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## Child Vehicular Heatstroke Deaths: How the Criminal Legal System Punishes Grieving Parents Over a Neurobiological Response

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CARDOZO LAW REVIEW  
*de•novo*

CHILD VEHICULAR HEATSTROKE DEATHS: HOW  
THE CRIMINAL LEGAL SYSTEM PUNISHES GRIEVING  
PARENTS OVER A NEUROBIOLOGICAL RESPONSE

*Amanda Washabaugh*<sup>†</sup>

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<sup>†</sup> J.D. Candidate, Benjamin N. Cardozo School of Law, 2021. Associate Editor, *Cardozo Law Review*, Volume 42. I would like to thank Professor Kate Levine for her guidance, Trevin Roming for his countless edits and words of encouragement, and my friends and family for their unwavering support.

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## INTRODUCTION

On July 26, 2019, one-year-old twins, Mariza and Phoenix Rodriguez, tragically passed away from hyperthermia in the Bronx, New York after their father, Juan Rodriguez, unintentionally left them in his car outside of his work for several hours.<sup>1</sup> Rodriguez believed that he had dropped the twins off at daycare before heading to work that morning, unaware of his fatal mistake until he drove home from work that afternoon.<sup>2</sup> Upon his grave discovery, Rodriguez immediately pulled over to the side of the road, exited his vehicle, and let out a scream.<sup>3</sup> This alerted a nearby pedestrian who notified law enforcement officials.<sup>4</sup> Paramedics pronounced the twins dead at the scene and prosecutors subsequently charged Rodriguez with involuntary manslaughter and criminally negligent homicide.<sup>5</sup> His family and friends were astonished, and they struggled to comprehend how Rodriguez, an “attentive” and “caring father,” could have made this terrible mistake.<sup>6</sup>

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<sup>1</sup> See Nate Schweber & Andrea Salcedo, *Father Charged in Deaths of 1-Year-Old Twins Left in Car*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/nyregion/twins-found-dead-bronx.html> [<https://perma.cc/688Z-P2QQ>]; Christopher J. Eberhart & Nancy Cutler, *Father Pleads Guilty, Avoids Jail Time After Twin Toddlers’ Died in Hot Car*, USA TODAY (June 24, 2020, 11:34 AM), <https://www.usatoday.com/story/news/nation/2020/06/24/father-pleads-guilty-avoids-jail-time-twins-hot-car-deaths/3249999001> [<https://perma.cc/KR95-4A3N>].

<sup>2</sup> See Sharon Otterman & Andrea Salcedo, *Father Tries to Grasp How He Could Have Left Twins to Die in Hot Car*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/nyregion/twins-hot-car-father.html> [<https://perma.cc/32AB-YRB2>].

<sup>3</sup> Schweber & Salcedo, *supra* note 1.

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Rodriguez's story is unfortunately not uncommon in the United States. Since 1998, an average of thirty-nine children have died per year of heatstroke/hyperthermia after being left in unattended vehicles either on purpose or by mistake.<sup>7</sup> In an effort to prevent these tragedies, twenty states have passed legislation making it unlawful for a parent or guardian to leave a child in a car without adult supervision.<sup>8</sup> These laws vary in severity and penalty, with some states viewing the crime as a misdemeanor offense for which the maximum penalty is a \$100 fine and the completion of a child safety course, while others consider violation of the statute to be felony child endangerment, which can carry a sentence of up to two years in jail.<sup>9</sup> These twenty states' statutes differ in levels of culpability and minimum mens rea requirements for conviction.<sup>10</sup> Prosecutors in states that don't have this legislation instead charge these grieving parents with a homicide crime. Currently, New York State has no specific legislation pertaining to this issue, and yet Rodriguez would have faced a significant sentence if convicted. The two charges originally brought against him, criminally negligent homicide and involuntary manslaughter, are a class E felony carrying a sentence of up to four years in prison and a class C felony carrying a sentence of up to fifteen years in prison, respectively.<sup>11</sup>

While Rodriguez could have faced a significant amount of prison time if convicted, a jury would have been required to acquit him of all charges if the State was unable to meet its burden of proof.<sup>12</sup> However, if the incident had not occurred in New York, but in one of the twenty states with intermediate laws,<sup>13</sup> the prosecution would have likely charged Rodriguez under the relevant state statute. As a result, he would have

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<sup>7</sup> Injury Facts, *Motor Vehicle Safety Issues: Hot Car Deaths*, NAT. SAFETY COUNCIL, <https://injuryfacts.nsc.org/motor-vehicle/motor-vehicle-safety-issues/hotcars> [https://perma.cc/6LP2-XAGL].

<sup>8</sup> *State Laws*, KIDSANDCARS.ORG, <https://www.kidsandcars.org/resources/state-laws> [https://perma.cc/TYS8-NYBE].

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> N.Y. PENAL LAW §§ 70.00, 125.10, 125.15 (McKinney 2020).

<sup>12</sup> “[N]o man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). On June 23, 2020, Juan Rodriguez accepted a plea deal and pleaded guilty to two counts of reckless endangerment; he was sentenced to one-year conditional discharge. Andrea Salcedo & Ed Shanahan, *Father Whose Infant Twins Died in Hot Car Avoids Prison*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/nyregion/hot-car-death-twins-bronx.html> [https://perma.cc/93NX-ZD8W].

<sup>13</sup> The term “intermediate statutes/laws” as used in this Note refers to the statutes that twenty states have enacted in order to attempt to prevent the types of situations like the one faced by Rodriguez.

likely faced some level of punishment, even if a jury had acquitted him of homicide and manslaughter.<sup>14</sup>

This Note argues that the intermediate laws enacted by the twenty states increase the likelihood that a parent, who is already grieving a child and dealing with personal guilt, will face criminal punishment.<sup>15</sup> Further, legislature's reliance on deterrence as the basis for the intermediate laws is fundamentally flawed because it fails to consider a major possible root cause of forgetting a child in a vehicle: a neurobiological failure of the brain's prospective memory system.<sup>16</sup> In order to correct these legal wrongs, this Note proposes the following: First, states with relevant legislation should repeal those statutes.<sup>17</sup> Second, prosecutors should exercise discretion and bring no criminal charges against grieving parents, thereby declining to charge parents with the higher crime of manslaughter.<sup>18</sup> Third, since the criminal legal system is not the correct avenue to deter individuals from leaving a child in a vehicle unattended, state legislatures should focus on funding organizations that increase public education and technological advancements designed to alert parents of a child being left in a vehicle.<sup>19</sup>

Part I of this Note begins by discussing the background of child vehicular heatstroke deaths in America, including statistical data on the number of deaths as well as biological information on the cause of vehicular heatstroke.<sup>20</sup> Part I continues by considering the neurobiological processes that compete and cause parents to make the mistake of forgetting a child in a car.<sup>21</sup> Lastly, Part I examines intermediate laws enacted by twenty states and a history of the application of those laws.<sup>22</sup> Part II analyzes deterrence as the theory of criminal punishment behind the intermediate statutes.<sup>23</sup> Part III proposes prosecutors decline to bring charges against grieving parents and that states repeal these intermediate statutes.<sup>24</sup> Part III also proposes that state legislatures increase funding for programs aimed at expanding awareness and technological advances focused on preventing these tragedies.<sup>25</sup>

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<sup>14</sup> See *infra* Section II.B.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Section III.B.

<sup>18</sup> See *infra* Section III.A.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See *infra* Part I.

<sup>22</sup> See *infra* Part I.

<sup>23</sup> See *infra* Part II.

<sup>24</sup> See *infra* Part III.

<sup>25</sup> See *infra* Part III.

I. A HISTORY AND BACKGROUND OF CHILD VEHICULAR HEATSTROKE DEATHS AND RESULTING LEGISLATION

A. *Child Vehicular Heatstroke Deaths in America*

In the past twenty years alone, there have been at least 870 children who have died due to heatstroke brought on after being left in a car unattended.<sup>26</sup> Included in those deaths are children whose parent or guardian unintentionally left them in a vehicle, children who gained access to a vehicle on their own, and children whose parent or guardian purposefully left them in a vehicle.<sup>27</sup> More than half (54%) of those deaths happened after a child was unintentionally left in a car, while only 19% happened after the child's parent intentionally left them in a vehicle.<sup>28</sup> On average, in the United States, thirty-nine children die each year due to vehicular induced heatstroke.<sup>29</sup> A vast majority of these deaths are of infants less than one year in age, but children as old as eleven have suffered this horrific death.<sup>30</sup>

Even parents who intentionally leave a child in a vehicle disregard, typically without realizing it, a substantial risk of harm to the child's life. In many cases, these parents do so to quickly enter a store without the hassle of having to move their sleeping child.<sup>31</sup> However, internal temperatures of a car can rise over twenty degrees in less than ten minutes.<sup>32</sup> Even on a relatively cool day with outside temperatures of around 60°F, temperatures inside a parked vehicle have measured up to 110°F.<sup>33</sup> Some parents believe that if they roll the window down in the vehicle, the child will receive cool air through the outside and the car will

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<sup>26</sup> *Heatstroke Deaths of Children in Vehicles*, NOHEATSTROKE.ORG, <https://www.noheatstroke.org> [<https://perma.cc/E45P-FN82>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> This is one reason why a parent might leave a child in a vehicle intentionally. Other reasons include the child is sleeping and the parent does not want to disturb them or the parent believes they will only be gone for a short amount of time. *See generally* Kim Brooks, *I Left My Son Alone in the Car for Five Minutes—And It Caused a Two-Year Legal Nightmare*, GOOD HOUSEKEEPING (Aug. 14, 2018), <https://www.goodhousekeeping.com/life/parenting/a22724843/kim-brooks-son-legal-battle> [<https://perma.cc/25NE-RRQK>]. This Note does not discuss individuals who leave a child in a vehicle on purpose in order to murder the child, and generally does not touch upon parents who leave a child in a vehicle due to blatant child neglect as these cases are few and far between and are outside the scope of this Note.

<sup>32</sup> The Nat'l Highway Traffic Safety Admin., *Help Us Raise Awareness About Vehicular Heatstroke*, U.S. DEP'T TRANSP.: CONNECTIONS (July 28, 2017), <https://www.transportation.gov/connections/help-us-raise-awareness-about-vehicular-heatstroke> [<https://perma.cc/L2NY-GE25>].

<sup>33</sup> *Id.*

not heat as fast, but experts say that rolling down the window only reduces the temperature by about one to two degrees.<sup>34</sup> Further, infants and young children are unable to regulate body temperature as well as adults and are often unable to sweat as efficiently as adults in order to cool down.<sup>35</sup> As a result, children overheat “three to five times faster” than adults.<sup>36</sup> When a child’s internal body temperature reaches 104°F, their major organs begin to shut down.<sup>37</sup> Being left in a vehicle with internal temperatures above this point could mean certain death for the child in a matter of minutes.<sup>38</sup>

B. *The Root Cause of Vehicular Hyperthermia and Heatstroke: Lapse in Memory*

When news stories break of children dying in hot vehicles, the public is often in shock and left wondering how a loving parent could forget their child in a car.<sup>39</sup> The public attributes the blame to carelessness and remarks that the person must have been a horrible parent in order to have made such a terrible mistake.<sup>40</sup> Unfortunately, research has shown that this tragedy can happen to even the most attentive parents.<sup>41</sup> Most parents, no matter what age their children are (but particularly parents of young children) find raising children to be stressful, emotionally and intellectually draining, and exhausting.<sup>42</sup> This combination of stress,

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<sup>34</sup> *Warning: Kids Heat Up Faster than Adults in Cars*, WTSP (Aug. 5, 2016, 10:51 PM), <https://www.wtsp.com/article/news/health/warning-kids-heat-up-faster-than-adults-in-cars/67-289255696> [<https://perma.cc/TB73-VE3P>] (“When a child’s internal temperature is 104 degrees, their organs start shutting down. At 107 degrees, they could die.”).

<sup>35</sup> Andrea Barbalich, *You’d Never Forget Your Child in the Car, Right?*, PARENTS (May 8, 2014), <https://www.parents.com/baby/safety/car/youd-never-forget-your-child-in-the-car-right> [<https://perma.cc/Y94V-4EGH>].

<sup>36</sup> *Id.*

<sup>37</sup> *See* WTSP, *supra* note 34.

<sup>38</sup> Barbalich, *supra* note 35.

<sup>39</sup> “Whenever an unintentional hot car death hits the media, the public response is the same: How could a parent leave her child in a hot car?” *Id.*

<sup>40</sup> “*Oh my God, what a horrible parent. I would NEVER let that happen!*” This is a common refrain shouted across the Internet when summer inevitably brings a smattering of tragic stories involving young children who die after a parent forgets they’re in the car.” Aaron Gouveia, *Yes, You Could Forget Your Kid in the Car—I Did*, TIME (June 20, 2014, 10:56 AM), <https://time.com/2902520/child-forgotten-car-deaths> [<https://perma.cc/LZ4D-88GK>].

<sup>41</sup> *See generally* David M. Diamond, *When a Child Dies of Heatstroke After a Parent or Caretaker Unknowingly Leaves the Child in a Car: How Does It Happen and Is It a Crime?*, 59 MED., SCI. & LAW 115 (2019).

<sup>42</sup> *See The Myth of Joyful Parenthood*, ASS’N FOR PSYCHOL. SCI. (Jan. 31, 2011), <https://www.psychologicalscience.org/news/were-only-human/the-myth-of-joyful-parenthood.html> [<https://perma.cc/9V4P-HPCV>]; *see also* Leslie Irish Evans, *Parenthood Is Hard and Scary*,

heightened emotions, lack of sleep, and a change in routine can cause an otherwise typically conscientious person to have a fatal lapse in memory.<sup>43</sup>

The stories often begin the same way but with varying minor facts and contributing factors.<sup>44</sup> The parent will begin to drive to work intending to drop the child off at daycare, but somewhere along the drive will forget that the child is in the car with them.<sup>45</sup> The parent will then continue on to their ultimate destination believing that they have already dropped their child off.<sup>46</sup> If the parent is lucky, something will trigger the parent's memory and they will realize the mistake in time to save the child,<sup>47</sup> but in the most tragic of cases, a perfect storm of otherwise small transgressions, such as the parent's cellphone being out of battery, will result in the parent not realizing until it is too late.<sup>48</sup> In the most horrific of situations, the parent will drive to the daycare center to pick up their child, only to later learn that their child was in the back seat the entire time and had passed away some point earlier that day.<sup>49</sup>

Professor David Diamond has done extensive research on this topic and has developed a hypothesis about the root cause of the lapse in memory.<sup>50</sup> He theorizes that parents leave their children in vehicles after the parent loses awareness of the child being in the vehicle and suffers a failure of the brain's "prospective memory" system.<sup>51</sup> Failures of the prospective memory system typically occur when someone forms the

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HUFFPOST (Sept. 28, 2012, 3:53 P.M.), [https://www.huffpost.com/entry/parenthood\\_b\\_1923288](https://www.huffpost.com/entry/parenthood_b_1923288) [<https://perma.cc/96XX-JYEX>]; see generally Alice G. Walton, *How to Enjoy the Often Exhausting, Depressing Role of Parenthood*, ATLANTIC (Jan. 9, 2012), <https://www.theatlantic.com/health/archive/2012/01/how-to-enjoy-the-often-exhausting-depressing-role-of-parenthood/250901> [<https://perma.cc/G2A2-J6KG>].

<sup>43</sup> Gene Weingarten, *Fatal Distraction: Forgetting a Child in the Backseat of a Car Is a Horrifying Mistake. Is It a Crime?*, WASH. POST (Mar. 8, 2009), [https://www.washingtonpost.com/lifestyle/magazine/fatal-distraction-forgetting-a-child-in-thebackseat-of-a-car-is-a-horrifying-mistake-is-it-a-crime/2014/06/16/8ae0fe3a-f580-11e3-a3a5-42be35962a52\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/fatal-distraction-forgetting-a-child-in-thebackseat-of-a-car-is-a-horrifying-mistake-is-it-a-crime/2014/06/16/8ae0fe3a-f580-11e3-a3a5-42be35962a52_story.html) [<https://perma.cc/WTC4-JCCX>].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Gouveia, *supra* note 40.

<sup>48</sup> "Because the babysitter had a new phone, it didn't yet contain Balfour's office phone number, only her cell number, meaning that when the sitter phoned to wonder why Balfour hadn't dropped Bryce off that morning, it rang unheard in Balfour's pocketbook." Weingarten, *supra* note 43.

<sup>49</sup> "Several people—including Mary Parks of Blacksburg—have driven from their workplace to the day-care center to pick up the child they'd thought they'd dropped off, never noticing the corpse in the back seat." *Id.*

<sup>50</sup> See Diamond, *supra* note 41, at 116.

<sup>51</sup> *Id.* at 116–18.



intention to do a task in the future.<sup>52</sup> When the person does not proceed with performing the task immediately, a delay in forming the intention and executing the action occurs, allowing for intervening distractions, and the person loses focus on the original task.<sup>53</sup> In the most common of cases, a parent intends to drop off a child at daycare or home before driving to a subsequent location but loses awareness of the child in the vehicle along the way.<sup>54</sup>

Professor Diamond further hypothesizes that when the prospective memory system and the habit memory system compete, the habit memory system typically prevails, causing a parent to continue their habit of driving to work and forgetting the task of dropping their child off at daycare.<sup>55</sup> Stress and sleep deprivation tend to further exacerbate the problem by biasing the brain towards the habit memory system.<sup>56</sup> The habit memory system then overcomes the prospective memory system, causing the parent to completely lose awareness of the child in the vehicle.<sup>57</sup> In the majority of cases where a parent has accidentally left their child in a vehicle unintended, the parent's brain created a false memory of the parent dropping the child off at daycare.<sup>58</sup> Often times, the parent is unaware of the tragedy that has occurred until they arrive back at their vehicle after work, when it is too late to save their child's life.<sup>59</sup>

Certain factors can contribute to the loss of the awareness of the child in the car and further cause the failure of the prospective memory system to occur.<sup>60</sup> Parents who have been in this situation often report that they had been stressed the day of the incident or some other distracting experience had occurred prior to getting in the car, such as an issue at home they had to deal with before leaving.<sup>61</sup> Neuroscience research tells us that stress has a diminishing effect on the power of the prospective memory system, but stress does not affect habit memory in the same way.<sup>62</sup> Therefore, if a parent is experiencing stress, the habit memory is even more likely to win out in a fight against prospective

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<sup>52</sup> Prospective memory “refers to situations in which an individual intends to perform an action at a later time.” R. Key Dismukes, *Prospective Memory in Workplace and Everyday Situations*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 215 (2012).

<sup>53</sup> *Id.*

<sup>54</sup> See Diamond, *supra* note 41, at 118.

<sup>55</sup> David Diamond, *Children Dying in Hot Cars: A Tragedy that Can Be Prevented*, CONVERSATION (June 20, 2016, 6:05 AM), <https://theconversation.com/children-dying-in-hot-cars-a-tragedy-that-can-be-prevented-60909> [<https://perma.cc/CXK4-K5RV>].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Weingarten, *supra* note 43.

<sup>60</sup> See Diamond, *supra* note 41, at 118.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

memory.<sup>63</sup> In addition, sleep deprivation often has a detrimental effect on the prospective memory system, causing an even higher probability of the failure of that memory system if the parent is also sleep deprived.<sup>64</sup>

While social-emotional factors contribute heavily to the parent losing awareness of the child, certain physical factors associated with the drive also make it more likely that a parent will forget that a child is in the vehicle with them.<sup>65</sup> If a parent changes his or her driving routine on the way to work, for example, the basal ganglia triggers an autopilot response, bringing the parent along his or her usual route to work and causing the parent to forget that the child is in the car.<sup>66</sup> A common example of this occurs when the parent decides to stop for breakfast along the route. After stopping for breakfast, the brain triggers autopilot and the parent drives directly to work without stopping at the daycare center as originally planned.<sup>67</sup> Another possible trigger of the autopilot response occurs when the parent typically interacts with the child on the drive, but on the particular day in question the child is unusually quiet, often because the child has fallen asleep.<sup>68</sup> This change in interpersonal dynamics triggers the autopilot response in the basal ganglia once again.<sup>69</sup> This time, the brain recognizes the absence of interaction with the child to mean that the child is not present in the vehicle.<sup>70</sup>

While the neurobiological processes that cause a parent to forget that the child is in the car with them are mostly unpreventable, there are factors that can reduce the likelihood of the parent leaving the child in the car when they exit.<sup>71</sup> After losing initial awareness of the child, a cue or reminder can alert the parent to the presence of the child.<sup>72</sup> Effective cues include the child making some sort of noise or the parent observing a diaper bag in the front seat with them.<sup>73</sup> Additionally, if the parent is aware of the possibility of memory failure, the parent can pre-plan to attempt to trigger their memory by leaving a necessary item in the backseat that the parent must then retrieve before exiting the car, such as one of their shoes.<sup>74</sup> When the parent exits the vehicle and notices that they are missing a shoe, it will trigger them to the memory of their child

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 119–20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

in the back seat.<sup>75</sup> Awareness of the possibility that a failure of the prospective memory system may occur and pre-planning for how to remind the parent of the child's presence in the vehicle is then vital to saving the child's life.<sup>76</sup>

C. *Development of Statutes Across the United States and History of Criminalization*

Twenty states have passed legislation prohibiting parents or guardians from leaving a child in a vehicle unattended.<sup>77</sup> Of those twenty states, seven of them have strict liability laws, which make it a violation of the statute to leave a child in a vehicle, either intentionally or unintentionally, for any reason.<sup>78</sup> Strict liability laws shift the burden of proving the mens rea of the defendant away from the prosecution and allow the prosecution of individuals who may lack any intent.<sup>79</sup> The seven strict liability states are Alabama, California, Florida, Hawaii, Louisiana, Maryland, and Washington.<sup>80</sup>

California does not expressly provide for any sort of mens rea requirement in California Vehicle Law § 15620.<sup>81</sup> While the law does require the State to prove that the child was left in the car where there were “conditions that present a significant risk to the child's safety,” this provision does not require a parent or guardian to be aware of this

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<sup>75</sup> *Id.*

<sup>76</sup> See discussion *infra* Section III.C.

<sup>77</sup> Those states are Alabama, California, Connecticut, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Washington. ALA. CODE § 6-5-332.5 (2020); CAL. VEH. CODE § 15620 (West 2020); CONN. GEN. STAT. ANN. § 53-21a (West 2020); FLA. STAT. ANN. § 316.6135 (West 2020); HAW. REV. STAT. ANN. § 291C-121.5 (West 2020); 720 ILL. COMP. STAT. ANN. 5/12C-5 (West 2020); KY. REV. STAT. ANN. § 507.040 (West 2020); LA. STAT. ANN. § 32:295.3 (2020); MD. CODE ANN., FAM. LAW § 5-801 (West 2020); MICH. COMP. LAWS ANN. § 750.135a (West 2020); MO. ANN. STAT. § 577.300 (West 2020); NEB. REV. STAT. ANN. § 28-710 (West 2020); NEV. REV. STAT. ANN. § 202.485 (West 2020); OKLA. STAT. ANN. tit. 47, § 11-1119 (West 2020); 75 PA. STAT. AND CONS. STAT. ANN. § 3701.1 (West 2020); 31 R.I. GEN. LAWS ANN. § 31-22-22.1 (West 2020); TENN. CODE ANN. § 55-10-803 (West 2020); TEX. PENAL CODE ANN. § 22.10 (West 2020); UTAH CODE ANN. § 76-10-2202 (West 2020); WASH. REV. CODE ANN. § 9.91.060 (West 2020).

<sup>78</sup> The states with strict liability statutes are Alabama, California, Florida, Hawaii, Louisiana, Maryland, and Washington. See ALA. CODE § 6-5-332.5; CAL. VEH. CODE § 15620; FLA. STAT. ANN. § 316.6135; HAW. REV. STAT. ANN. § 291C-121.5; LA. STAT. ANN. § 32:295.3; MD. CODE ANN., FAM. LAW § 5-801; UTAH CODE ANN. § 76-10-2202; WASH. REV. CODE ANN. § 9.91.060.

<sup>79</sup> Strict liability is defined as “[l]iability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule.” *Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>80</sup> See statutes cited *supra*, note 78.

<sup>81</sup> CAL. VEH. CODE § 15620.

significant risk nor to have intentionally left the child in the car despite this risk.<sup>82</sup> Alternatively, a parent could be charged under the law if they were to leave the engine running or the keys in the ignition, again not providing a specific mens rea requirement.<sup>83</sup> It is also important to note that the California statute specifically provides prosecutors the opportunity to charge a parent with any additional crime under state law in connection with the child's death.<sup>84</sup>

Similar to California, Alabama's relevant statute focuses on whether there was an "unreasonable risk of injury or harm to the child," but does not explicitly state that a parent or guardian must have been aware of this risk or disregarded it.<sup>85</sup> The statute also provides that a "vehicle that has an ambient interior temperature of 99 degrees Fahrenheit or less shall be presumed safe."<sup>86</sup> Alabama's statute is the most recently enacted of the twenty and includes a provision protecting individuals from criminal liability who enter a vehicle by force in order to remove a child or incapacitated person.<sup>87</sup>

Florida State Law § 316.6135 makes it illegal for a person responsible for a child under the age of six to leave that child in a vehicle for more than fifteen minutes unattended or unsupervised.<sup>88</sup> In order to convict an individual under this statute, the State must prove: (1) defendant was legally responsible for the victim; (2) the victim was younger than the age of six; and either (3) the defendant left the victim unsupervised or unattended in a vehicle for more than fifteen minutes; or (4) in leaving the child unattended while the motor is running, the child is endangered or appears distressed.<sup>89</sup> While the law still requires the prosecution to prove certain elements of the crime, there is no mens rea requirement in the statute, making it easier for the prosecution to obtain a conviction.<sup>90</sup>

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<sup>82</sup> *Id.* § 15620(a)(1).

<sup>83</sup> *Id.* § 15620(a)(2).

<sup>84</sup> "Nothing in this subdivision precludes prosecution under any other provision of law." *Id.* § 15620(d)(2).

<sup>85</sup> ALA. CODE § 6-5-332.5(b) (2020).

<sup>86</sup> *Id.* This provision is bewildering in light of the relevant research about infants and their inability to regulate body temperature. *See* discussion *supra* Section I.A.

<sup>87</sup> ALA. CODE § 6-5-332.5(c).

<sup>88</sup> FLA. STAT. ANN. § 316.6135 (West 2020).

<sup>89</sup> *Id.* § 316.6135(1).

<sup>90</sup> *Staples v. United States*, 511 U.S. 600, 606 (1994) ("[W]e have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.")

Hawaii's relevant statute removes even more of the burden from the prosecution in proving its elements.<sup>91</sup> Under its law, the prosecution does not have to prove that the individual charged with the crime had custody or care of the child.<sup>92</sup> Further, the statute provides that it is unlawful to leave a child in a vehicle unsupervised for five minutes or more, which is an incredibly tight restriction as most people cannot run in and out of a store in that amount of time.<sup>93</sup>

Louisiana's statute is another of strict liability, making it unlawful for an operator of a vehicle to leave a child unattended and unsupervised in a vehicle.<sup>94</sup> Louisiana specifically outlines the punishment for this crime within the statute.<sup>95</sup> Violations for first-time offenders carries a fine of no more than five hundred dollars and/or imprisonment for six months, while subsequent offenders face one to two years in prison and/or a fine of one to two thousand dollars.<sup>96</sup>

Similar to Louisiana, the Maryland statute outlines a punishment and charges the crime as a misdemeanor, carrying a fine of no more than five hundred dollars, imprisonment not to exceed thirty days, or both.<sup>97</sup> Maryland's relevant statute stipulates that it is illegal to leave a child under the age of eight in a vehicle unless there is also a person over the age of thirteen in the car with them.<sup>98</sup> Neither of these statutes outlines an enhancement of the punishment if the child dies as a result of being left in the vehicle.<sup>99</sup> While Louisiana and Maryland are strict liability states, the lack of an explicit enhancement option works to prevent the prosecution from using the strict liability law to prove the higher crime of manslaughter without meeting its burden of proving *mens rea*.<sup>100</sup>

The last of the strict liability states is Washington, which has a law that makes it illegal for a person with custody of a child under the age of twelve from leaving that child in a vehicle unattended when entering a

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<sup>91</sup> Hawaii's statute makes it unlawful for a person to leave a child in a vehicle unsupervised for five minutes or longer, regardless of whether or not the person is charged with care or custody of the child. HAW. REV. STAT. ANN. § 291C-121.5(a) (West 2020).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* Although this paper is focused on individuals who leave their children in the car unintentionally, it is important to note how strict Hawaii's law is even when it comes to those who purposefully leave their child in the car. Hawaii's small time window may be attributed to the fact that Hawaii temperatures do not typically fall below 65°F, even in the wintertime. *See generally Monthly Weather Forecast and Climate Hawaii, USA*, WEATHER ATLAS, [https://www.weather-us.com/en/hawaii-usa-climate#climate\\_text\\_1](https://www.weather-us.com/en/hawaii-usa-climate#climate_text_1) [<https://perma.cc/56TY-FFLW>].

<sup>94</sup> LA. STAT. ANN. § 32:295.3 (2020).

<sup>95</sup> *Id.* § 32:295.3(D).

<sup>96</sup> *Id.*

<sup>97</sup> MD. CODE ANN., FAM. LAW § 5-801(b) (West 2020).

<sup>98</sup> *Id.* § 5-801(a).

<sup>99</sup> *See id.* § 5-801; LA. STAT. ANN. § 32:295.3.

<sup>100</sup> *See* MD. CODE ANN., FAM. LAW § 5-801; LA. STAT. ANN. § 32:295.3.

tavern or any premise that sells alcohol.<sup>101</sup> While this is still a strict liability statute, it only applies to the particular situation of leaving a child in a vehicle in order to enter a bar.<sup>102</sup> The wording of the statute points to a legislative intent which takes into consideration the socially normative idea that parents who forget a child in the car when entering a bar are more culpable than those who leave or forget a child in the car at their home or place of work.<sup>103</sup> Unfortunately, Washington's statute does not take into account the neurobiological causes of forgetting a child in a vehicle which can happen to anyone at any time.<sup>104</sup>

The other thirteen states with relevant statutes have varying levels of mens rea requirements.<sup>105</sup> Connecticut, Oklahoma,<sup>106</sup> Michigan, and Pennsylvania<sup>107</sup> consider whether there were conditions present that presented a risk to the child's health or safety. In order for the prosecution to obtain a conviction under one of these state laws, they must prove that the person was consciously aware of the risk and disregarded it.<sup>108</sup> This creates a mens rea requirement of recklessness.<sup>109</sup> Notably, the

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<sup>101</sup> WASH. REV. CODE ANN. § 9.91.060 (West 2020).

<sup>102</sup> *Id.*

<sup>103</sup> See Jason Torchinsky, *Is It Okay to Leave Your Kid Alone in a Car if You're Not an Idiot?*, JALOPNIK (May 7, 2015, 1:10 PM), <https://jalopnik.com/is-it-okay-to-leave-your-kid-in-a-car-if-youre-not-an-i-1702237113> [<https://perma.cc/3URD-8RAB>] (“The stories about moms leaving kids in cars while they go to a bar or a job interview or gamble? Of course that’s horrible—those are terrible decisions, and they have nothing in common with a responsible parent leaving their kid in a car, on a mild day, windows partially open, as they run a 10-minute errand. It’s just not the same thing.”).

<sup>104</sup> See discussion *supra* Section I.B.

<sup>105</sup> See CONN. GEN. STAT. ANN. § 53-21a (West 2020); 720 ILL. COMP. STAT. ANN. 5/12C-5 (West 2020); KY. REV. STAT. ANN. § 507.040 (West 2020); MICH. COMP. LAWS ANN. § 750.135a (West 2020); MO. ANN. STAT. § 577.300 (West 2020); NEB. REV. STAT. ANN. § 28-710 (West 2020); NEV. REV. STAT. ANN. § 202.485 (West 2020); OKLA. STAT. ANN. tit. 43A, § 10-103 (West 2020); 75 PA. STAT. AND CONS. STAT. ANN. § 3701.1 (West 2020); 31 R.I. GEN. LAWS ANN. § 31-22-22.1 (West 2020); TENN. CODE ANN. § 55-10-803 (West 2020); TEX. PENAL CODE ANN. § 22.10 (West 2020); UTAH CODE ANN. § 76-10-2202 (West 2020).

<sup>106</sup> Oklahoma's statute applies not only to children, but also individuals who are incapacitated due to a mental or physical disability, who are left unattended in a vehicle. OKLA. STAT. ANN. tit. 47, § 11-1119 (West 2020); see also *id.* tit. 43A, § 10-103.

<sup>107</sup> Pennsylvania requires the vehicle to be out of the vehicle owner's sight (and under circumstances which endanger the safety if the child) in order for charges to be brought under the statute. 75 PA. STAT. AND CONS. STAT. ANN. § 3701.1.

<sup>108</sup> See CONN. GEN. STAT. ANN. § 53-21a; MICH. COMP. LAWS ANN. § 750.135a; OKLA. STAT. ANN. tit. 43A, § 10-103; 75 PA. STAT. AND CONS. STAT. ANN. § 3701.1.

<sup>109</sup> The Model Penal Code's language defining “recklessness” is identical to the mens rea requirement in the listed statutes. MODEL PENAL CODE § 2.02(2)(c) (1985) (“A person acts recklessly with respect to a material element of an offense when he *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.” (emphasis added)).

Connecticut and Michigan statutes provide that in order for the State to charge a parent with a violation of the statute, the parent or guardian must have left the child in the vehicle for a period of time that creates a substantial risk.<sup>110</sup> The burden is then put on the prosecution to convince the jury that the time period in any specific case was enough to create a substantial risk.<sup>111</sup>

Illinois, Nebraska, Nevada, Tennessee, Texas, and Utah have a built in mens rea requirement in their statutes, requiring the prosecution to prove that an individual knowingly, intentionally, or negligently left their child in a vehicle.<sup>112</sup> Similar to the requirements in Connecticut and Michigan,<sup>113</sup> the Texas Penal Code contains a maximum duration beyond which it would be considered unreasonable to leave a child in a vehicle unattended.<sup>114</sup> This stricter time period requirement is likely due to the high heats in Texas, and the fact that Texas, as of 2018, ranked number one in the nation for child deaths caused by being left in a hot vehicle.<sup>115</sup> While Nevada carries the same mens rea requirements as Nebraska, Tennessee, and Texas, Nevada's statute is the only one of the twenty states that specifically explains that it does not apply to individuals who unintentionally lock a child in a vehicle.<sup>116</sup>

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<sup>110</sup> CONN. GEN. STAT. ANN. § 53-21a; MICH. COMP. LAWS ANN. § 750.135a.

<sup>111</sup> CONN. GEN. STAT. ANN. § 53-21a; MICH. COMP. LAWS ANN. § 750.135a. The time period requirement in Connecticut's statute is written to favor individuals who leave a child in the car in order to run into a store quickly. However, the State of Connecticut has been loose in applying this requirement and prosecutors have been known to charge individuals instead with felony risk of injury, which carries a higher punishment than the one prescribed in the statute. Lawyers in Connecticut believe this is due to the increase in recent years of children dying from being left in the car, combined with overcharging. *See generally* Mark Sherman, *Leaving a Child Under 16 in a Car—for Even 2 Minutes—Can Be a Felony Arrest in Connecticut*, LAW OFFS. MARK SHERMAN, <https://markshermanlaw.com/blog/leaving-a-child-under-16-in-a-car-2-minutes-can-be-felony> [<https://perma.cc/YZ4K-7LK6>]. Prosecutors in Michigan also rely on a timing requirement and often choose to charge individuals under their state statute if a child is left in a vehicle for more than fifteen minutes. *See generally* Steven M. Gursten, *Can You Be Arrested for Leaving Your Kids Alone in the Car?*, MICHIGANAUTOLOW (June 4, 2014), <https://www.michiganautolaw.com/blog/2014/06/04/can-you-be-arrested-leaving-kids-in-car> [<https://perma.cc/82JV-P4F5>].

<sup>112</sup> 720 ILL. COMP. STAT. ANN. 5/12C-5 (West 2020); NEB. REV. STAT. ANN. § 28-710 (West 2020); NEV. REV. STAT. ANN. § 202.485 (West 2020); TENN. CODE ANN. § 55-10-803 (West 2020); TEX. PENAL CODE ANN. § 22.10 (West 2020); UTAH CODE ANN. § 76-10-2202 (West 2020).

<sup>113</sup> *See supra* note 111.

<sup>114</sup> Texas's statute considers it unreasonable to leave a child under the age of seven unattended in a vehicle for longer than five minutes. TEX. PENAL CODE ANN. § 22.10(a). Illinois denotes a time period of ten minutes, after which a trier of fact could consider the child to be unattended. 720 ILL. COMP. STAT. ANN. 5/12C-5(b).

<sup>115</sup> *See generally* *Texas Ranks No. 1 for Child Hot Car Deaths in the US*, ABC 13 EYEWITNESS NEWS (June 13, 2018), <https://abc13.com/weather/texas-ranks-no-1-for-child-hot-car-deaths-in-the-us/3595440> [<https://perma.cc/RM6C-HSLU>].

<sup>116</sup> NEV. REV. STAT. ANN. § 202.485 ("The provisions of this section do not apply to a person who unintentionally locks a motor vehicle with a child in the vehicle.").

Utah prohibits a person responsible for a child under the age of nine years old from leaving that child unsupervised in a closed compartment of a vehicle.<sup>117</sup> Utah defines an “enclosed compartment” as any enclosed area of the vehicle, including the passenger compartment, regardless of whether the driver leaves a window or door open.<sup>118</sup> Under this law, a child is unsupervised if a parent leaves them alone without a person above the age of nine.<sup>119</sup> Utah’s statute also specifically allows the prosecution to charge the parent with a higher crime only if the prosecution is able to prove the elements of that higher crime.<sup>120</sup>

The remaining three states, Missouri, Rhode Island, and Kentucky, have interesting caveats to their laws that are important to discuss separately.<sup>121</sup> Missouri’s relevant statute does not account for cases in which a child left in a vehicle dies as a result, but instead focuses on cases in which an unsupervised child under the age of eleven causes the death or injury of a third person.<sup>122</sup> In Rhode Island, police officers are required to give a person who leaves a child in a vehicle unattended a verbal warning on the dangers of doing so.<sup>123</sup> Kentucky is the only state that explicitly considers leaving a child unsupervised in a vehicle, resulting in that child’s death, to be second-degree manslaughter.<sup>124</sup> In order to obtain a conviction under the statute, the child must be under the age of eight, and the circumstances must manifest an extreme indifference to human life.<sup>125</sup> If the prosecution cannot prove the elements of the statute, it is

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<sup>117</sup> UTAH CODE ANN. § 76-10-2202.

<sup>118</sup> *Id.* § 76-10-2202(1)(b).

<sup>119</sup> *Id.* § 76-10-2202(2)(c).

<sup>120</sup> “[D]oes not apply if the person’s conduct that constitutes a violation of this section is subject to a greater penalty under another provision of state law.” *Id.* § 76-10-2202(3).

<sup>121</sup> KY. REV. STAT. ANN. § 507.040 (West 2020); MO. ANN. STAT. § 577.300 (West 2020); 31 R.I. GEN. LAWS ANN. § 31-22-22.1 (West 2020).

<sup>122</sup> MO. ANN. STAT. § 577.300. This accounts for situations in which the child left in the vehicle ends up gaining control of the car and begins to drive it. However, such cases are beyond the scope of this Note.

<sup>123</sup> 31 R.I. GEN. LAWS ANN. § 31-22-22.1. In November of 2018, a Rhode Island father, Jose Funes, purposefully left his four-year-old daughter in his vehicle unattended while he was in a casino. Frank Maradiaga, *Man Accused of Leaving 4-Year-Old Locked in Cold Car While at Casino*, NBC 10 NEWS (Nov. 15, 2018), <https://turmtio.com/news/local/father-arrested-for-leaving-4-year-old-locked-in-cold-car-while-at-casino> [<https://perma.cc/L472-QE7Q>]. Police found the girl forty minutes later, rescued her, and charged Funes with child neglect under title 11, section 11-9-5 of the Rhode Island General Laws. *Id.*; Rhode Island v. Funes, No. P2-2018-3771A (R.I. Sup. Ct. Apr. 10, 2019); *see also* 11 R.I. GEN. LAWS ANN. § 11-9-5 (West 2020). The case was later dismissed by the State pursuant to Rule 48(a) of the Rhode Island Superior Court Rules of Criminal Procedure. *See Funes*, slip op.; *see also* R.I. SUPER. R. CRIM. P. 48(a) (2020). That it was dismissed pursuant to Rule 48(a), typically means that the prosecution has exercised discretion and chosen not to charge the individual.

<sup>124</sup> KY. REV. STAT. ANN. § 507.040.

<sup>125</sup> *Id.*



likely that the prosecution will decline to charge the individual with a lesser crime.<sup>126</sup>

## II. A CRITICAL LOOK AT THE CRIMINAL CHARGES PARENTS IN THIS SITUATION OFTEN FACE

### A. *Intermediate Laws Use the Deterrent Punishment Theory to Attempt to Prevent Parents from Leaving Children in Vehicles Unattended*

At the root of deterrence punishment theory is the belief that a person gears every action they take in life towards the goal of increasing their overall happiness.<sup>127</sup> If a person only takes specific actions with the end goal of increasing overall happiness, then the threat of punishment and, therefore, the threat of a decrease in overall happiness, can deter people from committing wrongful acts.<sup>128</sup> Establishing punishments for certain wrongful acts then forces the individual to do a cost-benefit analysis, weighing the happiness that they feel is certain to result from committing the act against the potential decrease in happiness that occurs when being punished after getting caught.<sup>129</sup> Deterrence theory postulates that realizing that the punishment is greater than the reward will dissuade an individual from committing the act altogether.<sup>130</sup>

Deterrence theory further relies on the idea that in order to balance the interests of an individual's actions in favor of reducing crime, the resulting punishment must be severe.<sup>131</sup> In reality, the certainty of being caught is a far more significant factor in deterring crime.<sup>132</sup> There is a vast amount of evidence that shows that increasing the visibility of police officers to heighten perceived risk has a higher effect on deterring crimes than increasing punishments.<sup>133</sup> Therefore, under deterrence theory, it

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<sup>126</sup> Charges are often not filed in cases where the prosecution is unable to prove the elements of manslaughter. *See generally* Mike Stunson, *A 2-Month-Old Died in Lexington After Being Left in a Hot Car, Police Say*, LEXINGTON HERALD LEADER (Aug. 30, 2019, 1:07 PM), <https://www.kentucky.com/news/local/crime/article234555287.html> [<https://perma.cc/9RPR-VZV4>].

<sup>127</sup> BEN JOHNSON, *DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY: A PRIMER* 3 (2019), <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf> [<https://perma.cc/8UZ2-RTDQ>].

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 4.

<sup>131</sup> *Id.*

<sup>132</sup> NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *FIVE THINGS ABOUT DETERRENCE* 1 (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf> [<https://perma.cc/JF7T-XA9C>].

<sup>133</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *CRIME & JUST.* 199, 201 (2013).

follows that to decrease the amount of individuals who intentionally leave children in vehicles unattended, parking lots and other public areas should increase surveillance in order to increase the perceived risk of certainty of being caught.<sup>134</sup>

In most of the twenty states with statutes preventing individuals from leaving a child in a vehicle without adult supervision, the legislation provides for small fines and short prison sentences.<sup>135</sup> With the exception of Nevada, none of the state statutes expressly take into consideration a situation in which a parent leaves a child in a vehicle unattended accidentally due to a failure of the brain's prospective memory system.<sup>136</sup> The other states only consider situations in which a parent has left a child in a vehicle for a period of time, whether intentionally or recklessly.<sup>137</sup> The focus of these punishments is to force individuals to weigh the potential increase in happiness that results, for example, from not having to go through the hassle of unbuckling, waking, and carrying a sleeping child from the vehicle in order to quickly run into a store, with the possibility of being charged and then subsequently convicted of a crime.<sup>138</sup>

This legislative intent is further demonstrated by the fact that some of the state laws that prescribe punishments for violation include increases of punishments for repeat offenders.<sup>139</sup> An increase in punishment for repeat offenders is a classic characteristic of deterrence punishment theory, which suggests that the increase in the severity of the threat of punishment should be enough to decrease the likelihood of individuals committing a crime repeatedly.<sup>140</sup> Researchers have a variety of explanations for why they believe deterrence theory works best for

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<sup>134</sup> See generally *id.*

<sup>135</sup> See statutes cited *supra* note 77. The only state that expressly provides for a higher punishment is Kentucky which considers the crime to be that of manslaughter and not a smaller intermediate crime. KY. REV. STAT. ANN. § 507.040 (West 2020).

<sup>136</sup> See statutes cited *supra* note 77; see also *supra* note 116.

<sup>137</sup> See statutes cited *supra* note 77. The strict liability states also fail to consider situations in which a parent has left a child in a vehicle accidentally as they are not concerned with the state of mind behind the act. See statutes cited *supra* note 78.

<sup>138</sup> “Beccaria and Bentham expected potential criminals to compare the expected benefit of committing a crime with the benefit of not committing a crime. In short, the theory held that if you increase the cost of committing a crime enough, people will not commit the crime.” JOHNSON, *supra* note 127, at 3 (footnote omitted); see also CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS WITH A COMMENTARY BY M. DE VOLTAIRE (1872).

<sup>139</sup> These states include Illinois, Louisiana, Oklahoma, and Tennessee. See 720 ILL. COMP. STAT. ANN. 5/12C-5 (West 2020); LA. STAT. ANN. § 32:295.3 (2020); OKLA. STAT. ANN. tit. 47, § 11-1119 (West 2020); TENN. CODE ANN. § 55-10-803 (West 2020).

<sup>140</sup> See BECCARIA, *supra* note 138.

repeat offenders,<sup>141</sup> but the most prominent seems to be that after an initial conviction, an individual has already suffered the cost of being labeled a criminal and thus has less apprehension in committing the wrongful act a second time.<sup>142</sup> Further, repeat offenders have higher levels of confidence that they will be able to avoid detection and are thus more likely to attempt the wrongful act again.<sup>143</sup> Despite the legislative intent behind increasing punishment for subsequent offenders, prison sentences actually do little to prevent future crimes.<sup>144</sup> In fact, research has shown that prison time can have the opposite effect by desensitizing individuals to prison, neutralizing the threat that comes with increased jail time.<sup>145</sup>

Cases where individuals unintentionally leave a child in a vehicle due to a lapse in memory and a failure of the prospective memory system exemplify the central issue with deterrence theory.<sup>146</sup> If an individual does not intend on committing an act and is unaware that they are even committing an act, that individual cannot possibly consider either the severity of the punishment or the certainty of being caught before committing that act.<sup>147</sup> While an argument exists that individuals may exercise more caution in making sure they do not leave a child in a vehicle if they are aware of the severity of punishment and the certainty of being caught,<sup>148</sup> that argument does not consider the fact that, in most cases, forgetting a child in a vehicle is a neurobiological processing issue unaffected by conscious decision making.<sup>149</sup>

Further, punishments based solely on deterrence theory do not consider the likely built-in consequence of leaving a child in a vehicle unattended for a significant length of time—the death of that child.<sup>150</sup> Recent research on deterrence theory has discovered that internal factors, such as feelings of guilt, have a substantially higher deterrence effect than

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<sup>141</sup> Alex Raskolnikov, *Deterrence Theory: Key Findings and Challenges*, in CAMBRIDGE HANDBOOK OF COMPLIANCE (forthcoming May 2021) (Columbia Law & Econ., Working Paper No. 610, 2019), [https://scholarship.law.columbia.edu/faculty\\_scholarship/2576](https://scholarship.law.columbia.edu/faculty_scholarship/2576) [<https://perma.cc/9M7V-48U4>].

<sup>142</sup> Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 39 (2017).

<sup>143</sup> See Raskolnikov, *supra* note 141.

<sup>144</sup> See NAT'L INST. OF JUSTICE, *supra* note 132.

<sup>145</sup> *Id.*

<sup>146</sup> See generally discussion *supra* Section II.A.

<sup>147</sup> See generally discussion *supra* Section II.A.

<sup>148</sup> Cf. Jeremy D. Davey & James E. Freeman, *Improving Road Safety Through Deterrence-Based Initiatives: A Review of Research*, 11 SULTAN QABOOS U. MED. J. 29 (2011) (hypothesizing that an increase in police presence, awareness of certainty of getting caught, and severity of punishment helped to decrease drunk driving accidents in Australia).

<sup>149</sup> See generally discussion *supra* Section I.B.

<sup>150</sup> See generally discussion *supra* Section II.A.

legal consequences and punishments.<sup>151</sup> It is no question that parents who have lost a child due to unintentionally leaving that child in a vehicle on a hot day carry the grief and guilt of that act for a lifetime, and many of them contemplate suicide in the months immediately after the tragedy.<sup>152</sup> In one particularly heartbreaking situation, Miles Harrison's toddler son passed away after Harrison forgot to drop him off at daycare and the child spent nine hours in Harrison's vehicle in the office parking lot on a scorching July day.<sup>153</sup> Throughout Harrison's manslaughter trial, several witnesses were unable to maintain their composure while describing the events of that day.<sup>154</sup> The hospital emergency room nurse described Harrison's demeanor as tortured, explaining that he was rocking back and forth with his eyes shut, unable to contain his heartbreak.<sup>155</sup> When she spoke with him and offered him a sedative to help calm him, he remarked that he didn't deserve one because he deserved the pain he was going through.<sup>156</sup> He told her he wanted to feel the pain of the guilt and heartbreak, and then he wanted to die.<sup>157</sup>

In addition to possible mental illnesses and suicidal ideations, manifestations of the emotional pain often prevent grieving parents from moving on in a multitude of other ways. One man, Mikey Terry, was a contractor in Texas working on building a wall for a Catholic church, despite not having a job in the preceding months.<sup>158</sup> His realization of his fatal mistake came as he was transporting lumber for the job in a thirty-foot truck, which he drove as fast as he could to his personal vehicle sitting outside the church.<sup>159</sup> He knew as soon as he arrived at his truck, sitting in the sweltering sun for hours, that his six-month-old daughter, who he had unintentionally left in the truck's cab, had passed.<sup>160</sup> The prosecution declined to charge Terry with a crime, but he has been unable to attend any church since the accident despite being an avid churchgoer his entire life up to that day.<sup>161</sup>

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<sup>151</sup> Heather Mann, Ximena Garcia-Rada, Lars Hornuf, & Juan Tafurt, *What Deters Crime? Comparing the Effectiveness of Legal, Social, and Internal Sanctions Across Countries*, 7 FRONTIERS PSYCHOL. 85 (2016).

<sup>152</sup> "[He] wasn't charged with a crime, but for months afterward he contemplated suicide." Weingarten, *supra* note 43.

<sup>153</sup> *See id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> "I feel guilty about everyone in church talking about how blessed we all are. I don't feel blessed anymore. I feel I have been wronged by God. And that I have wronged God. And I don't know how to deal with that." *Id.*

*B. The Intermediate State Statutes Allow Prosecutors to Charge Grieving Parents With a Crime Even When They Determine that Manslaughter Is Inapplicable*

When a child passes away after being left in a vehicle, the state considers whether the individual who left the child in the vehicle is guilty of a crime.<sup>162</sup> In cases where the prosecution decides to bring charges, the defendant could potentially face a charge of manslaughter.<sup>163</sup> In a criminal prosecution, the burden is on the state to prove that the defendant committed the crime beyond a reasonable doubt.<sup>164</sup> In a manslaughter case, the prosecution must then prove beyond a reasonable doubt that the defendant caused the victim's death, intended the conduct that caused the victim's death, and that the conduct was wanton or reckless.<sup>165</sup> While more and more district attorneys' offices are declining to bring charges against individuals who unintentionally forget a child in a vehicle, resulting in that child's death, the offices who charge the individual with manslaughter face a difficult battle in proving the elements of manslaughter.<sup>166</sup> Additionally, juries are less likely to convict such individuals, as the law requires, when there exists a reasonable doubt to the intent of the defendant in leaving the child in the vehicle.<sup>167</sup>

When the prosecution is unable to prove the intent of the parent in states where an intermediate law does not exist, the defendant is either not charged with a crime or ultimately, if charged, acquitted of all charges.<sup>168</sup> In states with intermediate laws, even when the prosecution is

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<sup>162</sup> See generally Reuven Blau & Rosa Goldensohn, *Jury's Out on Prosecution of Parents Who Leave Kids in Cars*, CITY (July 30, 2019, 4:22 PM), <https://www.thecity.nyc/2019/7/30/21210885/jury-s-out-on-prosecution-of-parents-who-leave-kids-in-cars> [<https://perma.cc/U6CW-4ML8>].

<sup>163</sup> *Id.*

<sup>164</sup> “[T]he state must establish every element of the offense . . . beyond a reasonable doubt.” MODEL PENAL CODE § 1.12 explanatory note (1985) (emphasis added).

<sup>165</sup> The burden of proof for manslaughter varies slightly only in wording depending on the jurisdiction. For purely demonstrative purposes, this Note uses the model jury instructions for manslaughter from Massachusetts:

To prove that the defendant is guilty of involuntary manslaughter because of wanton or reckless conduct, the Commonwealth must prove the following elements beyond a reasonable doubt: 1. The defendant caused the victim's death; 2. The defendant intended the conduct that caused the victim's death; 3. The defendant's conduct was wanton or reckless . . . .

MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE JURY INSTRUCTIONS § 2.8.1 (MASS. CONTINUING LEGAL EDUC. 2018) (codifying jury instructions) (footnotes omitted).

<sup>166</sup> See Blau & Goldensohn, *supra* note 162.

<sup>167</sup> See generally Pat Crossley, *Jury: Woman Acquitted of Charges for Death of Child Left in Hot Car*, WILLIAMSPORT SUN-GAZETTE (Nov. 10, 2018), <https://www.sungazette.com/news/top-news/2018/11/jury-woman-acquitted-of-charges-for-death-of-child-left-in-hot-car> [<https://perma.cc/2AFK-D4ZS>].

<sup>168</sup> See generally Blau & Goldensohn, *supra* note 162.

unable to prove manslaughter due to the defendant's lack of intent, the prosecution often still charges the defendant under the intermediate state statute, leaving the grieving parent to face an unnecessary legal battle.<sup>169</sup>

A prime example of this point is a Florida case involving a four-year-old child who died after a mother unintentionally forgot the child in her vehicle for over six and a half hours.<sup>170</sup> The temperature in Florida that day reached above 90°F, and officials later measured the temperature inside of the vehicle at more than 120°F, causing a horrific death for the four-year-old.<sup>171</sup> Although the jury acquitted the mother, Brittany Borgess, of manslaughter because the prosecution failed to show that she acted recklessly, the jury still convicted her under Florida's state law against leaving a child unattended in a running vehicle.<sup>172</sup> The jury convicted Borgess of this lesser charge only after the trial revealed that she had left her child in a running vehicle earlier in the day before the fatal incident itself occurred.<sup>173</sup> Under the statute, Borgess was convicted of a summary offense and charged a fine of twenty-five dollars.<sup>174</sup> At the start of the trial, the prosecution's focus was solely on manslaughter claims and lesser included charges, but once it became apparent that they could not prove the case beyond a reasonable doubt, the State added on the summary charge under the intermediate statute.<sup>175</sup>

### III. HOW TO CORRECT THESE LEGAL WRONGS

#### A. *Prosecutors Should Exercise Discretion and Decline to Bring Manslaughter Charges*

In pursuit of the ethical administration of criminal law, the American Bar Association (ABA) sets forth best practices describing the standards on discretion to file and when it is proper and improper to bring charges.<sup>176</sup> As a function of the job, the prosecutor serves the public and therefore owes a duty solely to the public and not to any specific governmental agency or institution.<sup>177</sup> In satisfying that duty, the prosecutor must determine whether bringing charges appropriately meets

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<sup>169</sup> See Crossley, *supra* note 167.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.1–4.6 (AM. BAR ASS'N 2017) [hereinafter PROSECUTION STANDARDS].

<sup>177</sup> *Id.* § 3-1.3.

the public's interests or whether there exists other available remedies that could more effectively satisfy those interests.<sup>178</sup> As described in Section II.A, the public's interest in these cases rests upon deterring similar tragedies from occurring.<sup>179</sup> Further, the ABA requires that a prosecutor only bring charges that are necessary to deter similar conduct.<sup>180</sup> In bringing criminal charges, the prosecution cannot effectively deter individuals who lack the requisite mens rea requirement to intentionally commit an act.<sup>181</sup> When prosecutors decide to charge an individual who has left a child in a vehicle without intent, the decision to prosecute goes against the public's interests.

In addition to serving the interest of the public, a significant factor outlined by the ABA in considering discretion to file is whether the likely punishment or collateral consequences are disproportionate to the particular offense.<sup>182</sup> A parent who feels emotionally responsible for the death of their own child suffers a greater emotional consequence than any punishment the criminal law could prescribe.<sup>183</sup> However, when prosecutors charge a grieving parent with manslaughter, that parent could face a fine of up to \$5,000 and up to fifteen years in prison if convicted.<sup>184</sup> The further consequences associated with resulting criminal charges often make it difficult for the parent to stay gainfully employed, may cause issues for the parent with housing, and may even make it difficult for the parent to adopt in the future.<sup>185</sup> The cumulative effect of the actual and collateral consequences of criminal charges, along with the emotional and societal consequences the parent is already facing, makes the prosecution of parents in this situation highly disproportionate to the offense committed. Adding criminal punishment to the personal torture the parent already endures is unnecessary and wasteful.<sup>186</sup>

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<sup>178</sup> *Id.* § 3-4.4(a)(xvi).

<sup>179</sup> *See* discussion *supra* Section II.A.

<sup>180</sup> *See* PROSECUTION STANDARDS, *supra* note 176, § 3-4.4(d).

<sup>181</sup> *See* discussion *supra* Section II.A.

<sup>182</sup> *See* PROSECUTION STANDARDS, *supra* note 176, § 3-4.4(a)(vi).

<sup>183</sup> *See* discussion *supra* Section II.A.

<sup>184</sup> N.Y. PENAL LAW § 125.15 (McKinney 2020) (“Manslaughter in the second degree is a class C felony.”); *id.* § 70.00(2)(b) (“For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years.”); *id.* § 80.00(1) (setting forth the maximum fine for a felony).

<sup>185</sup> *See generally* David Schlusel, *Broken Records: Criminal History Errors Cost Jobs and Housing*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Dec. 20, 2019), <https://ccresourcecenter.org/2019/12/20/broken-records-criminal-history-errors-jobs-and-housing> [https://perma.cc/Q8BR-24FT]; *see also* Weingarten, *supra* note 43.

<sup>186</sup> The prosecution is also ethically obligated to consider the limited resources available to the state. *See* PROSECUTION STANDARDS, *supra* note 176, § 3-4.4(a)(xiv).

B. *States with Intermediate Laws Should Repeal Those Laws to Hold Prosecutors to Their Burden of Proof and Ethical Obligations*

The punishments associated with the intermediate statutes, in cases where an individual is a first-time offender, are typically small.<sup>187</sup> Some of the states require fines, such as Florida's twenty-five dollar fine that Brittany Borgess was required to pay, while other states prescribe community service as a punishment.<sup>188</sup> A small number of the state statutes denote punishment for conviction as requiring incarceration of the individual for a period of less than six months.<sup>189</sup> There is no debate that the punishments prescribed by the state statutes are less severe than the punishment typically doled out to those convicted of manslaughter.<sup>190</sup> However, convictions of any kind carry a wide variety of collateral consequences including loss of employment, inability to gain approval to adopt children, and housing consequences, such as eviction from rental properties.<sup>191</sup>

These convictions carry punishments that are designed to deter individuals from leaving a child in a vehicle unattended.<sup>192</sup> As discussed in Section II.A, deterrence is ineffective in preventing behavior where an individual lacks the requisite intent of the underlying crime.<sup>193</sup> The intermediate statutes allow the State to charge, and often convict, individuals under the statute despite the State being unable to carry its burden of proof for the original manslaughter charge.<sup>194</sup> Additionally, while the ethical obligations of the State may prevent it from bringing manslaughter charges, the lesser punishment could possibly allow prosecutors to not feel that same restraint when bringing charges under the intermediate statutes.<sup>195</sup>

When the prosecution brings manslaughter charges against a parent, they are also often able to bring charges under the relevant intermediate statute. The fines and prison time associated with the intermediate statutes are then considered during sentencing in order to further punish the parent for their actions.<sup>196</sup> This enhancement of punishment would be excessive since the State has already prescribed a punishment of

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<sup>187</sup> See generally statutes cited *supra* note 77.

<sup>188</sup> See discussion *supra* Section I.C.

<sup>189</sup> See discussion *supra* Section I.C.

<sup>190</sup> See statutes cited *supra* note 184.

<sup>191</sup> See Schlusser, *supra* note 185.

<sup>192</sup> See discussion *supra* Section II.A.

<sup>193</sup> See generally JOHNSON, *supra* note 127.

<sup>194</sup> See generally Blau & Goldensohn, *supra* note 162.

<sup>195</sup> See discussion *supra* Section III.A.

<sup>196</sup> See generally statutes cited *supra* note 77.



manslaughter under its penal code.<sup>197</sup> The intermediate laws included in the state statutes then become lesser included charges.<sup>198</sup> In order to consider an offense a “lesser included” crime, the elements of the lesser offense must be elements of the greater offense.<sup>199</sup> If it is possible to commit the greater offense without committing the lesser offense, then the lesser is not an included crime.<sup>200</sup> It is possible for an individual to commit involuntary manslaughter without leaving a child in a vehicle.<sup>201</sup> Therefore, the intermediate laws should not be considered lesser included charges when an individual is charged with manslaughter, and the intermediate laws would only apply in situations where the prosecution cannot bring manslaughter charges.<sup>202</sup> It is improper to charge individuals who have forgotten a child in a vehicle with the intermediate laws when the prosecution has failed to meet the burden of proof of manslaughter.<sup>203</sup> It follows that there are no remaining situations in which the intermediate laws can be properly applied to a parent whose child dies after being left in a car without the State violating its ethical obligations as prescribed by the ABA.<sup>204</sup>

To correct these legal wrongs and make the law clearer in these tragic situations, all twenty states should repeal their current statutes. Additionally, prosecutors should exercise discretion to decline to charge individuals who suffer this unfortunate tragedy with manslaughter.

C. *Ultimately, the Criminal Legal System Is the Wrong Avenue to Prevent These Tragedies*

Parents who unintentionally leave a child in a vehicle typically do so due to a failure of the brain’s prospective memory.<sup>205</sup> The failure of the brain’s prospective memory system is a neurobiological process that is unintentional and, for the most part, unpreventable.<sup>206</sup> The criminal law

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<sup>197</sup> See generally statutes cited *supra* note 184.

<sup>198</sup> A lesser included offense is “a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.” *Offense, lesser included offense*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>199</sup> See generally Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 PUGET SOUND L. REV. 185 (1992).

<sup>200</sup> *Id.*

<sup>201</sup> See *Commonwealth v. Welansky*, 55 N.E.2d. 902 (Mass. 1944), in which a night club owner was convicted of involuntary manslaughter after a fire, caused by Welansky’s reckless behavior, killed several patrons.

<sup>202</sup> See generally Huigens, *supra* note 199.

<sup>203</sup> See generally Blau & Goldensohn, *supra* note 162.

<sup>204</sup> See generally discussion *supra* Section III.A.

<sup>205</sup> See Diamond, *supra* note 41.

<sup>206</sup> *Id.*

is unable, through its theories of punishment, to deal with unintentional actions that are biological in nature.<sup>207</sup> However, there are triggers that attribute to a failure of the prospective memory system, and are more likely to cause its failure, including stress, lack of sleep, and distractions.<sup>208</sup> While the criminal legal system is an inadequate system to prevent these tragedies, understanding the triggers and the root cause of the failure of the prospective memory system has allowed companies and organizations to create devices and strategies to prevent these tragedies.<sup>209</sup>

Developers have released several cell phone applications in hopes of preventing parents from unintentionally forgetting their child in a vehicle.<sup>210</sup> One application, Precious Cargo, works via Bluetooth within the vehicle, connecting to the parent's phone and sending an alert asking if there is a baby or child in the vehicle.<sup>211</sup> If the parent selects "yes" on the application, when the vehicle turns off, the phone alerts the parent to the existence of the child.<sup>212</sup> Another application, Kars4Kids Safety, works similarly, utilizing Bluetooth in a vehicle to alert parents of the existence of a child in the vehicle.<sup>213</sup> While these applications have potential to help save children's lives, they require cars to have Bluetooth connectivity.<sup>214</sup> Although newer cars often have Bluetooth capabilities, only a small percentage of vehicles in use worldwide have Bluetooth connectivity.<sup>215</sup>

A similar product available on the market to help prevent parents from unintentionally forgetting their child in a vehicle is the eClip.<sup>216</sup> The eClip works through a smartphone application and Bluetooth connection between the phone and the eClip itself.<sup>217</sup> The parent attaches the eClip to the child's car seat and opens the application.<sup>218</sup> If at any point the

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<sup>207</sup> See discussion *supra* Section II.A.

<sup>208</sup> See Diamond, *supra* note 41.

<sup>209</sup> See generally baby teeth chart, *Don't Forget Your Baby in the Car! There's an App for That*, PARENTS (July 25, 2014), <https://www.parents.com/baby/all-about-babies/dont-forget-your-baby-in-the-car-theres-an-app-for-that> [<https://perma.cc/SU9J-WDCC>].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> "It is estimated that there are over one billion motor vehicles in use worldwide. In 2019, worldwide sales of connected cars with embedded telematics are estimated to have hit 28.5 million units." I. Wagner, *Connected Cars—Statistics & Facts*, STATISTA (Sept. 15, 2020), <https://www.statista.com/topics/1918/connected-cars> [<https://perma.cc/P32M-A92B>].

<sup>216</sup> Clayton Moore, *The eClip Is an Alert Device to Remind You Not to Leave Your Kid Behind*, DIGITALTRENDS (Aug. 8, 2019), <https://www.digitaltrends.com/home/elepho-eclip-baby-monitor> [<https://perma.cc/4HBV-WREB>].

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

phone is more than twenty-five feet from the eClip, the application will alert the phone to remind the parent that he has forgotten the child in the car.<sup>219</sup> The eClip has received funding and praise due to its ability to potentially save lives, but it, too, is not without faults.<sup>220</sup> If the parent were to leave their cell phone in the vehicle when leaving the car, which is often the case and a contributing factor in these situations, the device would not be able to alert them to their child in the car.<sup>221</sup>

A fourth grade student, Sophie Rapson, invented a device that does not have the same technological issues as the commercial products and applications on the market.<sup>222</sup> Rapson invented “Sophie’s Baby Forget-Me-Not” as part of a project for her school’s “Invention Convention.”<sup>223</sup> Sophie’s invention is simple, and parents can easily replicate it at home using a stretchy cord and two Velcro loops.<sup>224</sup> The parent attaches the Velcro loops to the ends of the stretchy cord, and then the parent attaches one of the Velcro loops to the child’s car seat and the other to the parent’s car keys after they enter the vehicle.<sup>225</sup> When the parent turns the keys to turn off the ignition of the car, this pulls the stretchy cord, alerting the parent to the memory of attaching the other end to the child’s car seat.<sup>226</sup> While there is no commercial store that currently sells Sophie’s invention, parents can easily replicate it at home.<sup>227</sup>

In order for any of the devices explained above to be helpful, parents must be aware that forgetting a child could happen to anyone.<sup>228</sup> Janette Fennell formed one of the most prominent organizations created to spread awareness of this issue, KidsAndCars, after a man kidnapped her and her husband at gunpoint while they were driving, and, after robbing them, left them in the trunk of Fennell’s car.<sup>229</sup> During the ordeal, neither she nor her husband knew the fate of their infant son who had been in the car with them.<sup>230</sup> After being rescued, relief flooded over Fennell and her husband when they discovered the kidnapper had left their son alone in front of

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*; see also Weingarten, *supra* note 43.

<sup>222</sup> Perri Konecky, *Fourth Grader Invents Genius Device to Help Parents Remember Their Kid Is in the Car*, POPSUGAR (Nov. 9, 2016), <https://www.popsugar.com/family/Fourth-Grader-Invention-Kids-Cars-42685394> [<https://perma.cc/3QZC-8XZE>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See discussion *supra* Section I.B.

<sup>229</sup> *Our Story*, KIDSANDCARS.ORG, <https://www.kidsandcars.org/about-us/our-story> [<https://perma.cc/RAZ4-QTWM>].

<sup>230</sup> *Id.*

their home.<sup>231</sup> Soon after, Fennell started a successful campaign to pass federal regulations requiring a release lever on the inside of trunks in order to reduce trunk entrapment.<sup>232</sup> She later formed KidsAndCars to promote safety for children in and around vehicles.<sup>233</sup> While the organization aims to promote safety and reduce the risk of a wide variety of vehicle-related incidents, it is now primarily focused on safety regulations and spreading awareness to prevent deaths of children being left in cars by parents, either intentionally or unintentionally.<sup>234</sup>

While KidsAndCars is the leading organization fighting to prevent these tragedies, several other organizations and authorities have since joined in the cause, including The United States Department of Transportation National Highway Traffic Safety Administration, which released information about the safety of children in various vehicular situations and published a tip sheet aimed at preventing child heatstroke.<sup>235</sup> Another notable organization, Ray Ray's Pledge, was formed after a young girl died when her father left her in his vehicle in the Texas heat for nearly three hours, thinking he had dropped her off at daycare.<sup>236</sup> The main focus of Ray Ray's Pledge is on "day-care drop off time" being a high period for vehicular heatstroke deaths, and the organization aims to educate both parents and daycare providers on the need of notifying parents immediately if their child has not been dropped off at daycare at the typical time.<sup>237</sup>

These organizations and technological advances have been working towards a common goal: ending the number of deaths caused by parents unintentionally forgetting a child in a vehicle unattended.<sup>238</sup> Since the prevailing view of parents is that such a tragedy could never happen to them, an increase of awareness is vital in preventing the amount of deaths.<sup>239</sup> In cases where parents intentionally leave a child in a vehicle,

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Our Mission Statement*, KIDSANDCARS.ORG, <https://www.kidsandcars.org/our-mission-statement> [<https://perma.cc/C9AK-KUBR>].

<sup>235</sup> *Tips to Avoid Child Heatstroke*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/child-safety/tips-avoid-child-heatstroke> [<https://perma.cc/T6FM-NX47>].

<sup>236</sup> *Our Tragedy: The Result of ONE WRONG TURN*, RAY RAY'S PLEDGE, <https://www.rayrayspledge.com/Ray-Ray-s-Story.html> [<https://perma.cc/72KT-6LBV>].

<sup>237</sup> *Id.*

<sup>238</sup> *See generally* KIDSANDCARS.ORG, *supra* note 234; *see also* RAY RAY'S PLEDGE, *supra* note 236; baby teeth chart, *supra* note 209.

<sup>239</sup> Press Release, Safe Kids Worldwide, *New Study: 14% of Parents Say They Have Left a Child Alone Inside Parked Vehicle Despite the Risks of Heatstroke* (Apr. 29, 2014), <https://www.safekids.org/press-release/new-study-14-parents-say-they-have-left-child-alone-inside-parked-vehicle-despite> [<https://perma.cc/QYL5-DLP7>] ("Tragedies from heatstroke in cars happen far too often. They are heartbreaking and preventable, and this research is a reminder that we need

education on how readily a car heats up to fatal-level temperatures can help to reduce the number of parents who believe that it is safe to leave a child in a vehicle unattended for even a couple of minutes.<sup>240</sup>

Another way to prevent individuals from leaving a child in a car unattended is increasing awareness of the neurobiological processes that cause even the most careful of parents to forget a child.<sup>241</sup> While the failure of the prospective memory system itself is exceedingly difficult to prevent, educating parents on the triggers of the failure can help them plan and institute procedures to combat those triggers.<sup>242</sup> For example, Ray Ray's Pledge considers how a call from the daycare provider asking why the child has not been dropped off yet could help remind parents who forget a child in a vehicle of their mistake before it becomes fatal.<sup>243</sup> If parents are aware that this tragedy could happen to anyone, parents will be more likely to create a plan with their daycare provider to contact them when their child has not been dropped off on time, potentially saving that child's life.<sup>244</sup> Additionally, since Professor Diamond's research shows that a trigger of some sort alerting the parent to the presence of the child is monumental in overriding the failure of the brain's prospective memory system, it has been suggested that the parent leave a shoe or some other vitally important item in the backseat with the child to remind them of their child's presence when they exit the car.<sup>245</sup> If parents are not fully educated that this tragedy can happen to anyone, then parents will be less likely to take preventative measures.<sup>246</sup> Therefore, education is vital to preventing these deaths.

#### CONCLUSION

There is no argument that a child dying after being left in a vehicle without supervision is not a particularly grievous tragedy. Not only is it a great tragedy whenever someone dies, and an even greater tragedy when someone dies young, but the horrific death of a child who has been left in a sweltering vehicle in the hot sun is a tragedy that reaches beyond words. These deaths affect not only the people involved, including the emotional toll and guilt that weighs on the parent that made the fatal

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to continue to raise awareness, particularly for dads and parents with children under three, to never leave a child alone in a car, not even for a minute." (quoting Kate Carr, president and CEO of Safe Kids Worldwide)).

<sup>240</sup> *Id.*

<sup>241</sup> *See* Diamond, *supra* note 41.

<sup>242</sup> *Id.*

<sup>243</sup> *See* RAY RAY'S PLEDGE, *supra* note 236.

<sup>244</sup> *Id.*

<sup>245</sup> *See* Diamond, *supra* note 41.

<sup>246</sup> *See generally* Barbalich, *supra* note 35.

mistake, but also rock the communities in which they happened to the core. It is normal for the community and family to seek someone to blame, but the issue arises when the attempt to find someone to blame, and hopefully prevent further tragedies, turns into punishing one of its victims. Parents who unintentionally leave their child in a car, resulting in that child's death, are just as much victims as the child itself. The parent's unintentional mistake caused the death of a loved one, and that is something the parent, and members of their family, must deal with for the rest of their lives. Further punishing the parent by charging them with a crime will do nothing to deter the continuation of this tragedy. Furthermore, the intermediate laws allow the prosecution to circumvent their burden of proof and their ethical obligations in order to obtain convictions. When a grieving parent is sent to prison for a mistake and labeled a criminal, there is no justice for the child's tragic death.

In order to correct these legal wrongs, the states with intermediate statutes should repeal these statutes. Further, prosecutors should exercise discretion in favor of declining to charge grieving parents with manslaughter or any other criminal charges. Increasing the personal torment of the individual with the added punishment associated with being convicted of a crime is not the way to prevent these tragedies. Instead, the best way to prevent these horrific deaths is to educate parents on the dangers associated with leaving a child unattended in a vehicle, for even short periods of time. Moreover, state legislatures should fund current technological advances in order to allow for an expansion of research that enables developers to create devices that better fit the lifestyles of a wider variety of parents in a multitude of socio-economic situations. This multi-dimensional approach aims to reduce the number of these tragedies, saving children from suffering these horrendous deaths and decreasing the unnecessary prosecution of grieving parents.