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Hannah Bondurant

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**ADDRESSING DOMESTIC VIOLENCE OF A SEXUAL NATURE BETWEEN
INTIMATE PARTNERS – A LEGISLATIVE SOLUTION TO AN
EVIDENTIARY PROBLEM**

Hannah Bondurant*

INTRODUCTION

A difficult aspect of prosecuting any instance of rape or sexual assault is showing that the victim did not consent.¹ Showing a lack of consent becomes even more difficult for prosecutors when the victim and the defendant are in a relationship.² When violence occurs between intimate partners, it often takes a physical, sexual, and psychological nature, which is defined as domestic violence.³ When a victim comes forward with evidence of sexual abuse as part of a domestic violence relationship, showing that the victim did not consent can be difficult due to misunderstandings regarding consent from juries and even from the victim herself.⁴ Because these cases pose special problems and can be more difficult to prosecute than traditional presentations of rape,

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* J.D. Candidate, 2018, University of Maryland Francis King Carey School of Law. I would like to thank the editors and staff of the *Maryland Journal of Race, Religion, Gender, and Class* for their hard work. This Comment would not be possible without the insights of Judge Videtta Brown and Professor Leigh Goodmark. I also like to thank my parents and friends for their unending support and love throughout this process.

¹ Jennifer Gentile Long et al., *Establishing Penetration in Sexual Assault Cases*, AEQUITAS 1, 1 (January 2015), <http://www.aequitasresource.org/Establishing-Penetration-in-Sexual-Assault-Cases-SIB24.pdf> (“Challenges to identification, consent, and attacks on victim credibility remain the most common defense tactics in any sexual violence crime.”).

² Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1332 (2005).

³ Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN’S J. LEGAL COMMENT. 535, 545–46 (2010) (recounting a victim’s story of violent marital rape leaving her feeling humiliated and betrayed, where she felt she owed her husband sex).

⁴ Little, *supra* note 2, at 1333 (noting that a common reaction of jurors to acquaintance rape is that the victim “got what she deserved”); Jennifer Youngs, *Domestic Violence and the Criminal Law: Reconceptualising Reform*, 79 J. CRIM. L. 55, 66 (2015) (finding that victims struggle to recognize the “nature of the wrong” committed against them by their rapist); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 369–70 (1996) (“[I]nternal and external pressures and prejudices further discourage [] victims from fully cooperating in the arrests and prosecutions of their batterers.”).

searching for a solution for these victims should be a priority in studying criminal law reform for rape and sexual assault.⁵

Maryland currently has no additional protections for prosecuting domestic violence aside from making protective orders more attainable, in contrast to at least twenty-three other states that have at least made domestic abuse a misdemeanor.⁶ Given the state's relative lack of additional protections for victims of domestic violence, and less than half of states ranking higher as to the likelihood that a woman will be killed by a man,⁷ this work will address what approach Maryland should take in regards to addressing sexual abuse as part of a pattern of domestic violence within its criminal code.

Women's rights advocates and scholars have proposed that domestic violence be its own criminal charge in state codes.⁸ Recently, an extensive domestic violence criminal statute was proposed in the United Kingdom, giving advocates of such a provision something to draw on when promoting similar bills in the United States.⁹ Domestic violence as a stand-alone criminal charge addresses the unique nature

⁵ Sack, *supra* note 3, at 548 (also noting that there is evidence that domestic violence abusers who rape their partners are among the most dangerous batterers).

⁶ *State Statutes: Misdemeanor Crimes of Domestic Violence*, NAT'L. CTR. ON PROT. ORD. & FULL FAITH & CREDIT (revised 2015), <http://www.bwjp.org/assets/documents/pdfs/ncpoffc-state-statutes-misdemeanor-crimes-of-domesti.pdf>.

⁷ Melissa Jeltsen, *The States Where Women are Most Likely to be Murdered by Men*, HUFFINGTON POST (Sept. 15, 2015), http://www.huffingtonpost.com/entry/murder-women-report_us_55f85315e4b0c2077efc3713 ("More than 1,600 women in the U.S. were murdered by men in 2013.").

⁸ Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 556 (2007); see Megan Bumb, *Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes are the True Threats to Prosecuting Perpetrators of Gender-Based Violence*, 82 BROOK. L. REV. 917, 918 (2017) (also adopting Burke's proposed domestic violence statute); see also Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1123 (2009). ("[C]riminal justice scholars recently have argued to expand the criminal law's definition of domestic violence to incorporate such dynamics.").

⁹ Domestic Violence (Legal Framework) Bill 2013-14, HC Bill (UK), <https://services.parliament.uk/bills/201314/domesticviolencelegalframework.html> Youngs, *supra* note 4, at 66 ("How, then, should the offense [of domestic violence] be formulated? The Domestic Violence (Legal Framework) Bill 2013-14 offered one proposal. . . .").

of sexual violence between intimate partners.¹⁰ In designing a criminal charge from the ground up, a definition of consent could be constructed that provides for the nature of the violence between the parties and the nature of consent between intimate partners.¹¹ Additionally, a domestic violence criminal offense could include the behaviors that are unique to a domestic violence relationship, and that make sexual abuse within those relationships so difficult to prosecute.¹²

In Part I, this Comment will examine the problems that exist currently with showing a lack of consent for victims of domestic abuse of a sexual nature more generally.¹³ Part II will be a survey of the Maryland law in order to identify gaps that should be filled in order to better assist survivors of sexually based domestic violence.¹⁴ Part III will argue that a domestic violence felony charge is the appropriate method for addressing the unique challenges in prosecuting sexual assault between intimate partners as an alternative to affirmative consent.¹⁵

I. CONSENT IS A CRUCIAL AND DIFFICULT ASPECT OF PROSECUTING DOMESTIC VIOLENCE RELATED SEXUAL ASSAULT.

Domestic violence is defined as “a pattern of coercive control, encompassing acts of physical, sexual, psychological or emotional abuse,”¹⁶ which includes rape and sexual assault as forms of physical, sexual violence.¹⁷ Domestic violence frequently includes patterns of

¹⁰ Youngs, *supra* note 4, at 66 (finding that a specific offense would help victims suffering from psychological abuse identify their situation as one of domestic violence).

¹¹ *See infra* Part IV.

¹² *See infra* Part IV.

¹³ *See infra* Part I.

¹⁴ *See infra* Part II.

¹⁵ *See infra* Part III.

¹⁶ Youngs, *supra* note 4, at 66.

¹⁷ For the purposes of this inquiry, the focus is on sexual violence between intimate partners (as opposed to married couples exclusively) consistent with patterns of domestic violence. I will be using gender-neutral language wherever possible, as domestic violence occurs between both same-sex and heterosexual couples. However, I will not be addressing the differences in the law between same-sex and heterosexual couples when addressing domestic violence. Additionally, the terms “sexual violence” or “sexual abuse” will be utilized to encompass rape and sexual

both sexual and other forms of physical violence as part of a pattern of abuse and control.¹⁸ The problem of sexual abuse between intimate partners may sound rare, but the National Coalition Against Domestic Violence estimates that between “14% and 25% of women are sexually assaulted by intimate partners during their relationship.”¹⁹ Over half of these women were sexually assaulted multiple times by their partner.²⁰ These victims are particularly vulnerable following a violent incident due to the nature of the abuse and its cyclic nature.²¹ Victims are often at their most vulnerable immediately following a violent outburst, which makes it difficult or unthinkable for many victims to seek help.²²

The sexual abuse dimension of domestic violence requires special attention as opposed to other elements because it leaves less visible evidence, including a lack of witnesses and physical evidence.²³ Battery often leaves visible bruises, whereas sexual violence may not leave such apparent signs.²⁴ Most crucially, proving sexual abuse requires a showing that the victim did not consent, which separates this aspect of domestic violence from the others.²⁵ When an abuser hits a victim, lack of consent is more readily assumed, whereas consent is the crucial element of showing whether sexual abuse has occurred.²⁶

assault, rather than differentiating them throughout this discussion. Non-consensual pornography and cyber abuse have also been excluded from the present discussion in order to create a more focused argument.

¹⁸ *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAM, <http://www.theduluthmodel.org/pdf/PowerandControl.pdf> (last visited Dec. 29, 2017). This Comment does not address any criticism of the model and uses it only for understanding the elements of domestic violence, if not the patterns they occur in.

¹⁹ *Facts about Domestic Violence and Sexual Abuse*, NAT'L. COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ncadv.org/files/Domestic%20Violence%20and%20Sexual%20Abuse%20NCADV.pdf> (last visited Dec. 29, 2017).

²⁰ *Id.*

²¹ *Id.*

²² De Sanctis, *supra* note 4, at 369–70 (finding that threats from the abuser as well as internal and external pressures discourage victims from cooperating with the arrests and prosecutions of their batterers).

²³ *Id.* at 371.

²⁴ *Id.*

²⁵ *Id.* at 383.

²⁶ Little, *supra* note 2, at 1322 (“As is common in rape charges, neither party denies that the sex took place. Instead the argument is based on whether the woman consented to it.”).

Proving a lack of consent between intimate partners is particularly difficult.²⁷ Because these acts of sexual violence occur between parties who are known to one another, they belong to the category of rape known as acquaintance rape.²⁸ There are varying types of acquaintance rape, which can range in the familiarity of the parties from date rape to marital rape.²⁹ Like many forms of acquaintance rape, however, showing a lack of consent for sexual abuse consistent with domestic violence can be especially difficult due to misconceptions regarding the nature of consent between parties in a relationship.³⁰

Aside from the lack of witnesses and lack of physical marks or evidence on the victim, there are sociological factors involved in prosecuting acquaintance rape generally that make it more difficult.³¹ Unlike stranger rape, “the jury has less reason to believe that the sex was non-consensual.”³² Jurors analyzing interpersonal rape often feel that the “victim got what she deserved.”³³ Culturally, there is a conception of rape as a brutal, physical assault by a stranger in a dark alley, which is also reflected in our laws.³⁴ Therefore, when a woman comes forward with a story that does not line up with that conception, juries are likely to discount the victim’s trauma, making it difficult to prove an absence of consent.³⁵

Additionally, jurors are prone to assume that the less appalling of the two scenarios presented is the one that is true.³⁶ It is easier for a juror to believe that a woman is lying or that she provoked the Defendant somehow than to believe beyond a reasonable doubt that this form of

²⁷ Sack, *supra* note 3, at 554 (noting that historical and societal understandings include automatic consent to sexual intercourse within marriages).

²⁸ Little, *supra* note 2, at 1331–32 (finding “that the vast majority of rapists are men known to their female victims”).

²⁹ *Id.* (“[M]any young males do not view a refusal to respect a woman’s expressed limits as being rape.”).

³⁰ *Id.* at 1333

³¹ *Id.* at 1332–33 (finding that with acquaintance rape, there are a lack of witnesses and lack of physical marks to indicate the woman resisted, therefore requiring the case to turn on the credibility of the parties).

³² *Id.* at 1333.

³³ Little, *supra* note 2, at 1333 (citing to Harry Kalven & Hans Zeisel, *THE AMERICAN JURY* 278–79 (1966)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ De Sanctis, *supra* note 4, at 371.

violence perceived by jurors to be rare happened.³⁷ Some male jurors would rather believe the victim is lying and some female jurors would rather mentally distance themselves from the victim out of resistance to imagining their own relationships turning violent.³⁸ The prosecution must combat this type of thinking, which can be very difficult.

With marital or intimate partner sexual violence, the problems with showing a lack of consent also stem from victim misconceptions or resistance.³⁹ At the heart of intimate partner sexual abuse is a pattern of abuse and cycles of violence—physical, sexual, or both.⁴⁰ The vulnerability of victims immediately following a violent outburst, combined with the extensive free time available to an abuser in jail awaiting trial, means that victims are often manipulated and seduced by their abusers during this period.⁴¹ Abusers will make numerous phone calls, write letters, and contact the victim's loved ones in an attempt to persuade the victim to recant and help the abuser in his defense.⁴² Because of this manipulation and the vulnerability of the victim during this time, victims will often recant their initial statements regarding the culpability of the abuser.⁴³ Showing a lack of consent with an uncooperative victim poses problems unique to these cases that are difficult to overcome given the current state of Maryland law regarding sexual assault and rape, discussed *infra*.⁴⁴

II. STATE OF MARYLAND LAW REGARDING CONSENT IN INTIMATE PARTNER SEXUAL ABUSE AND DOMESTIC VIOLENCE MORE GENERALLY

A. *The Maryland Criminal Code*

Currently, under Maryland law domestic violence of any form has to be prosecuted by dicing apart the underlying acts of violence and

³⁷ *Id.*

³⁸ *Id.* at 371–72.

³⁹ *Id.* at 367–68.

⁴⁰ Burke, *supra* note 8, at 555–56; De Sanctis, *supra* note 4, at 369–70.

⁴¹ Lenore E. Walker, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 44–45 (1989) (“What she is likely to feel most strongly [after a violent outburst] is a sense of being psychologically trapped.”).

⁴² De Sanctis, *supra* note 4, at 369–70.

⁴³ *Id.*

⁴⁴ See *infra* Part II.

charging them individually.⁴⁵ For example, a defendant who shoots his significant other through the arm would be charged with attempted murder, various degrees assault, and reckless endangerment.⁴⁶ When sexual abuse occurs as part of the domestic violence, which is common, the sexual abuse has to be charged as any other instance of rape or sexual assault would be, despite the unique nature of the assault.⁴⁷

The relevant crimes that sexual abuse related to domestic violence could be divided into for the purposes of prosecution include rape in the first and second degree, sexual offense in the first and second degrees, attempted rape in the first and second degrees, and attempted sexual offense in the first and second degrees.⁴⁸ Maryland law defines first-degree rape as, “vaginal intercourse with another by force, or the threat of force, without the consent of the other.”⁴⁹ Additionally, a person may not,

(i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon; suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime; threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or commit the crime while aided and abetted by another.⁵⁰

Rape in the second degree includes situations in which a person may not engage in vaginal intercourse with another: substantial cognitive impairment; mental incapacitation; and physical helplessness that is known to the abuser.⁵¹ Sexual offense takes the definition of rape and expands it to include all sexual acts, not vaginal intercourse alone.⁵²

⁴⁵ Burke, *supra* note 8, at 558 (“[D]omestic violence is usually prosecuted using general criminal statutes such as assault, harassment, or menacing.”).

⁴⁶ Michele Lambert, Assistant State’s Att’y. for Md., Domestic Violence Lecture at the U. of Md. Francis King Carey Sch. of L. (Oct. 2016).

⁴⁷ Burke, *supra* note 8, at 558.

⁴⁸ MD. CODE ANN., CRIM. LAW §§ 3-301–12.

⁴⁹ MD. CODE ANN., CRIM. LAW § 3-303.

⁵⁰ *Id.*

⁵¹ MD CODE ANN., CRIM. LAW § 3-304.

⁵² MD CODE ANN., CRIM. LAW § 3-305.

Second-degree sexual offense tracks second-degree rape in the same way.⁵³ Attempted rape and attempted sexual offense in both degrees make attempting the above-described crimes illegal.⁵⁴

As the law stands, these crimes do not exactly track the nature of sexual abuse within a domestic violence relationship. First, none of these charges capture the methods used by abusers to obtain dominance during a violent outburst. The abuse that occurs during the lead up to a violent outburst is crucial to understanding that consent was lacking during the violent act.⁵⁵ The wording of the statutes currently is readily applicable to traditional understandings of rape or sexual assault, but not to situations where the threat of violence or physical force does not coincide temporally with the act of sexual violence. Threats and verbal abuse occur between the abuser and the victim almost constantly.⁵⁶ Victims often feel that they are walking on eggshells and will do anything to make the abuse stop and keep the abuser content.⁵⁷

Submitting to sexual conduct with the abuser at a time when he has not directly threatened the victim immediately prior to the act does not mean that she affirmatively wanted to engage in the contact.⁵⁸ It was still submitted to due to the abusive nature of the relationship.⁵⁹ The current state of Maryland law does not expressly provide for that temporal disconnect, making it difficult for jurors to comprehend and easy for defense attorneys to call into question whether the victim truly felt threatened. Such conduct can be painted as a moment of reconciliation between the couple, and not an attempt to placate a violent and demeaning abuser. On that same note, none of these charges as written address the misconceptions jurors may have regarding consent between intimate partners. By not including the forms of coercion or subjugation that occur between the abuser and victim

⁵³ MD CODE ANN., CRIM. LAW § 3-306.

⁵⁴ MD CODE ANN., CRIM. LAW §§ 3-309–12.

⁵⁵ Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2120 (1993) (explaining that an abuser uses normal gestures to signify that abuse is imminent, such as a nose scratch or a change in facial expressions).

⁵⁶ Andrew King-Ries, *Responding: Two New Solutions: True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence*, 23 ST. LOUIS U. PUB. L. REV. 313, 329–30 (2004).

⁵⁷ Fischer et al., *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

leading up to the violent outburst, jurors may not understand that an individual could submit, which appears to be consent, but only in an attempt to delay or end the on-going abuse.⁶⁰

Second, these statutes are “incident-focused,” like much of the criminal law, and do not take into account on-going or long term illicit behavior.⁶¹ Reducing domestic violence to an isolated incident is not reflective of the true nature of the abuse.⁶² The crime of domestic violence, however, does not operate the way other crimes do.⁶³ Victims of domestic violence do not involve the police until after the seventh incident of violence on average.⁶⁴ Each of those incidents and the psychological abuse that occurs between those incidents are crucial to convincing jurors that the victim did not consent.⁶⁵ Only charging the abuser with the one incident, which then limits the evidence to that one incident, hinders the prosecution’s ability to explain to jurors why the victim perhaps recanted, or why the victim remained in the relationship even after the incident before the court.⁶⁶

Crimes of domestic violence are fundamentally different because of the repetitive nature of the violence and that repetition is not reflected in the incident-based construction of the Maryland statutes on rape and sexual assault.⁶⁷ However, one of the pillars of modern democracy and democratic criminal codes is that defendants are entitled to a trial that judges them only on the crime they are accused of and not acts they may have committed in the past.⁶⁸ Defendants are innocent

⁶⁰ King-Ries, *supra* note 56, at 334.

⁶¹ Burke, *supra* note 8, at 574 (outlining the difficulty of proving that an abuser’s pattern of abuse is not a byproduct of an isolated incident, but that it is part of a calculated system of abuse).

⁶² *Id.*

⁶³ *Id.* at 563.

⁶⁴ King-Ries, *supra* note 56, at 333 (citing Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1206 (1993)).

⁶⁵ Burke, *supra* note 8, at 573–74.

⁶⁶ *Id.*

⁶⁷ *Id.* at 566 n.79, 595–96.

⁶⁸ King-Ries, *supra* note 56, at 332–33, 355, 357–59 (giving an overview of the Enlightenment idea which has particularly shaped the American judicial system in the form of the character evidence rule, that an individual’s private conduct for which they are not on trial should be left to the private sphere, and out of the “form decision-making” process of the judicial system); *see also* *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997).

until proven guilty⁶⁹ because an individual has done something awful in the past, the American justice system gives that individual the opportunity to only be charged and convicted based on the evidence surrounding the one, individual incident before the court.⁷⁰ This pillar of the American justice system, while it can be important for other defendants, appears to stand in the way of prosecuting domestic violence.⁷¹

Another aspect of the Maryland criminal code is that for cases where the victim is a spouse, Maryland law prevents a husband from being prosecuted for first- or second-degree rape or third- or fourth-degree sexual offenses if the parties were married at the time of the offense.⁷² Two exceptions apply.⁷³ The first is that the parties have been separated and not cohabitating for at least three months prior to the offense.⁷⁴ The second exception is if force is used against the will and without the consent of the victim.⁷⁵ The second exception is the most relevant to the present inquiry because it sets a high bar for showing that the victim did not consent.⁷⁶ Like the criminal offense of rape and sexual assault more generally, this exception does not account for any temporal disconnect between the abuse or violence and a sexual act.⁷⁷ The prosecution is required to show that the victim actively fought or denied consent.⁷⁸ In actuality, the victim may only be submitting in order to prevent further harm.⁷⁹ This statute does not allow for situations of coercion or fear that lead to the victim not consenting, but rather

⁶⁹ *Presumption of Innocence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷⁰ King-Ries, *supra* note 56, at 332–33, 355, 357–59 (the purpose of the character evidence rule is long rooted in American jurisprudence to judge a defendant for his actions, not for his private character—this notion suggests that if an abuser's aggressive and abuse characteristics were permissible, such evidence would “pervert the procedures in the trial”).

⁷¹ *Id.* at 331–33, 359–60.

⁷² LAURA HUNTER DIETZ, MARYLAND LAW ENCYCLOPEDIA 18 M.L.E. RAPE §. 7 (2016).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Dietz, *supra* note 72.

⁷⁸ Little, *supra* note 2, at 1329.

⁷⁹ Fischer et al., *supra* note 55, at 2128.

conceding. Those concepts are not the same and should be accounted for in the law.⁸⁰

B. Maryland State Rules of Evidence

Maryland Law currently has protections for victims built into the state rules of evidence under a rape shield law.⁸¹ MD. CODE. ANN., CRIM. L. §3-319 (Maryland's rape shield law) serves to exclude reputation and opinion evidence, and evidence of the victim's sexual history with individuals other than the defendant.⁸² This evidence is precluded from showing that it was more likely the victim consented to the sexual conduct in question.⁸³ Section 3-319 has been upheld by the Court of Appeals in regards to "the exclusion of the evidence when its probative value is outweighed by the State's interest in protecting the victim from harassment and humiliation."⁸⁴

There are a handful of circumstances where evidence of the victim's sexual history may be admitted into evidence.⁸⁵ Those exceptions include:

- (1) evidence of "the victim's past sexual conduct *with the defendant*";
- (2) evidence of "a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma";
- (3) evidence which "supports a claim that the victim has an ulterior motive to accuse the defendant of the crime";
- or (4) evidence offered for the purpose of "impeachment after the prosecution has put the victim's prior sexual conduct in issue."⁸⁶

This Comment will focus on prongs one and three.

⁸⁰ See generally Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (despite the push for sex equality under the law, the current system is designed in a manner that does not effectively promote sex equality, especially concerning the field of rape and sexual assault).

⁸¹ LYNN MCLAIN, MARYLAND EVIDENCE, STATE & FEDERAL § 412:1 RAPE VICTIM'S PRIOR CONDUCT, MARYLAND LAW (2017).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MD CODE ANN., CRIM. LAW § 3-319.

⁸⁶ *Id.*

The exceptions to the introduction of evidence regarding the victim's sexual conduct do not work in the victim's favor in cases of domestic violence related sexual abuse. These exceptions are targeted at the *victim's* behavior, not the defendant's, serving primarily to protect defendants from false accusations.⁸⁷ Because the parties are in an intimate relationship, it is likely that a fair amount of sexual activity has existed between plaintiff and defendant. Despite this evidence not being allowed for the purposes of showing it is more likely that the victim consented, it could still cloud an already skeptical jury's conceptions of intimate partner sexual violence.⁸⁸ Allowing information about the couple's relationship from start to finish could make it difficult for jurors to imagine how the victim did not consent.⁸⁹ If the jury hears about the parties when they were a typical couple before the abuse began, it may be difficult to imagine that the abuser intended to cause the victim intense harm or to sexually assault the victim.⁹⁰ The jury may assume that the victim did something to provoke the abuser.⁹¹ Again, jurors want to believe that anything other than the worst-case scenario occurred when it comes to domestic abuse.⁹² Introducing evidence that the couple had an on-going consensual sexual relationship can play into that tendency on the part of jurors.⁹³

Additionally, allowing evidence of an ulterior motive on the part of the victim can dilute the victim's credibility and is difficult to combat. For example, if the defense presents evidence that the victim at one point said she wanted to leave and take the couple's children with her,

⁸⁷ Lynn McClain, *Reforming the Criminal Law: University of Baltimore School of Law Group Goes to Annapolis*, 34 U. BALT. L.F. 2, 3–4 (2003).

⁸⁸ De Sanctis, *supra* note 4, at 371–73.

⁸⁹ Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present, and Future*, 2003 U. ILL. L. REV. ONLINE 1115, 1117 (2003) (noting that evidentiary exceptions of this nature are typically used to show the background or context of the relationship).

⁹⁰ *Id.* (while the author notes that exceptions regarding the defendant's history can be used to prove a history of domestic violence, it is easy to see how the Maryland exception could cut both ways and be used to show a lack of intent on the abuser's part).

⁹¹ Kovach, *supra* note 89, at 1127.

⁹² De Sanctis, *supra* note 4, at 367.

⁹³ Sack, *supra* note 2, at 559–61 (explaining the changes in rape law, especially concerning partner rape, which may have lasting consequences that are distinct from stranger rape, since the victim is raped by a person that she trusts).

that comment would be admissible as evidence of ulterior motive.⁹⁴ The jury may not be awarded the opportunity to understand that the victim made that comment due to extensive and on-going abuse, because the exceptions are tailored towards the victim's behavior, and not the defendant's.⁹⁵ The exceptions do not allow for evidence of the entire domestic violence relationship, including financial or psychological abuse either.⁹⁶ Presenting extensive evidence from family members or friends that the abuser had been controlling the victim financially, physically, or otherwise therefore could not be utilized to negate the evidence of an ulterior motive on the part of the victim.⁹⁷

The necessary evidence of abuse or control prior to the abuser's incarceration leading up to trial is difficult to obtain and admit into the trial record, even though it is essential to educating and convincing jurors.⁹⁸ Through prison calls or letters, it is possible to show the abuser's control over the victim in the days or months leading up to trial in order to explain a recanting victim.⁹⁹ However, evidence from this period provides only a narrow view into the dynamics of a domestic violence relationship that may not be exhaustive enough to convince jurors. The evidentiary exceptions to Maryland's rape shield law work to protect the defendant's due process rights, but do very little to provide similar protections to victims.¹⁰⁰

C. Observations Regarding the State of Maryland Law

⁹⁴ De Sanctis, *supra* note 4, at 384–85 (noting that in rape cases, it is always possible that “based on some ulterior motive, the woman may have fabricated the rape claim”).

⁹⁵ King-Reis, *supra* note 56, at 335 (noting that the character evidence rule has been tailored towards allowing the victim's conduct into evidence, while excluding the defendant's); Kovach, *supra* note 89, at 1150 (using the Illinois common law as an example of how the circumstances surrounding abuse are often left out of evidence in courts that view the rules strictly).

⁹⁶ King-Ries, *supra* note 56, at 334–35.

⁹⁷ See Kovach, *supra* note 89, at 1125 (describing the difficulties associated with entering evidence against the defendant based on “intent, motive, plan, or other [permissible] theories” that would also apply to entering evidence for that same purpose on behalf of the victim); De Sanctis, *supra* note 4, at 374–75 (noting that past-conduct exceptions can be used to show a pattern of abuse that points to intent; however, in Maryland the exceptions to the rape shield law are limited to the victim's character rather than the defendant's, limiting to scope of admissible information).

⁹⁸ De Sanctis, *supra* note 4, at 389–90.

⁹⁹ Lambert, *supra* note 46.

¹⁰⁰ McLain, *supra* note 81, at 3–4.

The problems with Maryland's law can be divided into four general issues. First, the law is incident-focused, and as such it does not address the temporal disconnect between the sexual act and the coercion or abuse. The law also does not encompass the psychological and emotional elements that are crucial to understanding the withholding or withdrawal of consent between the parties. Second, the law requires prosecutors to pick the domestic violence conduct apart into its subsequent parts. The charges that this type of abuse must be divided into do not capture the nature of the sexual abuse, making conviction difficult. Third, the evidence that can be included pursuant to the exceptions to the Maryland rape shield law are over-inclusive and allow the defense to present a normalized or skewed view of the relationship that can serve to distort juror understandings of the abuse. Fourth, the law sets the bar too high for showing that the victim withheld consent. The law requires affirmative withdrawal or force on the part of the abuser. This standard does not account for fear paralysis, coercion, submission, or other subtler forms of withholding or withdrawing consent that should be known to the abuser but that are easy for the abuser to deny.

III. DOMESTIC VIOLENCE CHARGE

A domestic violence criminal offense is a viable option for addressing both the general issues with prosecuting sexual abuse related to domestic violence and those that are specific to Maryland law. While the current domestic violence statutes that exist are categorized as misdemeanors, there are options for what a criminal statute would entail.¹⁰¹ Such a statute would criminalize the entire scope of domestic violence behavior, encapsulating both the physical violence addressed here and the myriad of other aspects of domestic violence that lead to a lack of consent from the victim.¹⁰²

¹⁰¹ See generally Youngs, *supra* note 4 (offering a "provisional proposal" of a domestic violence criminal offense which fixes the shortcomings of the current, deficient criminal law); Nat'l. Ctr. on Prot. Ord. & Full Faith & Credit, *supra* note 6, at 21–22.

¹⁰² Youngs, *supra* note 4, at 59–61.

A. *What is a Domestic Violence Charge and How does it Operate?*

Currently, twenty-five states have some form of a misdemeanor charge of domestic violence as part of their state criminal codes.¹⁰³ Maryland is not one of those states.¹⁰⁴ The adoption of a misdemeanor statute similar to those already in existence is not sufficient to address the problems noted above. However, a domestic violence criminal charge defined as a statutory crime making the conduct associated with domestic violence, including the systematic nature of the abuse, physical violence, sexual violence, and the infliction of mental and emotional trauma, a felony would appropriately address the noted problems.

The misdemeanor statutes referenced above as problematic do not go far enough in protecting victims of domestic violence.¹⁰⁵ First, these statutes, for the most part, do not mention sexual abuse at all.¹⁰⁶ They are limited to “bodily harm” or “imminent bodily injury.”¹⁰⁷ Only Rhode Island and Nevada mention sexual assault explicitly.¹⁰⁸ While bodily harm or injury is defined very generally, it is unclear from these statutes if they are intended to cover sexual harm, as well. Many of the twenty-three statutes extend to all family or household members, indicating that perhaps traditional battery is the target rather than intimate partner rape or sexual assault.¹⁰⁹ Regardless of the legislative

¹⁰³ Nat’l Ctr. on Prot. Ord. & Full Faith & Credit, *supra* note 6 (noting the twenty-five states: Alabama, Arizona, Arkansas, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, Vermont, Washington, West Virginia).

¹⁰⁴ *Id.* at 21–22.

¹⁰⁵ Burke, *supra* note 8, at 554–55.

¹⁰⁶ See Nat’l Ctr. on Protection Orders and Full Faith & Credit, *supra* note 6 (noting, for example, Rhode Island and Nevada are the only two states which mention sexual assault explicitly).

¹⁰⁷ *Id.* (noting, for example, Illinois’s statute: “A person commits domestic battery if he or she . . . (1) causes bodily harm to any family or household member”); Burke, *supra* note 8, at 562.

¹⁰⁸ Nat’l Ctr. on Protection Orders and Full Faith & Credit, *supra* note 6, at 24, 33.

¹⁰⁹ Burke, *supra* note 8, at 561–62; see Nat’l Ctr. on Protection Orders and Full Faith & Credit, *supra* note 6, at 5 (noting, for example, Arkansas’s domestic battering statute extends to protect a “family or household member” from physical injury).

intent, these statutes are missing the crucial sexual and psychological elements of domestic abuse.¹¹⁰

Second, there is little difference between these statutes and pre-existing crimes.¹¹¹ Often, these statutes copy the definition of assault, harassment, or endangerment with an added provision that the parties be in an intimate relationship.¹¹² Other statutes of this nature merely create new combinations of *mens rea* and *actus reus* elements from other crimes already in existence, with the added requirement that the parties are in an intimate relationship.¹¹³ Such cobbled together statutes do not address the issues noted above in regards to the current law in Maryland.

With those problems in mind, what would a felony domestic violence charge as defined above look like? There are two key elements to any criminalized act- the conduct element and the intent element.¹¹⁴ The law typically refers to these elements as the *actus reus*¹¹⁵ and *mens rea*¹¹⁶ of the crime respectively. The conduct element of a domestic violence charge should focus on the continual and systematic nature of the abuse in order to address the incident-based nature of the criminal law.¹¹⁷ In 2014, a bill was proposed in the Parliament of the United Kingdom that would have criminalized domestic violence conduct.¹¹⁸ That bill framed domestic violence conduct by requiring that, “the offender ‘pursue a course of conduct’ which ‘amounts to domestic violence,’” using a definition already in use,¹¹⁹ “although narrowed so

¹¹⁰ Burke, *supra* note 8, at 562–63.

¹¹¹ *Id.* at 560–63.

¹¹² *Id.* at 560–61.

¹¹³ Youngs, *supra* note 4, at 67–68.

¹¹⁴ Youngs, *supra* note 4, at 67.

¹¹⁵ *Actus Reus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹¹⁶ *Mens Rea*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹¹⁷ Youngs, *supra* note 4, at 67; Deborah Tuerkheimer, *Recognizing and Remediating the Harm to Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1019–20 (2004); Burke, *supra* note 8, at 602.

¹¹⁸ Domestic Violence (Legal Framework) Bill 2013-14, HC Bill (UK), <https://services.parliament.uk/bills/2013-14/domesticviolencelegalframework.html>;

Youngs, *supra* note 4, at 66–67.

¹¹⁹ Domestic Violence (Legal Framework) Bill 2013-14, HC Bill (UK), <https://services.parliament.uk/bills/2013-14/domesticviolencelegalframework.html> (“The cross- government definition of domestic violence and abuse is: any incident or pattern of incidents of controlling, coercive, threatening behavior, violence or abuse between those aged 16 or over who are, or have been, intimate partners or

that ‘coercive and controlling behavior’ was a necessary component.’¹²⁰ The benefits of this framing are that it allows for the prosecution of physical, emotional, or financial abuse.¹²¹ Merely taking the behavior included in the misdemeanor domestic violence statutes that already exist in twenty-three states and attaching criminal penalties would not be appropriate, as noted above.¹²² As such, the statute proposed in the United Kingdom is a better model for a statutory domestic violence felony in Maryland.¹²³

In constructing such a statute for Maryland, there are several components of the crime that require the General Assembly’s consideration. The first of which is the type of relationships that would be covered by the statute.¹²⁴ For instance, the statute could either be limited to address intimate partners or it could be expanded to address the entire family or household.¹²⁵ Second, there are three options for defining the mens rea of a domestic violence crime.¹²⁶ One approach is to require that the abuser consciously intended to commit the abuse.¹²⁷ Under this formulation, the abuser would have to reasonably believe that his conduct “is likely to result in substantial power or control over the victim.”¹²⁸ Other advocates suggest a less stringent mens rea requirement, such as framing the “offense as an inchoate crime, an attempt to gain power or control,” as proving specific intent could be difficult.¹²⁹ The actual presence of power or control would not need to be shown, only that the abuser attempted to gain it. A third option is the “intent to ‘cause physical or psychological harm to the victim.’”¹³⁰ This approach can also coincide with a requirement that the abuser “know or

family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, emotional”).

¹²⁰ Youngs, *supra* note 4, at 67.

¹²¹ *Id.*

¹²² Burke, *supra* note 8, at 558–60.

¹²³ As of publication, this bill has not passed.

¹²⁴ Youngs, *supra* note 4, at 67.

¹²⁵ *Id.*

¹²⁶ *Id.* at 67–69.

¹²⁷ *Id.* at 67 (citing Tuerkheimer, *supra* note 117, at 1020).

¹²⁸ *Id.* at 67–68.

¹²⁹ Youngs, *supra* note 4, at 68 (citing Burke, *supra* note 8, at 602–03).

¹³⁰ *Id.*

reasonably should know that his or her conduct amounts to domestic violence.”¹³¹

The following configuration would be the most viable given the problems identified in the course of this discussion. First, for the purposes of prosecuting sexual abuse associated with domestic violence, a felony charge in Maryland should be limited to intimate partners. While domestic violence occurs within households and can affect any of the individuals under that roof,¹³² the sexual abuse related to domestic violence that is the topic of this discussion is unique to intimate partners. Beyond that, abuse that occurs between the abuser and other individuals living in the home can be prosecuted through other means.¹³³ If the abuse occurs between an abuser and a child, the law has progressed much farther in protecting children in allowing prior abuse of that child or another into evidence;¹³⁴ whereas the rules of evidence do not allow testimony from other victims of the defendant.¹³⁵ Therefore, a domestic violence statutory crime of this nature should be limited to intimate partners.

Second, the statute should be formulated to include both the physical and intangible elements of domestic violence in order to make prosecuting sexual abuse more attainable. The crucial difficulty, as discussed above, is showing a lack of consent.¹³⁶ A domestic violence statute would need to include the range of behaviors that make it comprehensible to a jury that someone would not consent to sex acts with an intimate partner.¹³⁷ These behaviors include the physical battery and any past sexual abuse.¹³⁸ Additionally, and perhaps more importantly, the emotional and psychological abuse that occurs as part

¹³¹ *Id.* (noting that the approach is flawed and “unnecessarily restricts the scope of the offense;” it is included in this work as a survey of all the options available, even if it is unsupported by scholars).

¹³² Childhood Domestic Violence Ass’n, *10 Startling Statistics about Children of Domestic Violence*, CHILDHOOD DOMESTIC VIOLENCE ASS’N (Feb. 21, 2014), <http://cdv.org/2014/02/10-startling-domestic-violence-statistics-for-children/>.

¹³³ Youngs, *supra* note 4, at 56.

¹³⁴ Kovach, *supra* note 89, at 1122–23; De Sanctis, *supra* note 4, at 381.

¹³⁵ Kovach, *supra* note 89, at 1122.

¹³⁶ Jason Palmer, *Eleventh Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence*, 11 GEO. J. GENDER & L. 97, 122–23 (2010); See *supra* Part I.

¹³⁷ King-Ries, *supra* note 56, at 334–36.

¹³⁸ *Id.* at 334.

of the cycle of violence leading up to the sexual abuse and the withholding of consent would need to be included.¹³⁹

Third, the mens rea element should be formulated to reflect domestic violence as an inchoate crime rather than one of specific intent.¹⁴⁰ The justification for this is twofold. First, abusers are often charismatic and manipulative.¹⁴¹ If the mens rea element is too specific, the abuser can create reasonable doubt that he reasonably intended to control.¹⁴² When juries are already skeptical that domestic abuse occurs, creating a highly specific mens rea requirement gives the defense and the abuser a readily available opportunity to create doubt that the abuser intended to control the victim.¹⁴³ The abuser could easily explain away his behavior to the jury in a similar manner that he uses to maintain control over the victim.¹⁴⁴ Lowering the mens rea element to require showing only that the abuser attempted to gain control is a much more attainable standard for the prosecution.¹⁴⁵

A key component of such a statute for the purposes of prosecuting sexual assault and rape would be defining consent. Defining consent in a way that excludes consent given through coercion or out of fear of the abuser allows the prosecution to fully establish the crime for the jury's consideration.¹⁴⁶ A standard that negates consent given out of fear of present *or future* violence would alleviate the problems associated with the temporal disconnect that can occur between a violent incident and a sexual encounter where consent may be given only to prevent more abuse.¹⁴⁷

Taken together, this configuration would include the elements of domestic abuse as a whole that lead to the victim not giving consent to sexual activity, regardless of whether force was used in that moment. These elements also provide jurors with enough information to educate the jury about domestic violence and convince the jury that the sexual abuse did occur, regardless of perceived notions. The standards are high enough to provide due process protections for the defendant, but not so

¹³⁹ Burke, *supra* note 8, at 570–71; Youngs, *supra* note 4, at 67.

¹⁴⁰ Burke, *supra* note 8, at 602–03.

¹⁴¹ De Sanctis, *supra* note 4, at 372, 383 n.144.

¹⁴² Tuerkheimer, *supra* note 117, at 1022.

¹⁴³ *Id.* at 1022 n.331.

¹⁴⁴ De Sanctis, *supra* note 4, at 372, 383 n.144.

¹⁴⁵ Burke, *supra* note 8, at 602–04.

¹⁴⁶ See *supra* Part II.A.

¹⁴⁷ See *supra* Part II.A.

high that the prosecution cannot meet their burden to show lack of consent on the part of the victim and intent on the part of the defendant.

B. Domestic Violence Charge Applied to the General Problems with Prosecuting Sexual Abuse Related to Domestic Violence

Jurors and victims both pose problems for the prosecution when attempting to show that a domestic violence victim did not consent to sex acts with an abuser.¹⁴⁸ On one hand, jurors often have a difficult time understanding the dynamics of a domestic violence relationship.¹⁴⁹ On the other hand, victims often recant, are difficult to work with, or disappear altogether during the course of the prosecution's case.¹⁵⁰ Allowing a holistic view of the abuse and its effect on the victim combats both of these problems. Using any information collected from the victim at the time an act of abuse is reported, the State can decide whether the violent incident was isolated or whether it shows signs of domestic violence. If the incident appears to be part of an on-going pattern of abuse, the State could proceed by prosecuting the abuser for domestic violence, rather than prosecuting the incident as an isolated incidence of rape or sexual assault.

Evidence of control and the cycle of abuse can be seen and presented by the State through the interactions the victim has with the abuser once separated, through financial records, or other evidence the State would be able to gather under the statute's provisions.¹⁵¹ A recanting victim or an abuser who claims consent due to the nature of the relationship can be mitigated through evidence of the level of control the abuser has over the victim, which would be included in the definition of consent under a domestic violence statute. While these calls are often admissible under current evidentiary standards, other evidence of this

¹⁴⁸ De Sanctis, *supra* note 4, at 367–68.

¹⁴⁹ *Id.* at 371–72.

¹⁵⁰ *Id.* at 367–68.

¹⁵¹ Burke, *supra* note 8, at 610 (noting verbal statements from the abuse are often “unambiguous”); King-Ries, *supra* note 56, at 300, 334 (noting domestic violence encompasses “economic or financial restrictions” which is part of the long-term pattern of control which should be included when prosecuting domestic violence); Youngs, *supra* note 4, at 67 (noting that a domestic violence statute could be used to prosecute purely psychological abuse, implying evidence of that nature would be admissible).

level of control from before the arrest occurred could also be admitted in order to explain the nature of the relationship and the lack of consent on the victim's part.¹⁵² Testimony from friends, family, or household members could be utilized to paint a picture of the control the abuser exerts over the victim or the fear the victim feels more generally towards the abuser.¹⁵³ Such evidence would go directly towards proving elements of the crime under the statute, and would be admissible, as opposed to prosecuting traditional rape or sexual assault.¹⁵⁴

C. Domestic Violence Applied to the Gaps in the Maryland Law

When compared to existing Maryland law and when considered next to the existing evidentiary standards, a domestic violence felony charge is conducive to allowing the evidence in that is necessary for educating juries and prosecuting abusers. It allows the prosecution to present the information necessary to educate reluctant jurors on each aspect of the crime so that the jury may truly understand that the victim has been systematically abused by his or her partner, resulting in a lack of consent.

The first problem with the Maryland law identified above is that it is incident-based, and therefore does not address the on-going nature of the abuse, and its emotional and psychological elements.¹⁵⁵ Structuring a domestic violence statute that encompasses all of the behaviors that are typical of an abuser breaks out of the incident-based framework. Breaking out of the incident-based framework gives the prosecution the ability to fully explain to jurors the nature of these relationships and why a victim may recant upon examination or defend

¹⁵² See Youngs, *supra* note 4, at 67 (noting that a domestic violence statute could be used to prosecute purely psychological abuse, implying that evidence of this nature would be admissible).

¹⁵³ See Tuerkheimer, *supra* note 117, at 992–94 n.176 (noting that some courts already “allow prior acts evidence to prove why [a victim] might be unwilling to testify against the defendant.”) However, these cases are not in Maryland could be expanded given the provisions of a domestic violence criminal statute and the relevancy of the evidence under such a statute's construction.

¹⁵⁴ See Youngs, *supra* note 4, at 64.

¹⁵⁵ See *supra* Part II.

the abuser.¹⁵⁶ It also allows prosecutors the opportunity to explain how sexual conduct in such a relationship differs from a healthy relationship.¹⁵⁷ Showing the jury evidence of the collective abusive acts and on-going behavior can help jurors retreat from wanting to believe the more benign version of events occurred, rather than confronting the nature of the abuse.¹⁵⁸ Even if jurors initially believe that sexual assault against an intimate partner is exceptionally rare, or believe that it is more likely that the victim brought the abuse on herself somehow, showing the jury a more exhaustive picture of what the relationships looks like can help overcome that resistance.¹⁵⁹

Second, the exceptions to Maryland's evidentiary rape shield law are overly inclusive of information that is unfavorable to the victim.¹⁶⁰ Under these exceptions, defense attorneys are able to bring in evidence regarding the couple's interactions apart from the abuse. This evidence can cloud jurors' understandings of how a domestic violence relationship operates and liken it more to their own conceptions of consent within a relationship.¹⁶¹ Evidentiary standards in the criminal law are intended to "isolate the charged incident from the defendant's past so the jury can assess the validity of the charged incident unencumbered by other behavior."¹⁶² Domestic violence is unique in that, by definition, it is about prior behavior.¹⁶³ Making the collective behavior a criminal act allows additional evidence that is specific to domestic violence, without amending the rules of evidence as they stand. The Maryland rules of evidence as written are logical and a pillar of modern democracy for other crimes, including rape more

¹⁵⁶ Youngs, *supra* note 4, at 61–64 (discussing the problems that an incident-based framework can cause for prosecutors, and ultimately adopting a domestic violence statutory crime as the solution).

¹⁵⁷ *Id.* at 61–62.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; see also De Sanctis, *supra* note 4, at 371–72 (noting that domestic violence cases can make jurors confront their own lives, making them prone to believing that anything other than such a horrific act occurred).

¹⁶⁰ See *supra* Part II.

¹⁶¹ See De Sanctis, *supra* note 4, at 371–72 (noting that domestic violence cases can make jurors confront their own lives, making them prone to believing that anything other than such a horrific act occurred).

¹⁶² King-Ries, *supra* note 56, at 314.

¹⁶³ Fischer et al., *supra* note 55, at 2160.

generally.¹⁶⁴ Changing the crime, rather than changing the evidentiary standard, keeps those strong holds for other crimes in place, while still allowing the crucial evidence beyond the isolated incident to be heard by the jury.¹⁶⁵

Third, the current definitions of rape and sexual offense are set too high for showing that the victim did not consent.¹⁶⁶ By creating a separate domestic violence statutory crime, the need to use the definition of rape or sexual assault from statutes that only tangentially fit the crime is no longer necessary, thereby eliminating the source of the problem. The definitions of rape and sexual assault under Maryland law include a traditional physical force requirement.¹⁶⁷ Sexual abuse within a domestic violence relationship often does not fit traditional conceptions of rape or sexual assault, such as the force or duress requirements in Maryland law.¹⁶⁸ Often, in domestic violence related sexual abuse there is a temporal disconnect between the force or coercion and the sex act.¹⁶⁹

As indicated above, the definition of consent for the purposes of a domestic violence felony statute can be framed in a way that better reflects the nature of consent between the parties and address the problems just reiterated. Removing the force requirement would alleviate the temporal problems associated with showing a lack of consent. It would also allow for fear paralysis or submission as a withholding or withdrawal of consent, as opposed to placing the prosecution in a position to show that the victim both affirmatively withheld consent and that the abuser used force in the moment of the sexual act.

Fourth, the law requires prosecutors to reduce domestic violence to its component parts, rather than addressing the holistic nature of the abuse.¹⁷⁰ This prong is where criminalizing domestic violence addresses

¹⁶⁴ King-Ries, *supra* note 56, at 357–59 (noting that “the character evidence rule ‘is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions’”).

¹⁶⁵ King-Ries, *supra* note 56, at 314–15 (arguing that changing the federal evidentiary standards with respect to domestic violence only is the appropriate response to these problems).

¹⁶⁶ See *supra* Part II.

¹⁶⁷ See *supra* Part II.

¹⁶⁸ Sack, *supra* note 3, at 538; Fischer et al., *supra* note 55, at 2120.

¹⁶⁹ See *supra* notes 64–66 and accompanying text.

¹⁷⁰ See *supra* Part II.

the problems most straightforwardly. Creating a domestic violence statutory crime, as formulated above, would eliminate the need to dice apart domestic violence conduct, and instead include evidence of any and all conduct within the relationship related to the domestic violence.¹⁷¹ Educating juries about the victim's behavior and consent within the relationship is much more attainable if jurors are allowed to see the larger picture.¹⁷² Prosecutors would not have to jump through evidentiary hoops in order to show elements of the relationship that are crucial to educating juries as to how sexual violence can occur between intimate partners.¹⁷³ Evidence about all aspects of the abuse could be included because that evidence is directly related to the elements of the charge.¹⁷⁴

In sum, a domestic violence felony charge could be formulated in a way that protects victims and defendants. Prosecutors well versed in domestic violence relationships when they see them could prepare for trial in a way appropriate to the crime. Information necessary to explain to jurors that intimate partners can rape or sexually assault one another could be included more readily. The hurdles that prosecutors face as a result of having to fit acts of domestic violence into definitions of crimes that are only tangentially related would be eliminated. In essence, A domestic violence felony charge is a balanced approach to a complex and pervasive problem.

CONCLUSION

When domestic violence more generally escalates to a degree that the police and subsequently a prosecutor become involved, if the abuser is not found guilty, the chances that the victim will die at the hands of her abuser increase dramatically. A domestic violence felony statute would allow the State to prosecute these crimes for what they are and keep more individuals safe by addressing the unique nature of the crime, while preserving the state of the law for other crimes. The aforementioned proposal is a viable option that should be considered by the Maryland General Assembly for reforming a crucial area of law.

¹⁷¹ Youngs, *supra* note 4, at 61.

¹⁷² De Sanctis, *supra* note 4, at 365.

¹⁷³ See generally De Sanctis, *supra* note 4 (discussing the challenges of the character evidence rule and prohibition on past acts in domestic violence cases); Burke, *supra* note 8, at 575–77.

¹⁷⁴ See Youngs, *supra* note 4, at 61–62.