



No. 3

Getting a Grip on Strangulation

Enumerating Strangulation in the UCMJ Will Help the Fight Against Domestic Abuse

By Captain Kaley S. Chan

He had even pulled a gun on me once, slapped me black and blue, but nothing felt as scary as this. There was that first part of the attack that so utterly terrified me as I anticipated my imminent death, panicking with what I could do. The fighting for freedom, the pain of his hands around my neck. Then as I began to suffocate, I could feel myself dying. Gasping for breath, desperate for air. Feeling myself slipping away, so fully conscious and hyper aware. And watching him—how personal the rage was. How he was using his bare hands to kill me—it was so intimate, he was so close to me. His skin on my skin. Like drowning, trapped in the water beneath the ice, the panic, the desperation to breathe, yet not being able to.¹

I. Introduction

One in four women and one in seven men in the U.S. have been a victim of severe physical violence at the hands of an intimate partner.² In fact, between 2003 and 2012, fifteen percent of all violent victimizations were attributed to an intimate partner.³ Although domestic and intimate partner violence is not gender-specific, women are the victims in a vast majority of cases.⁴ In the United States, women are killed by a current or former intimate partner “more often than by any other type of perpetrator.”⁵

Research into domestic-violence-related homicides shows that a history of non-fatal strangulation is “one of the most accurate predictors for the subsequent homicide of victims of domestic violence.”⁶ One such study found that women who have been subject to a non-fatal strangulation incident were approximately 700 percent more likely to be the victim of homicide than other domestic violence victims.⁷ And non-fatal strangulation events are not a rare occurrence. A 2010 Center for Disease Control and Prevention (CDC) study estimated that 1.1 million women were strangled or suffocated in the preceding twelve months, and more than 11.6 million women who participated in the survey had been strangled or suffocated in their lifetime.⁸

Growing recognition of the life-threatening nature of strangulation and the difficulty in prosecuting these offenses as felonies has led jurisdictions across the country and the globe to enact strangulation-specific statutes or include strangulation-specific language in existing statutes.⁹ As of today, fifty-two states and United States territories have enacted some form of legislation acknowledging the impact of strangulation.¹⁰ Following their lead, Congress passed the Violence Against Women Reauthorization

Act of 2013, adding language to address strangulation in the federal assault statute (18 U.S.C. §113).¹¹

These legislative additions and amendments have improved both of offender accountability and awareness of the gravity of strangulation offenses.¹² And yet, the Uniform Code of Military Justice (UCMJ)—which governs approximately 2.1 million service members¹³—is devoid of any strangulation-specific offense, even though research confirms that military families are at high risk for severe domestic violence.¹⁴ Accordingly, Congress should enact legislation to specifically enumerate a strangulation offense in the UCMJ and include commission of the offense against specific classes of victims as an aggravating element to the crime. The recent enactment of The Military Justice Act of 2016 and the coming changes to Article 128 intensify this concern.¹⁵

The Department of Defense's (DoD) Family Advocacy Program (FAP) statistics show that in Fiscal Year 2017 (FY17) there were 7,153 incidents that met a threshold criteria for spousal abuse, among 5,781 unique victims.¹⁶ This correlates to a victim of spousal abuse in approximately nine of every 1,000 married military couples.¹⁷ In contrast, the DoD reports that in FY17 there were 6,769 reports of sexual assault—nearly four hundred fewer reports than reports of spousal abuse that met FAP's threshold criteria for abuse.¹⁸ These incidents of spousal abuse led to nine fatalities in FY17, which were amongst the ninety-four intimate-partner-related fatalities between Fiscal Years 2011 and 2017.¹⁹ Although these figures do not specify how many incidents included allegations of strangulation, a study conducted on an Army installation between 1997 and 2005 showed that in 1,681 instances of spousal abuse occurring in on-base housing, thirty-eight percent of victims of physical abuse and nineteen percent of victims of verbal abuse reported a history of being “choked” by their spouse.²⁰

These harrowing statistics make clear what fifty-three U.S. jurisdictions and various countries have already accepted: Legislation is needed to address intimate partner violence, and, given the lethal nature of the act, a strangulation-specific offense is necessary to ensure victim safety and offender accountability.²¹ This article

will first explore the historical treatment of strangulation offenses. It will then address the current status of strangulation legislation and its impact on awareness and prosecution of these offenses. Finally, it will explore current options for prosecuting strangulation offenses under the UCMJ and propose a new enumerated offense.

II. Background

Strangulation is a type of asphyxia caused by external pressure to the neck, which impedes blood flow, and thus, oxygen to the brain.²² A mere eleven pounds of pressure on the carotid artery for approximately ten seconds is sufficient to render a person unconscious, and continued pressure leads to brain death after just four to five minutes.²³ More disturbingly, internal injuries caused by a lack of oxygen to the brain can cause delayed death days or even weeks following a strangulation incident.²⁴ Common internal and neurological injuries associated with strangulation include: fracture of the hyoid bone; internal tears and bleeding; subcutaneous emphysema, the leaking of air into soft tissue; blood clots; stroke; pulmonary edema resulting from excess fluid in the lungs; and anoxic encephalopathy, caused by lack of oxygen to brain tissue.²⁵ Victims may also experience psychological disorders, behavioral changes, and loss of memory.²⁶

Despite the risk of fatality, this offense is commonly misunderstood, mistaken, or minimized as something less than lethal.²⁷ Today, many experts agree “unequivocally that strangulation is one of the most lethal forms of domestic violence” and that strangulation offenses should be treated as presumptive felonies.²⁸ Prior to 2001, however, this was not the case.²⁹ Due to a lack of physical evidence, recantation or minimization by victims, and the inadequacy of training and education on the long-term effects of strangulation, cases were generally treated as “minor incidents” garnering misdemeanor-level attention and punishment, except in the most severe cases.³⁰

The publication of a 2001 study of 300 cases submitted for misdemeanor prosecution to the Office of the San Diego City Attorney “launched the most comprehensive effort in the United States to educate criminal and civil justice professionals about strangulation . . . [and] spawned research,

protocols, policies, and laws across the country and around the world.”³¹ The study found that in eighty-five percent of the cases, there was a lack of visible injury of strangulation sufficient to sustain a conviction.³² The lack of visible injuries, coupled with the lack of understanding among law enforcement regarding the consequences of strangulation, meant investigations lacked the detailed documentation and evidence necessary to hold offenders accountable.³³

In 2008, *The Journal of Emergency Medicine* published a study evaluating homicide and attempted homicide cases involving strangulation across eleven cities to “identify risk factors for intimate partner homicide and attempted homicide.”³⁴ The study found that strangulation was “a significant predictor for future lethal violence.”³⁵ Specifically, the study found that once a woman had been subject to a non-fatal strangulation event, she was approximately 600 percent more likely to be the victim of attempted homicide, and approximately 700 percent more likely to be the victim of homicide, than other domestic violence victims.³⁶

Prior to the publication of these studies, most states' laws required a showing of something akin to “grievous bodily injury” in order to charge strangulation under a felony assault theory.³⁷ Experts today, however, know that strangulation often results in long-term internal and emotional injuries, rather than acute, visible injuries.³⁸ In fact, even fatal cases often lack external evidence of strangulation.³⁹ These facts, coupled with victim minimization of both the conduct and their injuries, historically resulted in law enforcement and medical personnel failing to thoroughly investigate and document other signs and symptoms of strangulation.⁴⁰ Many prosecutors, in turn, failed to appreciate the level of violence, ultimately resulting in misdemeanor treatment of these offenses.⁴¹

Conversely, prosecutors who wanted to charge attempted homicide were deterred by a stringent specific intent element that could only be met in the most grievous cases.⁴² It was not until the destructive nature of non-fatal strangulation came to light in the early 2000s that jurisdictions across the country began to recognize that their criminal codes were inadequate for holding offenders accountable.⁴³

Even in light of the recent shift toward creating or amending legislation and prosecuting strangulation offenses as felonies, the DoD has done little to address strangulation offenses among its ranks. In 2000, at the direction of Congress, the DoD established the Defense Task Force on Domestic Violence (Task Force) for the purpose of assessing and making recommendations to improve the DoD's response to domestic violence.⁴⁴ In its 2001 report to Congress, the Task Force explained that "[a]ggressive prosecution is one important way of holding offenders accountable and may deter future recidivism while potentially enhancing victim safety."⁴⁵

In keeping with the Task Force's recommendation, Congressional action to make the UCMJ consistent with the federal assault statute and the fifty-two other states and territories recognizing strangulation-specific crimes would better ensure offender accountability and victim safety in a community at high risk for domestic violence.⁴⁶

III. Current Status of Strangulation Legislation

In a 2009 review of strangulation laws across the country, experts in intimate partner violence recommended "that all states develop policies to improve prosecution of strangulation, include strangulation in their criminal codes, and use language that includes all potential victims."⁴⁷ Similarly, as of 2011, every state prosecutor's association that has studied strangulation offenses has supported strangulation-specific legislation.⁴⁸ Even the United Nations has encouraged member-states to address strangulation in their criminal codes.⁴⁹ Although there is work to be done to achieve the full breadth of these recommendations, there has already been a visible shift to address strangulation offenses through legislation across the country.⁵⁰

A. U.S. Jurisdictions Addressing Strangulation

Currently, forty-nine states, the District of Columbia, Guam, and the Virgin Islands have statutes that specifically address strangulation in some form.⁵¹ Although the application varies widely—from consideration at a bail hearing, to an element in aggravation, to its own offense—the mere

fact that legislatures across the country are taking the results of strangulation research seriously is encouraging and telling.⁵²

Congress demonstrated its support when it passed The Violence Against Women Reauthorization Act of 2013 and specifically added a provision for "strangling, suffocating, or attempting to strangle or suffocate" one's "spouse, intimate partner, or dating partner" to the federal assault statute.⁵³ Congress's imposition of a ten-year maximum punishment serves as further appreciation for the lethal effects of strangulation.⁵⁴ However, at the time of enactment, this amendment was seen as primarily granting jurisdiction over offenses in Indian Territory and between same sex couples, not members of the armed forces.⁵⁵

B. Making an Impact

The evolution in the landscape of domestic violence and strangulation offenses with recent legislation has positively impacted not only punitive disposition, but also awareness and training dedicated to investigating and prosecuting these offenses.⁵⁶ For instance, New York police arrested 2,003 offenders under the state's new strangulation offenses in the first thirteen weeks following enactment in 2010.⁵⁷ After eighteen months, police had made 17,171 arrests for strangulation across the state—more than 3,200 of which were felony-level.⁵⁸ As of 2015, New York has seen the lowest domestic and intimate partner homicide rates since 2007.⁵⁹

Similarly, within thirteen months of enactment of a new strangulation offense, 1,107 charges for felony strangulation were filed in Minnesota.⁶⁰ One county saw twenty-four cases charged under the newly enacted statute, with a forty-two percent conviction rate in the first six months.⁶¹ After seventeen months, "there was a [sixty-one percent] increase in cases charged" and "the conviction rate for any felony increased from [seventeen] percent to [thirty-eight] percent" because prosecutors were able to use the strangulation charge to leverage a plea bargain for other felonies.⁶² Advocates noted that "the law helped to bring some dangerous first-time domestic abusers to the system's attention sooner than if they had been charged with misdemeanors for strangling their victims."⁶³

New legislation has also had an impact on police departments, prosecutor's offices, and medical providers, who have increased training on strangulation investigations and prosecution, to include recognizing signs and symptoms.⁶⁴ In fact, at least five states now statutorily require training on strangulation for law enforcement.⁶⁵

In Arizona, the Maricopa County Attorney's Office established a program to work with local law enforcement and medical providers in an effort to coordinate a community response to strangulation offenses.⁶⁶ Since implementation in December 2011, cases in which felony charges were filed increased from less than fifteen percent to more than sixty percent of cases submitted by law enforcement.⁶⁷ The county also saw a corresponding twenty-four percent decrease in domestic violence-related fatalities from 2012 to 2014.⁶⁸

Researchers in Minnesota noticed that "the increased awareness and training received by law enforcement officers, investigators, and prosecutors has resulted in a significant decrease in the number of cases being dismissed when strangulation cases are charged as felonies compared to when they are charged as misdemeanors."⁶⁹ Local judges even "commented that they had observed law enforcement officers conducting more thorough investigations by taking more pictures and better documenting the crime scene."⁷⁰

These results demonstrate the impact enumerating an offense can have and are indicative of how a specific offense can help establish a coordinated effort between law enforcement, medical personnel, and prosecutors. By breaking ground in felony-level strangulation legislation, these jurisdictions have paved the way for an offense in the UCMJ.

IV. Enumerating an Offense Under the Uniform Code of Military Justice

Military prosecutors generally have three existing options for charging strangulation offenses, and with these options come the same criminal element and punishment-related hurdles that civilian prosecutors faced before strangulation-specific offenses were enacted.⁷¹ Military prosecutors, however, are also responsible for ensuring the



conviction is both clear to, and translates to a felony in, civilian jurisdictions. Enactment of an enumerated offense will address each of these issues, while still answering common counter-arguments.

A. Misdemeanors v. Felonies

It is vital that the civilian criminal justice system be able to assess the nature of a court-martial conviction. Prior convictions are often used in bail determinations, trials for similar offenses, and in imposing sentencing enhancements.⁷² The classification of a court-martial conviction as a felony or misdemeanor, however, is generally up to the discretion of the state because the military does not define its offenses in terms of misdemeanors or felonies.⁷³ States often assign those labels by looking to the maximum possible punishment.⁷⁴ Generally, offenses that have a maximum punishment of twelve months in confinement, regardless of forum, will translate

to a misdemeanor in the civilian criminal justice system.⁷⁵

In addition to a felony classification, the need to ensure the civilian criminal justice system is adequately informed of the offender's criminal history and potential for future lethal violence requires clarity and specificity regarding the nature of the crime.⁷⁶ This is particularly important in strangulation cases because many jurisdictions have enacted provisions that increase either the level of offense or the punishment, or both, where the offender has committed the same or similar offense in the past.⁷⁷ If a charging scheme leaves it unclear that an offender has previously committed a strangulation offense, it may be difficult, if not impossible, for another jurisdiction to impose sentence enhancements if the offender strikes again.⁷⁸ A lack of clarity could also impede a civilian prosecutor's ability to use the court-martial conviction to argue against bail for victim

safety, or introduce the prior strangulation conviction as evidence at trial.

The most effective way for the military to ensure clarity on this matter is to enumerate a specific offense for strangulation with a maximum possible punishment exceeding twelve months in confinement. Under the current construct of the UCMJ, aggravated assault and attempted murder are the two most plausible offenses that could render such a punishment.

B. Current UCMJ Charging Options

1. Aggravated Assault

Aggravated assault under Article 128, was once the government's most logical charging theory and the only assault charge that could render a punishment in excess of twelve months in confinement.⁷⁹ However, Article 128 falls short in three respects: its required elements fail to appreciate the harm non-fatal strangulation can impose without visible injury, it lacks consideration of a consensual-touching defense, and a conviction for aggravated assault is not specific enough to provide clarity to the civilian criminal justice system about the nature of the offense.

Currently, aggravated assault can be charged under one of two theories, either: (1) "Assault with a dangerous weapon or means or force likely to produce death or grievous bodily harm[,]" or (2) "[a]ssault in which grievous bodily harm is inflicted."⁸⁰ For cases lacking grievous bodily harm, the former theory is often used as an avenue for prosecution of strangulation cases. Until recently, "means or force likely to produce death or grievous bodily harm" required that "the risk of harm [was] 'more than merely a fanciful, speculative, or remote possibility.'"⁸¹ In 2015, The United States Court of Appeals for the Armed Forces (CAAF) overruled this precedent in *United States v. Gutierrez*, stating that the appropriate standard for whether or not death or grievous bodily harm was "likely" is whether it is the "natural and probable consequence of the action."⁸²

This heightened standard, which relies on probabilities of harm,⁸³ is problematic for prosecuting strangulation cases, because the statistical likelihood that a strangulation event would end in death or grievous bodily harm may not reach the military judge's or

members' threshold probability, due to their own lack of knowledge of the offense.⁸⁴ However, with the recent passage of the Military Justice Act of 2016, this issue is soon to become moot.⁸⁵

Under the newly drafted version of Article 128, the two charging theories have been amended to read: "(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or (2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person; is guilty of aggravated assault."⁸⁶ Based on these revisions, the government would only be able to charge strangulation as aggravated assault in cases where a "dangerous weapon" is used or where there is an infliction of substantial or grievous bodily harm.⁸⁷ Although the intent of the change may have been to mirror the federal assault statute, it expressly failed to account for strangulation offenses.⁸⁸ Thus, given the statistical unlikelihood of evidence of physical harm, there are few circumstances where the government would be able to prove a non-fatal strangulation as an aggravated assault unless the offender's hands were considered a "dangerous weapon."⁸⁹

These amendments also fail to address the possibility of a defense under a theory of consensual touching. Although one can generally consent to an assault, the same is not true for aggravated assault.⁹⁰ This would unnecessarily create defenseless culpability in instances of consensual sexual activity, martial arts, and emergency medical procedures.

Even were a conviction under this revised statute possible, it would also fail to provide adequate notice to the civilian criminal justice system that the accused had a history of non-fatal strangulation, thereby impacting criminal history assessments and potentially evidence in future prosecutions for similar offenses. Where aggravated assault does not fit, prosecutors may look to charging attempted murder.

II. Attempted Murder

While a conviction for attempted murder or manslaughter would arguably convey the magnitude of the offense, the likelihood of conviction is slim. The UCMJ's murder and manslaughter statutes, similar to civilian statutes, require the government to prove the offender's specific intent to kill.⁹¹ While general intent to harm can be

inferred from the conduct itself, specific intent requires diving into the accused's mind at the moment of the offense.⁹² Absent a statement of intent from the accused, the government will generally be forced to rely on circumstantial evidence.⁹³

Most offenders, however, do not actually intend to kill their victims; strangulation is a form of control, rather than a mechanism for death.⁹⁴ And even if the government provided evidence of specific intent, domestic violence stereotypes are difficult to overcome.⁹⁵ Until members and military judges are familiarized with the gravity and lethality of non-fatal strangulation offenses, it is unlikely that members would be willing to convict on attempted murder absent particularly egregious facts or injuries.⁹⁶ Where neither aggravated assault, nor attempted murder theories are viable, military prosecutors may also have the ability to charge under an Article 134 theory.⁹⁷

III. Crimes Not Capital—Article 134

Article 134 of the UCMJ provides the government with a unique vehicle to charge non-capital offenses that are in violation of federal law, to include state laws made applicable through the Assimilative Crimes Act (18 U.S.C. § 13), provided the same offense is not enumerated elsewhere in the UCMJ.⁹⁸ The doctrine of pre-emption also prohibits the assimilation of state laws where the same crime is already "made punishable by an enactment of Congress."⁹⁹ Additionally, state and federal offenses may only be charged under this theory if the offense occurred within the jurisdiction of the enactment.¹⁰⁰ While federal offenses may have either unlimited or local application,¹⁰¹ assimilating a state offense requires that the crime be committed in that state and within an area of exclusive or concurrent federal jurisdiction.¹⁰²

However, using Article 134 to charge a strangulation offense under state or federal law in lieu of an enumerated UCMJ offense is problematic. Provided the federal assault statute is not pre-empted by Article 128, it is limited to a domestic violence context, and is presently only applicable to crimes occurring within the "special maritime and territorial jurisdiction of the United States," which generally does not include those stationed abroad.¹⁰³ Moreover, where a state statute is not already pre-empted by the

federal offense because it covers non-domestic offenses, it will invariably lead to the unequal application of law between service members in different states.¹⁰⁴

Finally, and of greatest importance, is what enumerating an offense advertises to the military community. By creating a separate offense, offenders are put on notice, victims are told they matter, and commanders, investigators, and prosecutors are more likely to take strangulation seriously.

C. Proposed Offense

To be clear, the addition of an enumerated offense for strangulation does not make strangulation a new crime—strangulation is already a crime.¹⁰⁵ However, creating a separate offense will provide clarity, encourage better investigations and felony-level prosecution, promote offender accountability, and send a message to the military community about the gravity of this offense.¹⁰⁶

In drafting a new offense, it is important to keep in mind that while a common fact pattern, strangulation is not limited to the domestic violence context, nor to women. Therefore, it is important to draft the statute broadly enough to cover non-domestic violence scenarios. Experts in the field generally consider the statutes passed by Texas and Idaho to be among the best strangulation laws in the country, because they "focus on impeding breathing and blood flow to the brain."¹⁰⁷ Experts specifically endorse the Texas model because "it includes a 'reckless' mental state . . . makes strangulation an automatic felony . . . [and] enables the state to increase the penalty for repeat offenders[,]" acknowledging the lethal implications of this conduct.¹⁰⁸

With these factors in mind, Congress should consider the following offense:

Article 128b Strangulation: Any person subject to this chapter who intentionally, knowingly, or recklessly impedes the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth, is guilty of strangulation and shall be punished as a court-martial may direct.

Aggravating Element: The person is a current or former family member, co-habitant, or intimate partner.¹⁰⁹



This proposed language expressly provides for a reckless mental state, does not require any showing of bodily harm, and yet still allows for a defense based on a theory of consent. Additionally, it identifies classes of victims in need of special protection—family members, which in today's society take many forms, co-habitants, and intimate partners.¹¹⁰ In the alternative, Congress could address the issue by amending the current assault statute to include strangulation offenses. However, drafting this amendment to account for a consent-based defense could be unnecessarily

complex.¹¹¹ Moreover, this alternative option fails to address the messaging effect a separate offense provides.¹¹²

Regardless of the mechanism for identifying strangulation offenses in the UCMJ, the associated punishment should be commensurate with the gravity of the offense. The maximum punishment for a strangulation offense should be a dishonorable discharge or dismissal and five years' confinement.¹¹³ Where the offense is committed against a family member, co-habitant, or intimate partner, the maximum punishment should increase to ten

years' confinement, to be consistent with its federal statutory counterpart.¹¹⁴

D. Opposition and Counter Arguments

The best argument in opposition is that military prosecutors do not need a separate offense, because they have the ability to assimilate state or federal statutes. However, as previously discussed, the pre-emption doctrine and unequal application of laws pose undesirable challenges.¹¹⁵ Additionally, this course of action fails to send a message to offenders, victims, investigators, commanders, and prosecutors alike, and raises the possibility that a serious offender will not be held accountable if the complexities of Article 134 are not thoroughly understood by the trial counsel.

Opponents may also argue that historically the military does not have enough strangulation cases to warrant a specific statute. Not only is this inaccurate,¹¹⁶ it avoids the crux of the problem: that when it *does* happen, the DoD needs a way to ensure the offense is prosecuted, the offender is held accountable, and the civilian criminal justice system is aware of the offender's potential for future lethal violence.

Another opposing viewpoint is that the government should have to prove either intent or grievous bodily harm for strangulation to warrant felony-like punishment. The available studies do not question the harm and potential lethality of strangulation—in fact, the evidence supports it—even absent acute, visible injuries.¹¹⁷ The difficulty in diagnosing internal, neurological, or psychological injuries unique to this crime, and the potential for delayed onset of these symptoms, should not alleviate a violent offender from being held accountable. Ensuring felony-level accountability addresses the seriousness of the offense and identifies potentially-lethal offenders early.

Ultimately, to have the intended impact, the punishment must fit the crime. Currently, fraudulent enlistment has a maximum punishment of two years' confinement; effecting an unlawful enlistment carries a five-year maximum; willfully disobeying a commissioned officer could land an offender up to five years in confinement; failure to obey a lawful order carries a two-year maximum sentence; and intentionally failing to comply with procedural rules has

a five-year maximum sentence.¹¹⁸ The fact that these offenses carry more weight in the military justice system than the near-fatal strangulation of another person is cause enough for its own felony-level offense.

V. Conclusion

One of the greatest lessons learned since 2005, as strangulation statutes have been passed across the country, is that strangulation assaults should be a presumptive felony. Prosecutors must lead this effort. If prosecutors do not treat these cases as serious felonies, police officers, medical professionals, advocates, and survivors will not treat them as such.¹¹⁹

Given the current status of the law, a separate offense is a prosecutor's best mechanism to lead the effort.¹²⁰ However, it is important to not overlook the impact enumerating an offense will have on the military justice system, beyond enhancing military prosecutors' capability to secure a felony-level conviction.¹²¹ It will encourage training and coordination among legal, law enforcement, medical, and advocacy communities.¹²² It will raise awareness about the lethal implications of strangulation for commanders and victims, and it will arm commanders with a mechanism to promote victim safety. Above all, it will send a message to offenders that their conduct has deadly consequences and will not be tolerated.

As one Minnesota judge stated after the enactment of a strangulation offense, "This law is doing what we hoped it would do: it is drawing attention to the potential lethality of this crime. More resources are being devoted to this type of case. We have also increased the consequences, and in some ways educated the public on domestic violence."¹²³ To achieve similar results, similar action is needed, and Congress has already accepted the necessity of enacting the offense. It is time to focus efforts on a population at risk, enumerate a strangulation offense in the UCMJ, and alleviate commanders from a dilemma—secure a conviction, albeit a misdemeanor, or risk offender accountability, both of which fail to address victim safety. **TAL**

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Appendix A. Article 128b: Strangulation, Suffocation

54a. Article 128b Strangulation, Suffocation

a. Text of statute.

(a) Any person subject to this chapter who intentionally, knowingly, or recklessly impedes the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth, is guilty of strangulation and shall be punished as a court-martial may direct.

b. Elements.

(1) That the accused impeded the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth; and

(2) That the accused did so intentionally, knowingly, or recklessly;

(Note: Add the following as applicable)

(3) That the person was a family member, co-habitant, or intimate partner.

c. Explanation.

(1) *In general.*

(2) *Family member.* A family member includes all members of an extended family unit by blood, marriage, adoption, or government placement, to include, but not limited to: spouses, parents, step-parents, siblings, step-siblings, half-siblings, children, step-children, and foster children. "Family member" specifically includes persons with whom the accused has a child in common or was previously married to. A spouse is considered a current family member until a divorce decree is entered by a court of competent jurisdiction.

(3) *Co-habitant.* A co-habitant is a person who shares the same dwelling as the accused, but is not a family member or an intimate partner at the time of the assault.

(4) *Intimate partner.* An intimate partner includes those in a current or former dating relationship. "Dating relationship" means a continuing or significant relationship of a romantic or intimate nature, regardless of their engagement in sexual conduct.

d. *Lesser included offenses.* Article 128—Assault Consummated by a Battery; Simple Assault.

e. *Maximum punishment.*

(1) *Generally.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) *When committed upon a family member, co-habitant, or intimate partner.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

f. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board location), on or about _____, (intentionally) (knowingly) (recklessly) impede the normal (breathing) (circulation of the blood) of (another person, to wit: [name of person]) (a family member, to wit: [name of person]) (a co-habitant, to wit: [name of person]) (an intimate partner, to wit: [name of person]) by (applying pressure to the said [name of person]'s throat or neck) (blocking the said [name of person]'s nose or mouth).

Appendix B. Military Judge's Benchbook

STRANGULATION, SUFFOCATION (ARTICLE 128b)

MAXIMUM PUNISHMENT:

When committed upon a family member, co-habitant, or intimate partner: DD, TF, 10 years, E-1.

Other cases: DD, TF, 5 years, E-1.

MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board location), on or about _____, (intentionally) (knowingly) (recklessly) impede the normal (breathing) (circulation of the blood) of (another person, to wit: [name of person]) (a family member, to wit: [name of person]) (a co-habitant, to wit: [name of person]) (an intimate partner, to wit: [name of person]) by (applying pressure to the said [name of person]'s throat or neck) (blocking the said [name of person]'s nose or mouth).

c. ELEMENTS:

(1) That (state the time and place alleged) you impeded the normal (breathing) (circulation of the blood) of (state the name of the alleged victim);

(2) That you did so by (applying pressure to the person's throat or neck) (blocking the person's nose or mouth);

(3) That you did so (intentionally) (knowingly) (recklessly); [and]

NOTE1: Aggravating circumstances alleged. When the alleged victim is a family member, co-habitant, or intimate partner, add element [4] below.

[(4)] That at the time of the assault(s), (state the name of the alleged victim) was a (family member) (co-habitant) (intimate partner).

d. DEFINITIONS AND OTHER INSTRUCTIONS.

A “family member” includes all members of an extended family unit by blood, marriage, adoption, or government placement, to include, but not limited to: spouses, parents, step-parents, siblings, step-siblings, half-siblings, children, step-children, and foster children. “Family member” specifically includes persons with whom the accused has a child in common or was previously married to. A spouse is considered a current family member until a divorce decree is entered by a court of competent jurisdiction.

A “co-habitant” is a person who shares the same dwelling as the accused, but is not a family member or an intimate partner at the time of the assault.

An “intimate partner” includes those in a current or former dating relationship. “Dating relationship” means a continuing or significant relationship of a romantic or intimate nature, regardless of their engagement in sexual conduct.

Note 3: Read in all cases.

Impeding the normal breathing or circulation of blood of another person is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

There is no requirement that impeding the normal breathing or circulation of blood be done with the intent to kill or injure the victim.

There is no requirement to show that the victim suffered any injury or harm caused by impeding his or her normal breathing or circulation of blood.

Note 4: Attempted strangulation or suffocation. If the specification alleges an attempt to impede the normal breathing or circulation of blood, give the following instruction:

Attempted strangulation or suffocation is an overt act which amounts to more than mere preparation and is done with apparent present ability to impede the normal

breathing or circulation of blood of another. Physical injury or offensive touching is not required.

Note 5: Victim’s status. When the alleged victim is a family member, intimate partner, co-habitant, law enforcement, or servicemember, provide the following instruction:

Knowledge that the victim was a family member, co-habitant, or intimate partner is not an element of the offense.

Accordingly, if the factfinder is convinced beyond a reasonable doubt that (state the name of the alleged victim) was a [family member] [co-habitant] [intimate partner] at the time of the alleged offense(s), the factfinder is advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was a [family member] [co-habitant] [intimate partner] at the time of the alleged offense(s), and it is not a defense to strangulation or suffocation upon a [family member] [co-habitant] [intimate partner] even if the accused reasonably believed that (state the name of the alleged victim) was not a [family member] [co-habitant] [intimate partner].

Note 6: Other instructions.

Instruction 5-4, Accident: Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), may be raised by the evidence.

Notes

1. Letter from Jennifer Bishop Jenkins to U.S. Sentencing Comm’n (Feb. 4, 2014) (on file with The Training Inst. on Strangulation Prevention).
2. Ctr. for Disease Control & Prevention, The National Intimate Partner and Sexual Violence Survey 2 (2010) [hereinafter CDC SURVEY].
3. Jennifer L. Truman & Rachel E. Morgan, U.S. Dep’t of Just., NCJ 244697, Nonfatal Domestic Violence, 2003-2012, at 1 (Apr. 2014).
4. *Id.* at 1 (finding that seventy-six percent of victims were women). Domestic violence generally refers to violence between family members or relatives, to include intimate partners, whereas intimate partner violence is committed by a current or former spouse, boyfriend, or girlfriend. *Id.*
5. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: From a Multistate Case Control Study*, 93 Am. J. Pub. Health 1089, 1089 (2003); see also Mohammad Amin, Asif Islam & Augusto Lopez-Claros, *Absent Laws and Missing Women: Can Domestic Violence Legislation Reduce Female Mortality?* 3 (World Bank Grp., Policy Research Working Paper No. 7622, 2016) (finding that sixty-one percent of female homicides in the United States in 2011 were caused by an intimate

partner). On average, three women are killed every day in the United States at the hands of a current or former intimate partner. See Nat’l Inst. of Just., U.S. Dep’t of Just., NCJ 225722, Practical Implications of Current Domestic Violence Research For Law Enforcement, Prosecutors & Judges 3 (2009) (finding that 1,181 women were killed by intimate partners in 2005 and that “[t]he proportion of female homicide victims killed by an intimate partner is increasing.”).

6. Casey Gwinn & Gael B. Strack, *Introduction and Overview of Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 1, 1 (2013) [hereinafter *Introduction and Overview of Strangulation Cases*].

7. Nancy Glass et al., *Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women*, 35 J. Emergency Med. 329, 329 (2008).

8. CDC Survey, *supra* note 2, at 44-45 (estimating an additional 1.2 million men have been the victim of non-fatal strangulation in their lifetime). Compare 1.1 million women strangled in a twelve month period circa 2010 with the Federal Bureau of Investigation (FBI) reporting just over 1.2 million violent crimes in all of 2010. See *Uniform Crime Report 2010*: <https://ucr.fbi.gov/crime-in-the-u.s./2010/crime-in-the-u.s.2010/tables/10tbl01.xls> (last visited Jan. 18, 2017).

9. See generally Melissa Mack, *He Takes My Breath Away: Why Legislators Must Take Action to Protect Victims of Strangulation*, May 10, 2013, (unpublished manuscript) (on file with The Training Inst. on Strangulation Prevention); Heather Douglas & Robin Fitzgerald, *Strangulation, Domestic Violence and the Legal Response*, 36 Sydney L. Rev. 231 (2014) (discussing legal responses from Canada, United Kingdom, Australia, and New Zealand).

10. **Alabama:** Ala. Code § 13A-6-138; Ala. Code § 13A-6-133. **Alaska:** Alaska Stat. § 11.81.900; Alaska Stat. § 11.41.200; Alaska Stat. § 11.41.210; Alaska Stat. § 11.41.220; Alaska Stat. § 11.41.230. **Arizona:** Ariz. Rev. Stat. § 13-1204. **Arkansas:** Ark. Code Ann. § 5-13-204. **California:** Cal. Penal Code § 273.5; Cal. Penal Code § 13730. **Colorado:** Colo. Rev. Stat. § 18-3-202; Colo. Rev. Stat. § 26-3.1-101. **Connecticut:** Conn. Gen. Stat. § 53A-64AA; Conn. Gen. Stat. § 53A-64BB; Conn. Gen. Stat. § 53A-64CC. **Delaware:** Del. Code Ann. tit. 11, § 607; Del. Code Ann. tit. 11, § 4201(c). **District of Columbia:** D.C. Code § 16-2301. **Florida:** Fla. Stat. Ann. § 784.041; Fla. Stat. Ann. § 39.01. **Georgia:** Ga. Code Ann. § 16-5-19; Ga. Code Ann. § 16-5-21. **Hawaii:** Haw. Rev. Stat. Ann. § 709-906. **Idaho:** Idaho Code § 18-918; Idaho Code § 18-923. **Illinois:** 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; 725 Ill. Comp. Stat. Ann. 5 / § 110-5; 725 Ill. Comp. Stat. Ann. 5 / § 110-5. **Indiana:** Ind. Code Ann. § 35-42-2-9; Ind. Code Ann. § 12-7-2-53.2. **Iowa:** Iowa Code § 708.2A; Iowa Code § 236.12. **Kansas:** K.S.A. § 21-5414. **Louisiana:** La. Stat. Ann. § 14:34.9; La. Stat. Ann. § 14:35.3; La. Stat. Ann. § 40:2405.8. **Maine:** Me. Rev. Stat. Ann. tit. 17-A § 208; Me. Rev. Stat. Ann. tit. 25 § 2803-B. **Maryland:** Md. Code Ann. Crim. L. § 3-303; Md. Code Ann. Crim. L. § 3-305; Md. Code Ann. Crim. L. § 3-307. **Massachusetts:** Mass. Ann. Laws ch. 265, § 16; Mass. Ann. Laws ch. 265 § 15D; Mass. Ann. Laws ch. 12 § 33; Mass. Ann. Laws ch. 6 § 116A. **Michigan:** Mich. Comp. Laws Serv. § 750.91; Mich. Comp. Laws Serv. § 750.84. **Minnesota:** Minn. Stat. Ann. § 609.2247; Minn. Stat. Ann. § 125A.0942; Minn. Stat. Ann. § 125A.0942. **Mississippi:** Miss. Code Ann. § 97-3-7. **Missouri:** Mo. Ann. Stat. § 565.073. **Montana:** MT Code Ann. § 45-5-215. **Nebraska:** Neb. Rev. Stat.

Ann. § 28-310.01; Neb. Rev. Stat. Ann. § 29-4503. **Nevada:** Nev. Rev. Stat. Ann. § 200.481; Nev. Rev. Stat. Ann. § 193.166; Nev. Rev. Stat. Ann. § 200.400; Nev. Rev. Stat. Ann. § 200.485; Nev. Rev. Stat. Ann. § 202.876. **New Hampshire:** N.H. Rev. Stat. Ann. § 631:2. **New Jersey:** N.J.S.2C:12-1. **New Mexico:** N.M. Stat. Ann. § 29-7-4.1; N.M. Stat. Ann. § 30-3-11; N.M. Stat. Ann. § 30-3-16; N.M. Stat. Ann. § 32A-4-2; N.M. Stat. Ann. § 40-13-2. **New York:** N.Y. Penal Law § 121.11; N.Y. Penal Law § 121.12; N.Y. Penal Law § 121.13; N.Y. Crim. Proc. § 530.11. **North Carolina:** N.C. Gen. Stat. § 14-32.4. **North Dakota:** N.D. Cent. Code § 11-19.1-01; N.D. Cent. Code § 12.1-01-04. **Ohio:** Ohio Rev. Code Ann. § 2919.251. **Oklahoma:** Okla. Stat. Ann. tit. 21, § 644; Okla. Stat. Ann. tit. 22, § 58; Okla. Stat. Ann. tit. 22, § 1105. **Oregon:** Or. Rev. Stat. Ann. § 163.187; Or. Rev. Stat. Ann. § 124.105; Or. Rev. Stat. Ann. § 135.703; Or. Rev. Stat. Ann. § 133.055; Or. Rev. Stat. Ann. § 135.951. **Pennsylvania:** 18 Pa. Stat. and Cons. Stat. Ann. § 2718; 23 Pa. Stat. and Cons. Stat. Ann. § 6303. **Rhode Island:** 11 R.I. Gen. Laws § 5-2.3. **South Carolina:** S.C. Code Ann. § 16-25-65; S.C. CODE ANN. § 43-35-10. **South Dakota:** S.D. Codified Laws § 22-18-1.1. **Tennessee:** Tenn. Code Ann. § 39-13-102. **Texas:** Tex. Penal Code Ann. § 22.01. **Utah:** Utah Code Ann. § 76-5-103; Utah Code Ann. § 76-5-109. **Vermont:** Vt. Stat. Ann. tit. 13, § 1021; Vt. Stat. Ann. tit. 13, § 1024. **Virginia:** Va. Code Ann. § 18.2-51.6; Va. Code Ann. § 18.2-57.2; Va. Code Ann. § 18.2-58; Va. Code Ann. § 18.2-58.1. **Washington:** Wash. Rev. Code Ann. § 9A.36.021; Wash. Rev. Code Ann. § 9A.04.110; Wash. Rev. Code Ann. § 9A.16.100; Wash. Rev. Code Ann. § 74.34.035. **West Virginia:** W. Va. Code Ann. § 61-2-9d; W. Va. Code Ann. § 48-27-1002; W. Va. Code Ann. § 61-2-12. **Wisconsin:** Wis. Stat. Ann. § 940.235; Wis. Stat. Ann. § 813.129. **Wyoming:** Wyo. Stat. Ann. § 6-2-509. **Guam:** 9 Guam Code Ann. § 19.80. **Virgin Islands:** V.I. Code Ann. tit. 14, § 296; V.I. Code Ann. tit. 14, § 507. **Federal Statute:** 18 U.S.C. § 1113.

11. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 [hereinafter VAWA 2013] (also addressing suffocation).

12. See generally 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 (2013); Heather Wolfgram, WATCH, *The Impact of Minnesota's Felony Strangulation Law* (2007); David Martin & Emily Elting, *Strong New Laws Target Most Deadly Conduct*, 19 Domestic Violence Rep. 1 (2013); Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 Crim. J. Mag. 32 (2014) [hereinafter *On the Edge of Homicide*]. At least one study has even correlated domestic violence legislation with reduced mortality rates of women. See Amin, *supra* note 5, at 4.

13. U.S. Dep't of Def., Defense Manpower Requirements Report: Fiscal Year 2018, at 2 (2017), http://prhome.defense.gov/Portals/52/Documents/MRA_Docs/TFM/Reports/Final%20FY18%20DMRR%2011Dec2017.pdf (includes active duty, reserve, and National Guard estimates).

14. See U.S. Dep't of Veterans Aff., *Intimate Partner Violence: Prevalence Among U.S. Military Veterans and Active Duty Servicemembers and a Review of Intervention Approaches* 7, 10 (2013) (finding "that [intimate partner violence] victimization and perpetration are prevalent among active duty servicemembers and veterans" and that "[m]ilitary service has unique psychological, social, and environmental factors that may contribute to elevated risk,]" such as: "[m]ultiple deployments, family separation and reintegration, [and]

demanding workloads . . ."); Ctr. for Disease Control & Prevention, *Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men—Comparisons with Women in the U.S. General Population* 39 (2013) (finding that an estimated 4,000 active duty women and 14,000 wives of active duty men had been the victim of severe physical violence by their intimate partner in the twelve months preceding a 2010 survey).

15. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001–5521, 130 Stat. 2000. See discussion *infra* Section IV.B.1.

16. U.S. Dep't of Def., Report on Child Abuse and Neglect and Domestic Abuse in the Military for Fiscal Year 2017, at 35-37 (Apr. 2018) [hereinafter FY 17 FAP Data] (out of 15,657 total reports of spousal abuse).

17. *Id.* at 37. Seventy-four percent of incidents that met criteria for abuse were physical in nature. *Id.* at 32. These statistics are still likely low, because military families face unique disincentives to reporting family violence. Christine Hansen, *A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military*, 6 Domestic Violence Rep. 49, 49-50 (2001).

Women associated with the military are particularly vulnerable due to geographical isolation from family and friends, social isolation within the military culture, residential mobility, financial insecurity and fear of adverse career impact. Abused women are often fearful of reporting incidents due to the lack of confidentiality and privacy; limited victim services; and lack of adequate training and assistance available from [c]ommand, military police, family advocacy programs, medical corps and military justice trial counsel.

Id.

18. U.S. Dep't of Def., Sexual Assault Prevention & Response Off., Department of Defense Annual Report on Sexual Assault in the Military 14 (2016) (nearly nine-thousand fewer reports than all reports of spousal abuse).

19. FY 17 FAP Data, *supra* note 16, at 55 (nine deaths in FY 2017); U.S. Dep't of Def., Report on Child Abuse and Neglect and Domestic Abuse in the Military for Fiscal Year 2016, at 51 (May 2017) (nine deaths in FY 2016); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2015 Data 16 (fourteen deaths in FY 2015); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2014 Data 24 (28 Aug. 2015) (eleven deaths in FY 2014); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2013 Data 27 (20 May 2014) (sixteen deaths in FY 2013); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2012 Data 18 (28 June 2013) (seventeen deaths in FY 2012); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2011 Data 21 (29 May 2012) (eighteen deaths in FY 2011).

20. Colonel (Ret.) James E. McCarroll et al., *Characteristics of Domestic Violence Incidents Reported at*

the Scene by Volunteer Victim Advocates, 173 Mil. Med. 865, 867 (2008) (results limited to families living on base). These figures equate to 489 incidents of strangulation on a single installation during this time period. See *id.* In an additional 276 cases, victims were unwilling to speak with advocates at all. *Id.* at 869.

21. See Kathryn Laughon, Nancy Glass, & Claude Worrell, *Review and Analysis of Laws Related to Strangulation in 50 States*, 33 Evaluation Rev. 358, 364 (2009).

22. William Green, *Medical Evidence in Non-Fatal Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 53, 55 (2013).

23. Gael B. Strack et al., *How to Improve Your Investigation and Prosecution of Strangulation*, Nat'l Ctr. on Domestic & Sexual Violence 3 (May 1999), http://www.ncdsv.org/images/strangulation_article.pdf. Compare eleven pounds of pressure to block blood flow to the brain with the twelve pounds of pressure to fire a double action shot from a Beretta M9 pistol. David Tong, *A Fair and Balanced Analysis of the M9 Service Pistol*, http://www.chuckhawks.com/beretta_M9_pistol.htm (last visited Jan. 15, 2017).

24. Gael B. Strack & Michael Agnew, *Investigation of Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases s 21, 21 (2013) [hereinafter *Investigation of Strangulation Cases*].

25. See Green, *supra* note 22, at 56-58.

26. *Id.* at 59; see also Lee Wilbur et al., *Survey Results of Women Who Have Been Strangled While in an Abusive Relationship*, 21 J. Emergency Med. 297, 298 (2001) (explaining that psychosis, progressive dementia, and post-traumatic stress disorder are among the possible psychological effects of strangulation).

27. Allison Turkel, "And Then He Choked Me": *Understanding and Investigating Strangulation*, 2 Fam. & Intimate Partner Violence Q. 339, 339 (2010). Victims commonly, yet incorrectly, refer to their near-death experiences as "choking," which, in contrast, refers to an object impeding the airway (i.e. food) and is generally accidental. See *id.*; *On the Edge of Homicide*, *supra* note 12, at 33 (2014). Similarly, many practitioners still use the term "attempted strangulation," which fails to acknowledge that neither unconsciousness, nor death are required to complete the crime. Casey Gwinn, *Strangulation and the Law*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 5, 13 (2013) [hereinafter *Strangulation and the Law*].

28. *Introduction and Overview of Strangulation Cases*, *supra* note 6, at 1; *Strangulation and the Law*, *supra* note 27, at 17.

29. *Introduction and Overview of Strangulation Cases*, *supra* note 6, at 2.

30. *Investigation of Strangulation Cases*, *supra* note 24, at 21; see, e.g., Melissa Jeltsen, *A Legal Loophole May Have Cost This Woman Her Life: When States Fail to Recognize Strangulation as a Precursor to Domestic Homicide*, *The Results Can Be Fatal*, The Huffington Post (Oct. 9, 2015 08:01 AM EDT), http://www.huffingtonpost.com/entry/ohio-strangulation-felony_us_56153530e4b0fad1591a36bf.

31. *On the Edge of Homicide*, *supra* note 12, at 33. This study also encouraged the founding of The Training Institute on Strangulation Prevention by former City Attorney of San Diego Casey Gwinn and former prosecutor Gael Strack. See *Our Team*, Training Institute on Strangulation Prevention, <https://www.strangulation-traininginstitute.com/about-us/our-team/> (last visited Feb. 19, 2017).
32. Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. Emergency Med. 303, 306 (2001) [hereinafter *A Review of 300 Attempted Strangulation Cases*]. Notably, eighteen percent of suspects studied were servicemembers. *Id.* at 304.
33. *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 308.
34. Glass, *supra* note 7, at 330.
35. *Id.* at 334.
36. *Id.* at 329. See also Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. Just. J. 14, 17 (2003) (finding that women who were a victim to non-fatal strangulation were in excess of 900 percent more likely to be the victim of homicide).
37. See Laughon, *supra* note 21, at 360.
38. *On the Edge of Homicide*, *supra* note 12, at 33; *A Review of 300 Attempted Strangulation Cases*, *supra* note 31, at 308; see generally Wilbur, *supra* note 26 (discussing the physical, neurological, and psychological injuries associated with strangulation).
39. Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-fatal Intimate Partner Strangulation Assaults*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, *California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases* Appx. 115, 116 (2013).
40. See *Investigation of Strangulation Cases*, *supra* note 24, at 30 ("Victims of domestic violence may recant, minimize, or even completely change their story by the time the case goes to trial. If that happens, it will be the evidence gathered by investigators that tells the truth."); Bridgette P. Volochinsky, *Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, *California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases* Appx. 8, 9 (2013).
41. *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 308 ("The combination of limited visible injuries, a poor understanding of the medical significance of symptoms, the victim's failure to report symptoms, and the victim's unwillingness to seek medical attention may have caused police and prosecutors to unintentionally minimize or trivialize the seriousness of the actual violence.").
42. Laughon, *supra* note 21, at 360.
43. See Verdi, *supra* note 12, at 268 ("Since the early 2000s numerous states have passed legislation making domestic violence strangulation a felony.").
44. National Defense Authorization Act of 2000, Pub. L. No. 106-65, §591, 113 Stat. 512, 639.
45. Memorandum from Defense Task Force on Domestic Violence to Sec'y of Defense, subject: Domestic Violence 39 (28 Feb. 2001).
46. See generally Laughon, *supra* note 21.
47. *Id.* at 358.
48. Casey Gwinn & Gael Strack, *Why Strangulation Should be a Felony*, Strangulation Training Inst. 2 (Jan. 2011), <http://www.strangulationtraininginstitute.com/file-library/strangulation-07-strangulation-white-paper-nfca-01-10-pdf/> [hereinafter *Why Strangulation Should be a Felony*].
49. Director, Women's Human Rights Program, *Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union*, UN Doc. EGM/GPLVAW/2008/EP.01, at 11-12 (Jun. 17, 2008). Several nations have taken similar steps to study and codify strangulation as a felony-level offense. See, e.g., Douglas, *supra* note 9; Law Commission *The Prosecution of Offences* (NZLC R138, 2016) (reporting on the need for a specific strangulation offense in New Zealand); Legal Affairs and Community Safety Committee, 55th Parliament of Queensland, *Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015*, Report No. 23 (2016) (Austl.) (recommending legislation creating a specific strangulation offense).
50. Verdi, *supra* note 12, at 268.
51. See *supra* note 10. At the time of this writing, Kentucky and Ohio do not have strangulation-specific offenses, although Ohio does recognize strangulation in bail determinations hearings and is pending legislation to expand felonious assault to include strangulation. Ohio Rev. Code Ann. § 2919.251 (LexisNexis 2016); S.B. 207, 132nd Gen. Assemb.
52. See *supra* note 10. Among these fifty-three jurisdictions, legislation can be divided into three categories: (1) states that enacted a separate offense for strangulation; (2) states that amended existing offenses to address strangulation; and (3) states that have enacted some limited authority over strangulation offenses. *Id.*
53. VAWA 2013, *supra* note 11, at 124 (amending 18 U.S.C §113).
54. *Id.* Ten years' confinement is consistent with the maximum punishment for assault with a dangerous weapon and assault with serious bodily injury. 18 U.S.C.A. § 113 (West 2016). The Department of Justice noted "[t]here are clear reasons why strangulation assaults, particularly in an intimate partner relationship should be a separate felony offense and taken extremely seriously at sentencing" and "urge[d] the commission to make the enhancement for strangulation or suffocation five offense levels." U.S. Dep't of Just., U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 9, 11 (Mar. 6, 2014).
55. VAWA 2013, *supra* note 11, at 124. The change to 18 U.S.C. § 113 was enacted as part of Title IX, Safety for Indian Women. *Id.*; see also, 159 Cong. Rec. S45 (daily ed. Jan. 22, 2013) (statement of Sen. Reid) ("Congress should . . . ensure that all victims of domestic or sexual violence, including Native American women, gay and lesbian victims, and battered immigrant women, receive the support and protections provided by VAWA."); 159 Cong. Rec. S157 (daily ed. Jan. 22, 2013) (statement of Sen. Leahy) (noting the need for assisting tribal communities, lesbian, gay, bisexual, transsexual (LGBT) communities, and immigrant victims).
56. See generally Martin, *supra* note 12.
57. Stacey Bederka, New York State Division of Criminal Justice Services, Arrests and Arraignments Involving Strangulation Offenses Nov. 11, 2010 – Feb. 22, 2011, at 1 (Apr. 2011). Although eighty-three percent of offenders were charged with misdemeanors, "perpetrators who had previously avoided any punishment because of a lack of visible injuries were now facing criminal sanctions . . ." *On the Edge of Homicide*, *supra* note 12, at 35.
58. Andrew Wheeler, New York State Division of Criminal Justice Services, Arrests and Arraignments Involving Strangulation Offenses Nov. 11, 2010 – June 30, 2012, at 1 (Sept. 2012).
59. Adriana Fernandez-Lanier, New York State Division of Criminal Justice Services, Domestic Homicide in New York State 2015, at 11 (July 2016).
60. Wolfgram, *supra* note 12, at 28-29.
61. *Id.* at 7.
62. Marna L. Anderson, WATCH, WATCH Report Part II: The Impact of Minnesota's Felony Strangulation law 5 (2009) (emphasis added). Convictions for lesser qualifying domestic violence crimes also saw a seven percent increase. *Id.*
63. Wolfgram, *supra* note 13, at 6.
64. See, e.g., Melissa Gomez, *Training Teaches Law Vegas Law Enforcement, Medical Staff to Spot Signs of Strangulation* Las Vegas Rev. J. (Aug. 10, 2016, 5:30 AM), <http://www.reviewjournal.com/view/training-teaches-las-vegas-law-enforcement-medical-staff-spot-signs-strangulation> (reporting that Las Vegas law enforcement officers and medical personnel attended training after receiving approximately 700,000 reports of strangulation in 2014); Heather Mongilio, *Authorities Lead Strangulation Investigation Training*, Carroll Cty Times (June 22, 2016, 9:55 PM), <http://www.carrollcountytimes.com/news/crime/ph-cc-sa-strangulation-training-20160622-story.html> (reporting on the local State's Attorney's Office and police department leading three training sessions on investigating and prosecuting strangulation).
65. See *supra* note 10 (Maine, Maryland, and Massachusetts, Louisiana, and New Mexico).
66. See Domestic Violence Strangulation Project, *The Burden of Proof: Strangulation and Suffocation Cases*, at slides 16-19 (unpublished PowerPoint presentation), https://www.azmag.gov/Documents/DVPEP_2012-11-02_Burden-of-Proof_Strangulation-and-Suffocation-Cases.pdf (last visited Jan. 16, 2017). See also Alexa N. D'Angelo, *Maricopa County domestic-violence deaths drop after policy change*, azcentral.com (Mar. 2, 2015 3:18 PM), <http://www.azcentral.com/story/news/local/phoenix/2015/03/02/county-attorney-strangulation-protocol/24001897/>.
67. Domestic Violence Strangulation Project, *supra* note 66, at slide 18.
68. D'Angelo, *supra* note 66.
69. Wolfgram, *supra* note 12, at 5.
70. *Id.* at 6.
71. See Laughon, *supra* note 21, at 360 (discussing the difficulties in charging assault or attempted murder).
72. See e.g., Del. Code Ann. tit. 11, § 607; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; 725 Ill. Comp. Stat. Ann. 5 / § 110-5; Mass. Ann. Laws ch. 265 § 15D; Miss. Code Ann. § 97-3-7; Neb. Rev. Stat. Ann. § 28-310.01; Ohio Rev. Code Ann. § 2919.251; Okla. Stat. Ann. tit. 22, § 1105; 18 Pa. Stat. and Cons. Stat. Ann. § 2718; Tex. Penal Code Ann. § 22.01; Wis. Stat. Ann. § 940.235. See also Fed. R. Evid. 609 (permitting evidence of prior convictions).

73. Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 Fed. Sent'g Rep. 220, 221 (2003). A servicemember is subject to either a special court-martial—akin to misdemeanor court because the court is limited to awarding twelve months confinement—or a general court-martial—more often associated with felonious offenses because the court can award the maximum punishment available for the offense. See The Judge Advocate Gen.'s Legal Ctr. & Sch., Criminal Law Deskbook: Practicing Military Justice 1-7-8 (2015) (explaining that general courts-martial also procedurally require a pre-trial investigation, similar to a grand jury).
74. See Freedus & Fidell, *supra* note 73, at 221.
75. See 18 U.S.C. §3559(a) (2012) (defining a felony as any offense that carries a maximum sentence of more than one year in confinement).
76. See Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military State Criminal Record Reporting*, 1995 Army Law. 3, 12 (1995) (arguing that “[b]ecause an offender’s prior court-martial conviction can have an impact on the disposition of a pending civilian offense, the Army has an obligation to be complete and accurate in reporting court-martial convictions.”). See also U.S. Dep’t of Def., Instr. 5505.11, Fingerprint Card and Final Disposition Report Submission Requirements (C1, 31 Oct. 2014) (requiring DoD components to report the final disposition of cases to the FBI).
77. See, e.g., Del. Code Ann. tit. 11, § 607; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; Mass. Ann. Laws ch. 265 § 15D; Miss. Code Ann. § 97-3-7; Neb. Rev. Stat. Ann. § 28-310.01; 18 Pa. Stat. and Cons. Stat. Ann. § 2718; Tex. Penal Code Ann. § 22.01; Wis. Stat. Ann. § 940.235.
78. See generally Hargis, *supra* note 76. See also Legal Affairs and Community Safety Committee, *supra* note 49, at 9 (“A specific strangulation [offense] will ensure that strangulation appears clearly on the criminal record of the accused and alert social services and future sentencing judges to the dangerous level of the offender’s domestic violence history.”).
79. See Manual for Courts-Martial, United States, pt. IV, ¶ 54(e)(8)(b) (2016) [hereinafter MCM].
80. 10 U.S.C. §928(b) (2012).
81. *United States v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993) (holding that having unprotected sexual intercourse with an unknowing partner, while infected with human immunodeficiency virus (HIV), was an assault with a means likely to cause death or grievous bodily injury), *overruled by United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015).
82. *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015) (reversing an aggravated assault conviction for factual insufficiency where the accused’s likelihood of transmitting HIV to an unknowing partner during unprotected sex was too low to be “likely” to produce death or grievous bodily harm). The court determined that a “plain English definition” of the word “likely” required this heightened standard. *Id.* at 63, 66.
83. See *id.* at 66.
84. See Gerald W. Fineman, *Prosecuting Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 39, 48 (2013) (discussing common misperceptions jurors have about strangulation cases).
85. Military Justice Act of 2016, *supra* note 15.
86. *Id.* § 5441.
87. *Id.* Currently, the Manual for Courts-Martial states: “A weapon is dangerous when used in a manner likely to produce death or grievous bodily harm.” MCM, *supra* note 79, pt. IV, ¶54(c)(4)(a)(1).
88. Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Mil. Just. Rev. Grp. 937-40 (Dec. 22, 2015) (recommending conformity with 18 U.S.C. §113(a)(3)).
89. See *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 306; Laughon, *supra* note 21, at 360.
90. See U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook 738 (10 Sept. 2014) [hereinafter Military Judges’ Benchbook].
91. UCMJ art. 118 (2016).
92. See Laughon, *supra* note 21, at 360.
93. See *id.*
94. See *Strangulation and the Law*, *supra* note 27, at 5 (“Many domestic violence offenders . . . do not strangle their partners to kill them; they strangle them to let them know they can kill them—anytime they wish.”).
95. See *id.* at 8 (“Jurors expect to see visible injuries.”); Fineman, *supra* note 84, at 48.
96. See Laughon, *supra* note 21, at 360 (“When injury is caused by a person’s hands, however, as is often the case in strangulation, the judge or jury has more difficulty inferring any specific intent.”).
97. UCMJ art. 134 (2016)
98. *Id.*; MCM, *supra* note 79, pt. IV, ¶ 60(c).
99. 18 U.S.C. §13 (2012) (meaning the state crime is already a crime under a federal statute).
100. See MCM, *supra* note 79, pt. IV, ¶ 60(c)(4).
101. Local application means that the specific offense is only an offense when committed where the law applies, whereas unlimited application means that the offense is an offense regardless of where it is committed. *Id.* Notably, the recent passage of the Military Justice Act of 2016 expands federal jurisdiction of all federal offenses to worldwide applicability for service members. Military Justice Act of 2016, *supra* note 15, § 5451.
102. MCM, *supra* note 79, pt. IV, ¶ 60(c)(4).
103. 18 U.S.C.A. § 113 (West 2016).
104. States vary widely in how they have chosen to define and punish strangulation offenses, and some states have no strangulation-specific law at all. See *supra* note 10. Currently Kentucky and Ohio do not have any strangulation-specific offense. The District of Columbia limits application to child abuse cases, and Maryland limits application to sexual offenses. See *id.*
105. *Why Strangulation Should be a Felony*, *supra* note 48, at 5 (“Strangulation violence is a felony under virtually any assault statute in the United States. A specialized strangulation statute will not create a new crime, it will simply provide clear elements of an offense for existing lethal force being used consistently by violent and abusive intimate partners . . .”).
106. See *id.* “Strong laws make a difference. How seriously a crime of domestic violence is defined, how seriously it is sentenced, and what statistics are kept regarding the frequency or cycle of domestic violence makes a difference on many levels—to victims, offenders, police, and to the community at large.” Martin & Elting, *supra* note 12, at 12.
107. *Strangulation and the Law*, *supra* note 27, at 14.
108. *Id.* at 16.
109. See *infra* App. A, B (definitions provided within).
110. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 818 (1993) (“Domestic violence statutes must offer coverage to a wide range of extended family relationships to fully reflect the reality of American family life.”); Laughon, *supra* note 20, at 365 (recommending “all states . . . use language that includes all potential victims”).
111. See Military Judges’ Benchbook, *supra* note 90, at 738.
112. See Laughon, *supra* note 21, at 365.
113. “Low sentences feed into denial.” Wolfgram, *supra* note 12, at 12 (quoting a probation officer who felt offenders were not adequately punished for their offenses with merely sixty or ninety days in confinement).
114. 18 U.S.C.A. § 113 (West 2016).
115. See discussion *supra* Section IV.B.III.
116. See *supra* note 20 and accompanying text.
117. Glass, *supra* note 7, at 329. See also Legal Affairs and Community Safety Committee, *supra* note 48, at 10 (“While strangulation is arguably covered already by common assault, an assault charge underrepresents the seriousness of non-fatal strangulation given the high risk and danger associated with it.”).
118. MCM, *supra* note 79, at Appx. 12.
119. *Strangulation and the Law*, *supra* note 27, at 17.
120. See Amin, Islam & Lopez-Claros, *supra* note 5, at 6 (“Furthermore, the presence of domestic violence legislation may legally bind governments to be more responsive to cases of domestic violence, possibly improving accountability and increasing provision of public services that both deter domestic violence and assist victims . . .”).
121. See Mack, *supra* note 9, at 2 (“Without an express statute, there is a lack of awareness of the crime, a lack of charging and prosecution of the crime, and therefore a lack of offender accountability.”).
122. Organizations within the DoD already participate in training put on by The Training Institute on Strangulation Prevention. Email from Gael Strack, Chief Executive Officer, The Training Institute on Strangulation Prevention, to author (Jan. 29, 2017, 6:59PM EST) (on file with author). The Institute is a Department of Justice-funded technical assistance organization, and since its founding has conducted training in every state and sixteen countries, training, on average, five-to-ten thousand practitioners annually. *Id.* Continued utilization of this program on a broader spectrum would assist in ensuring the provision of necessary training and guidance in investigating and prosecuting these offenses.
123. Wolfgram, *supra* note 12, at 3.