemeanors. In other provisions regarding felonious sexual violence, state law defines bodily injury using the same language used in section 61-2-9d,³⁸ and the section's subsequent "serious bodily injury" is defined as "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ."³⁹ This list offers some hint of the type of bodily injury that would suffice for a strangulation conviction, albeit with a lesser degree of severity required. Nonetheless, a list of examples for symptoms within the midrange of these two standards is lacking.

An additional challenge is the absence of an Oxford comma⁴⁰ for section 61-2-9d(a)(1),⁴¹ creating ambiguity as to whether the substantiality of "substantial physical pain, illness or any impairment of physical condition" is applicable to all three options as coordinate nouns or is limited to physical pain. The bill drafting manual for the West Virginia Legislature discourages excessive comma usage,⁴² further muddling the question, but a plain reading of the text and the desire for

³⁷ W. VA. CODE ANN. § 48-27-1002(b)(1) (West 2017).

³⁸ *Id.* § 61-8B-1(9) ("Bodily injury" means substantial physical pain, illness or any impairment of physical condition").

³⁹ *Id.* § 61-8B-1(10). The child welfare chapter also carries this definition, albeit under the term "serious physical abuse." *Id.* § 49-1-201.

⁴⁰ Megan E. Boyd & Adam Lamparello, *Legal Writing for the "Real World": A Practical Guide to Success*, 46 J. MARSHALL L. REV. 487, 526-27 (2013).

⁴¹ W. VA. CODE ANN. § 61-2-9d(a)(1) (West 2017).

⁴² LEGISLATIVE SERVS., W. VA. LEGISLATURE BILL DRAFTING MANUAL 21 (2006), www.wvlegislature.gov/legisdocs/code/Drafting_Manual.pdf ("Omit the comma before the conjunction within a series of words, phrases or clauses . . .").

the West Virginia Legislature to treat strangulation with a separate, enhanced penalty suggests its application to all three.⁴³

In considering such questions over the past year, lower courts within the state vary widely in their interpretation of the key word “substantial,”⁴⁴ and West Virginia’s case law on the subject is sorely lacking.⁴⁵ Fortunately, other jurisdictions with similar codes can offer some guidance.

Washington State’s definition of bodily injury is almost identical to West Virginia’s, but West Virginia added the word substantial.⁴⁶ When posed with the question of what constituted substantial bodily harm, the Washington Court of Appeals defined it as an action “that involves (1) a temporary but substantial disfigurement, or (2) which causes a temporary substantial loss or impairment of the function of any bodily part or organ, or (3) which causes a fracture of any bodily part.”⁴⁷ This implies that an action such as strangulation must entail some harm that will exist beyond the cessation of the act.⁴⁸ The Washington Court of Appeals considered facial bruising or swelling that lasts for several days as indicia of this type of harm.⁴⁹

New York’s criminal courts have devoted significant attention to interpretation of their laws, perhaps because the state possesses both a misdemeanor offense of impeded breathing⁵⁰ and two felony classes for strangulation.⁵¹ The most prominent New York case involved a victim

⁴³ See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (discussing canons of construction when facing a statute that is ambiguously worded). Interestingly, an alternative reading with a singular application was offered by one of its lead sponsors in the House of Delegates, who suggested instead that impairment of physical condition might not even refer to harm, but rather to restriction of movement, such as holding someone down. One counterpoint would be its presence within the definition for bodily injury. Telephone Interview with Ryan Weld, Senator, W.Va. Senate (notes of interview on file with author). Senator Weld was still a member of the House of Delegates at the time House Bill 4362 was being debated. *Id.*

⁴⁴ The Author’s own experience presiding over a courtroom and the issues raised attest to this difficulty.

⁴⁵ See, e.g., *State v. Jackson*, 597 S.E.2d 321, 324–26 (W. Va. 2004) (dismissing on a technicality an appeal requesting clarification on the meaning of substantial bodily injury).

⁴⁶ WASH. REV. CODE ANN. § 9A.04.110(4)(b) (West 2017).

⁴⁷ *State v. Carlos*, No. 32407-9-III, 2015 WL 6696328, at *8 (Wash. Ct. App. Oct. 29, 2015).

⁴⁸ *Id.* at 9.

⁴⁹ *State v. Kimmer*, No. 67540-1-I, 2012 WL 5478982, at *2 (Wash. Ct. App. Nov. 13, 2012).

⁵⁰ N.Y. PENAL LAW § 121.11 (McKinney 2017).

⁵¹ New York’s second degree felony statute provides:

who testified that he was strangled for approximately three seconds.⁵² While it caused tingling in the throat and a sharp pain, he did not require medical treatment and apparently suffered no long-term harm.⁵³ The court found this evidence insufficient to justify a felony conviction but suggested it would likely sustain a misdemeanor.⁵⁴

In another case, the Court of Appeals of New York wrote, “Of course ‘substantial pain’ cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial. Beyond these generalizations, there are several factual aspects of a case that can be examined to decide whether enough pain was shown to support a finding of substantiality.”⁵⁵ The final sentence serves as a useful reminder that the jury will serve as the ultimate factfinder of what meets the elements of section 61-2-9d of the West Virginia Code.

Surprisingly, West Virginia’s neighboring jurisdictions of Ohio,⁵⁶ Kentucky,⁵⁷ Maryland,⁵⁸ and the District of Columbia⁵⁹ are among the few areas that still lack felony strangulation as a separate criminal charge, despite efforts otherwise. Only Pennsylvania⁶⁰ and

A person is guilty of strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment.

Id. § 121.12.

The state’s first degree felony statute provides:

A person is guilty of strangulation in the first degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes serious physical injury to such other person.

Id. § 121.13.

⁵² People v. White, 953 N.Y.S.2d 423, 425 (N.Y. App. Div. 2012).

⁵³ *Id.* at 425.

⁵⁴ *Id.* at 424–25.

⁵⁵ People v. Chiddick, 834 N.Y.S.2d 710, 711–12 (N.Y. 2007).

⁵⁶ H.B. 362, 2016 Leg., 131st Gen. Assemb. (Ohio 2015).

⁵⁷ Deborah Highland, *Proposed Bill Would Make Non-Fatal Strangulation Felony*, BOWLING GREEN DAILY NEWS (Feb. 22, 2016), http://www.bgdailynews.com/news/proposed-bill-would-make-non-fatal-strangulation-felony/article_47e7cae4-cabe-5547-b2e2-fab3b3d5aed7.html.

⁵⁸ S.B. 612, 2012 Leg., 430th Sess. (Md. 2012).

⁵⁹ Council of D.C., B. B21-0528 (D.C. 2015).

⁶⁰ 18 PA STAT. AND CONST. STAT ANN. § 2718 (West 2017).

Virginia⁶¹ currently have a specific sanction in their criminal codes, and these two are relatively new. The Virginia Supreme Court, in a 2015 case of first impression, defined bodily injury as “any bodily injury whatsoever and includes an act of damage or harm or hurt that relates to the body; is an impairment of a function of a bodily member, organ, or mental faculty; or is an act of impairment of a physical condition.”⁶² As such, “the victim need not experience any observable wounds, cuts, or breaking of the skin. Nor must she offer proof of broken bones or bruises.”⁶³

Ruling on two appeals jointly, in the first case, the defendant beat his girlfriend with a belt and then choked her three times in quick succession for a few seconds apiece.⁶⁴ The victim could not breathe during the choking and her voice was inaudible for a few days thereafter.⁶⁵ She also displayed slight bruising.⁶⁶ In the second case, the defendant and victim had a domestic altercation which resulted in the defendant holding down the victim, and in the course of the scuffle, he may have briefly made contact with the victim’s throat.⁶⁷ The victim did not suffer a complete loss of consciousness, but instead experienced momentary blackouts.⁶⁸ The victim also stated that she had no noticeable injuries and required no medical attention afterwards.⁶⁹

In the first case, the Virginia Supreme Court upheld the conviction by citing its prior precedent of avoiding overly narrow, constrained readings of a statute⁷⁰ and by finding that bodily injury means any bodily hurt whatsoever, be it observable or otherwise.⁷¹ In the second case, the Virginia Supreme Court upheld the appellate court decision vacating the defendant’s conviction, but it did so on different

⁶¹ VA. CODE ANN. § 18.2-51.6 (West 2017).

⁶² *Ricks v. Commonwealth*, 778 S.E.2d 332, 336 (Va. 2015).

⁶³ *Id.*

⁶⁴ *Id.* at 333.

⁶⁵ *Id.*

⁶⁶ *Id.* at 333–34.

⁶⁷ *Id.* at 334.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 335 (citing *Elliott v. Commonwealth*, 675 S.E.2d 178, 182 (2009)).

⁷¹ *Id.* (finding persuasive the federal definition in 18 U.S.C. § 1515(a)(5)(A–E) of bodily injury as “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.”).

grounds, finding that while a momentary blackout would constitute sufficient bodily injury, there was not enough evidence showing that the blackouts occurred.⁷²

Many other jurisdictions nationwide are still hesitant to offer opinions with precedential value⁷³ or have not yet had the opportunity to hear arguments at the highest appellate levels.⁷⁴ While some others have ventured meaningful interpretations⁷⁵ of their strangulation laws, these are still relatively new statutes, and it remains to be seen how legislatures reacting to court rulings will amend them in the future.

III. ANALYSIS

A. *Methods for Determining Proper Cases Going Forward*

When handling the preliminary stages before a magistrate court or grand jury, or when arguing at trial before a circuit court, prosecutors should emphasize the types of injuries that are considered substantial in other jurisdictions. As noted above, such injuries have included ruptured blood vessels,⁷⁶ partial or total loss of consciousness for an extended period,⁷⁷ brain trauma,⁷⁸ vomiting⁷⁹ or loss of excretory control,⁸⁰ noticeable bruising or marking,⁸¹ scarring,⁸² prolonged changes in blood

⁷² *Id.* at 336–37.

⁷³ *Thomas v. State*, CR–13–0812, at *7 (Al. Crim. App. Aug. 14, 2015) (Welch, J., dissenting) (disputing facts of per curiam opinion and calling for reassessment of state’s domestic violence laws).

⁷⁴ Liz Navratil, *More Than 100 Charged Under New Pennsylvania Strangulation Law*, PITTSBURGH POST-GAZETTE (Apr. 10, 2017, 12:00 AM), <http://www.post-gazette.com/news/state/2017/04/10/Pennsylvania-domestic-violence-strangulation-law-changes/stories/201704100010>.

⁷⁵ *State v. Graham S.*, 87 A.3d 1182, 1189 (Conn. App. Ct. 2014) (holding that a conviction for multiple domestic violence offenses arising out of the same incident is a violation of the Double Jeopardy Clause).

⁷⁶ *People v. Peterson*, 988 N.Y.S.2d 271, 275 (N.Y. App. Div. 2014).

⁷⁷ *Torrence v. State*, No. A-11261, 2014 WL 3805766, at *1 (Alaska Ct. App. July 30, 2014).

⁷⁸ *People v. Leach*, 939 N.E.2d 537, 543 (Ill. App. Ct. 2010).

⁷⁹ *People v. Kelly*, 482 N.E.2d 614, 616 (Ill. App. Ct. 1985).

⁸⁰ *People v. Ryder*, 44 N.Y.S.3d 598, 602 (N.Y. App. Div. 2017).

⁸¹ *State v. Miranda*, 64 A.3d 1268, 1272 (Conn. App. Ct. 2013).

⁸² *State v. Rodriguez*, 352 P.3d 200, 202 (Wash. Ct. App. 2015).

pressure,⁸³ crushed or broken bones in the neck or upper torso,⁸⁴ miscarriage,⁸⁵ bleeding from the head,⁸⁶ broken teeth,⁸⁷ or a sustained raspy throat.⁸⁸ This list is not exclusive,⁸⁹ and other representations of trauma have also resulted in conviction. Additionally, strangulation does not typically require a complete closure of the airway,⁹⁰ but simple contact of the hands with the throat will not suffice, as this contact would not cause the requisite pain or impairment required under the statute.⁹¹

Frequently in the courtroom, alleged victims of violence are hesitant to testify, particularly within a domestic context.⁹² Under ideal circumstances, when law enforcement and emergency services arrive on scene, they will quickly transport alleged victims to receive medical care. Medical records serve as a valuable piece of evidence for proving the element of bodily injury,⁹³ and they can confirm whether the bodily injury originated from strangulation or was the result of other physical contact.⁹⁴ Also, they help overcome statutory and constitutional evidentiary restrictions.

In domestic violence cases where the parties are married, the West Virginia Code has an exception to the spousal privilege that would otherwise bar the offender's partner from testifying.⁹⁵ If alleged victims deny at trial their own remarks confirming the strangulation, the remarks

⁸³ State v. Dugger, No. A-12-116, 2012 WL 5395339, at *2 (Neb. App. Nov. 6, 2012).

⁸⁴ Barnes v. State, 768 N.W.2d 359, 360 (Minn. 2009).

⁸⁵ Heather Douglas & Robin Fitzgerald, *Strangulation, Domestic Violence and the Legal Response*, 36 SYDNEY L. REV. 231, 233 (2014).

⁸⁶ Kao v. Hornbeak, No. 2:09-CV-2674 JFM HC, 2011 WL 5884253, at *3 (E.D. Cal. Nov. 23, 2011).

⁸⁷ State v. Aleman, No. A15-1453, 2016 WL 4723340, at *2 (Minn. Ct. App. Sept. 12, 2016).

⁸⁸ State v. Mckee, No. 2014AP2176-CR, 2015 WL 4725066, at *1 (Wis. Ct. App. Aug. 11, 2015) (unpublished table opinion).

⁸⁹ Commonwealth v. Sicard, No. 14-P-1765, 2016 WL 454904, at *2 (Mass. App. Ct. Feb. 5, 2016) (“‘Strangulation’ is not a medical term of art . . .”)

⁹⁰ State v. Braxton, 643 S.E.2d 637, 641-42 (N.C. Ct. App. 2007).

⁹¹ See W. VA. CODE ANN. § 61-2-9d (West 2017).

⁹² See Cathleen A. Booth, *No-Drop Policies: Effective Legislation or Protectionist Attitude*, 30 U. TOL. L. REV. 621, 634-35 (1999).

⁹³ State v. Sacco, 267 S.E.2d 193, 195 (W. Va. 1980) (“[T]he State, if a causal connection is established, is entitled to introduce evidence of the injuries resulting from the assault.”).

⁹⁴ Summerville v. Warden, State Prison, 641 A.2d 1356, 1359 (Conn. 1994).

⁹⁵ W. VA. CODE ANN. § 57-3-3 (West 2017).

can generally be admitted as prior inconsistent statements.⁹⁶ On occasions when alleged victims refuse to take the stand entirely, the court has contempt powers to compel their testimony,⁹⁷ but this power is used sparingly and places authorities in the awkward position of sanctioning alleged victims of abuse. If the witness remains unavailable, federal case law⁹⁸ over the past decade has led to the exclusion of written⁹⁹ and oral¹⁰⁰ testimonial statements of alleged victims made shortly subsequent to the incident,¹⁰¹ leaving prosecutors who lack an independent eyewitness with little recourse if they cannot find an alternative¹⁰² hearsay¹⁰³ exception.¹⁰⁴ The availability via subpoena of medical professionals and records mitigates such a challenge.¹⁰⁵

Many prosecutors interviewed for this Article noted the lack of a hospital within the county or the immediate vicinity of the crime.¹⁰⁶ If the alleged victims are taken outside the county for medical treatment, prosecutors must meet the additional hurdle of obtaining a warrant from that county's municipal judge, magistrate, circuit judge, or mayor if the alleged victims refuse to release their medical records.¹⁰⁷ Courts in other states have sometimes sustained convictions where photographs document visible injuries.¹⁰⁸ This provides an alternative form of evidence for prosecutors in cases where there are no records of medical treatment. If the prosecutor is unable to obtain a witness, medical record,

⁹⁶ W. VA. R. EVID. 801(d)(1); *State v. King*, 396 S.E.2d 402, 406 (W. Va. 1990).

⁹⁷ W. VA. R. CRIM. P. 42.

⁹⁸ *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

⁹⁹ *State v. Kaufman*, 711 S.E.2d 607, 622 (W. Va. 2011).

¹⁰⁰ *See State v. Mechling*, 633 S.E.2d 311, 323 (W. Va. 2006).

¹⁰¹ Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768–82 (2005).

¹⁰² Thomas P. Hardman, *Spontaneous Exclamations v. Res Gestae*, 25 W. VA. L. Q. 341, 345–46 (1918).

¹⁰³ W. VA. R. EVID. 803, 804.

¹⁰⁴ *See Davis v. Washington*, 547 U.S. 813, 820–22 (2006).

¹⁰⁵ *State v. Scotchel*, 285 S.E.2d 384, 390 (W. Va. 1981) (“[E]vidence of the extent of an injury is admissible since under the statute the State must show that the defendant inflicted the injury . . .”).

¹⁰⁶ Interview with Ray LaMora, Prosecuting Attorney, in Grafton, W. Va. (Apr. 28, 2017) (notes of interview on file with author).

¹⁰⁷ W. VA. CODE ANN. § 62-1A-1 (West 2017); *State ex rel. Hill v. Smith*, 305 S.E.2d 771, 773 (W. Va. 1983).

¹⁰⁸ *See, e.g., State v. Lowery*, 743 S.E.2d 696, 699 (N.C. Ct. App. 2013) (holding that photographic evidence, coupled with victim and expert testimony, was sufficient for the fact-finder to conclude that the injuries were the result of strangulation).

or photographic evidence, the state faces a substantial challenge in achieving a conviction.

As a final note, in surveying the chief prosecutors of West Virginia's counties for this Article, the Author rarely encountered an occasion in which the new statute was used outside of a domestic violence context in either a completed or pending case.¹⁰⁹ While the West Virginia Code permits "any person" to be prosecuted for strangling another,¹¹⁰ the legislative debates indicate that the law was intended primarily to protect victims of domestic violence.¹¹¹ When questioned, however, virtually every prosecutor affirmed a willingness to use it in a non-domestic context if the proper occasion arose.¹¹²

B. *Suggestions for Potential Future Issues*

In addition to the punitive and deterrence benefits that will result, West Virginia's new strangulation law will restrict the ability of the convicted to acquire a firearm. Under current state law, felons are barred from possessing firearms,¹¹³ and subsequent ownership results in new criminal charges.¹¹⁴ However, the current national¹¹⁵ and state¹¹⁶ trend is to provide greater opportunities for expungement¹¹⁷ or post-conviction

¹⁰⁹ A few county prosecutors noted impending cases. A non-domestic charge had been filed in only three counties: Greenbrier County, Summers County, and Gilmer County. E-mail from Patrick Via, Prosecuting Attorney, Greenbrier County, to author (May 25, 2017) (on file with author); Telephone Interview with Kristin Cook, Prosecuting Attorney, Summers County (Aug. 25, 2017); Telephone Interview with Gerald Hough, Prosecuting Attorney, Gilmer County (Aug. 25, 2017) [hereinafter *Interviews*].

¹¹⁰ W. VA. CODE ANN. § 61-2-9d(b) (West 2017).

¹¹¹ Telephone Interview with Amy Summers, Delegate, W. Va. House of Delegates (May 23, 2017) (notes of interview on file with author).

¹¹² *Interviews*, *supra* note 109.

¹¹³ W. VA. CODE ANN. § 61-7-7(a)(1) (West 2017); *Id.* § 61-7-7(b)(1).

¹¹⁴ *Id.* § 61-7-7(a)(8).

¹¹⁵ Section 273.5 of California's Penal Code is a prominent example of a domestic violence "wobbler" that can be reduced from a felony to a misdemeanor under section 17(b). CAL. PENAL CODE §§ 273.5, 17(b) (West 2017).

¹¹⁶ See Joselyn King, 'Second Chance' Bill Passes in Reduced Form, INTELLIGENCER AND WHEELING NEWS REGISTER (April 13, 2017), <http://www.theintelligencer.net/news/top-headlines/2017/04/second-chance-bill-passes-in-reduced-form/>.

¹¹⁷ Felony offenses are currently exempt from expungement. W. VA. CODE ANN. § 61-11-26(a) (West 2017). When considering whether to support expungement, one might recall Lord Coke's maxim: "*peona mori potest, culpa perennis erit.*" Brown v. Crashaw, 80 Eng. Rep. 1028 (K.B. 1614).

reduction¹¹⁸ of criminal status.¹¹⁹ Should the defendant later have a strangulation conviction reduced to a misdemeanor by some future amendment of the West Virginia Code, the defendant will still be barred by the federal Lautenberg Amendment,¹²⁰ which prohibits those convicted of misdemeanor domestic violence from owning firearms.¹²¹

It is important to reiterate, though, that section 61-2-9d of the West Virginia Code is applicable to any instance of strangulation, regardless of whether a prior relationship existed between the parties. While the overwhelming majority of charges under section 61-2-9d thus far have been in domestic violence situations,¹²² a court, upon conviction, should make a specific finding in its opinion that a domestic relationship was present. If West Virginia's "second chance" laws are later revised and allow for reduction of violent felonies to misdemeanors, a canny defendant could argue that he or she was exempt from the restrictions of the Lautenberg Amendment if the court failed to note the presence of a domestic relationship and the trial record was unclear.¹²³

IV. CONCLUSION

The West Virginia Legislature's recent reforms are in line with national efforts to protect victims of domestic violence. While section 61-2-9d of the West Virginia Code is applicable in non-domestic conflicts, its use has overwhelmingly been in such situations. Few counties have a number of cases above single digits in which strangulation was charged, but that number can be expected to rise as the court system becomes increasingly comfortable with the law. Nonetheless, to curb any potential overreach, the judiciary should closely observe how other jurisdictions apply similar laws.

¹¹⁸ S.B. 76, 83d Leg., 1st Reg. Sess. (W.Va. 2017).

¹¹⁹ W. VA. CODE ANN. § 61-11B-4 (West 2017).

¹²⁰ 18 U.S.C. § 922(g)(9) (2012).

¹²¹ Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1456-65 (2005). Strangulation is a qualifying domestic offense. *Id.* However, if a defendant receives a gubernatorial pardon, rather than a reduction in criminal status, he is allowed to own a firearm; such pardons are rare, though. *See id.* at 1460 n.169.

¹²² Telephone Interview with Matthew Harvey, *supra* note 18; Interview with John L. Bord, *supra* note 30; Interview with Ray LaMora, *supra* note 106.

¹²³ *See, e.g.,* U.S. v. Blosser, No. 02-40074-01-JAR, 2002 WL 31261170, at *5 (D. Kan. Oct. 4, 2002).

To summarize the trend of other jurisdictions, it has been a general rule that while strangulation need not leave visible¹²⁴ or permanent injuries, it must result in at least a partial loss of consciousness or injury lasting beyond cessation of the contact. The judiciary will also need to anticipate the ramifications such a conviction will impose on a defendant's civil liberties pursuant to state and federal law.

As the West Virginia Legislature meets in future sessions, it will likely consider amendments to section 61-2-9d. Historically, a new law is most likely to be modified during the first few years of its existence, as the system of trial and error determines which portions effectively achieved the legislature's stated goals. When the West Virginia Legislature considers what revisions it intends to make, it should carefully debate the avenues other states have pursued in creating a misdemeanor offense¹²⁵ and the scale of punishment upon conviction.¹²⁶ More importantly, it may wish to consider amending the strangulation statute to help courts understand which types of physical injuries satisfy the crime's elements. Absent the passage of such legislation, West Virginia courts should continue to look to other jurisdictions for meaningful answers.

¹²⁴ Although H.B. 4362, 83d Leg., 1st Reg. Sess. (2016), removed the provision regarding non-visible injuries in the original H.B. 2240, 82d Leg., 2d Reg. Sess. (2015), the West Virginia Legislature intended to continue to allow prosecution for strangulation producing such injuries. Telephone Interview with Charles Trump, Senator, W. Va. Senate (June 7, 2017) (notes of interview on file with author).

¹²⁵ It should be noted that some prosecutors expressed concern that inclusion of a misdemeanor within the strangulation code would further muddle the waters. Telephone Interview with Edward Kornish, Prosecuting Attorney, McDowell County, W. Va. (July 20, 2017) (notes of interview on file with author).

¹²⁶ *State v. Henning*, 793 S.E.2d 843, 850 (2016) (finding assault was a lesser included offense of malicious assault).