

Hot-Car Deaths and Forgotten-Baby Syndrome: A Case Against Prosecution

Erika Breitfeld*

This article calls on prosecutors and policymakers to re-examine their perception and treatment of parents who forget their children in cars. It offers prosecutors a guide on how to analyze these cases and urges them to advocate for reform in their communities. For support, the article explores the neuroscience behind forgetting a child. It also examines recent cases to identify three categories of parents in hot-car child deaths: parents who truly forget their children in the car, parents who take calculated risks because they are uneducated about the danger of leaving children in cars, and parents who commit criminally negligent and intentional filicide. Finally, the article argues that fundamental criminal-law principles do not support a finding of criminal responsibility against truly forgetful parents—and argues that prosecutors should use community engagement along with existing safety and educational tools to reduce the ranks of the first two parent groups and the number of hot-car child deaths.

Introduction.....	73
I. Child-safety features.....	75
A. The historical context of the child in the backseat.....	75
B. Understanding how this happens: the vehicle becomes a death zone	76
II. Good parents do forget: the neuroscience behind Forgotten Baby Syndrome.....	77
A. The brain and memory function	78

DOI: <https://doi.org/10.15779/Z38NP1WJ9M>.

*. Erika Breitfeld is an assistant dean and associate professor of law at Western Michigan University-Cooley Law School, where she teaches criminal law and advocacy. Before teaching, she was an assistant prosecuting attorney. She has prosecuted hundreds of cases and has long advocated for victims, especially children.

2020]	<i>HOT-CAR DEATHS AND FORGOTTEN BABY SYNDROME</i>	73
	B. False memories: how the brain can remember events that never happened.....	81
III.	Criminal prosecution of forgetful parents.....	84
	A. The oxymoron: the loving, attentive, and careful parent who forgets their child is in the car.....	86
	1. Karen Osorio—Sofia’s mom.....	87
	2. Nicole Engler—Remi’s mom.....	88
	3. Brett Cavaliero—Sophia Rayne “Ray Ray’s” dad.....	89
	4. Wade Naramore—Thomas’s dad.....	90
	5. Kari Engholm—Clare’s mom.....	90
	B. Mens rea: the missing link in forgotten-baby cases.....	93
	C. Latent Knowledge: What does it mean to know?.....	95
IV.	Using the prosecuting attorney as a community leader to raise awareness.....	98
	A. Using community prosecution to build awareness.....	99
	B. The private sector’s efforts to raise awareness: organizations, baby products, and the auto industry.....	102
	C. Automotive advances.....	104
	Conclusion.....	105

INTRODUCTION

Jenna’s mom was adjusting to a new schedule.¹ She was a professor at a local university and enjoyed a flexible work schedule that allowed her to spend as much time as possible with her two young children.² On a usual day, she dropped both of her children off at the babysitter’s house. But on this day, her oldest child was set to begin preschool; therefore, for the first time, she had to make two stops: one to the new preschool for her son and one to the babysitter’s house for her 11-month old daughter.³

That August morning, she dropped her son off at preschool and spent a few extra minutes with him as he adjusted to his new surroundings. Her daughter was there too, enjoying the extra playtime in the morning with her big brother. As Jenna’s mom left the daycare, she loaded her daughter into her car seat and started to drive to the babysitter’s house. The babysitter was only a few minutes past the local university where she

¹ *Jenna*, KIDSANDCARS.ORG, https://www.kidsandcars.org/child_story/jenna/ (last visited Mar. 24, 2020).

² *Id.*

³ *Id.*

worked.⁴

While she drove, she talked to her daughter in the back seat, singing her songs. When she realized her daughter had fallen asleep, she began to visualize how she could keep her asleep when she arrived at the babysitter's house. Jenna's mom envisioned gently unbuckling her daughter, whispering to the babysitter, and carefully transitioning her to the crib to complete her nap.⁵

Now that she had a plan, Jenna's mom began to think about the busy morning ahead of her. She needed to print some important emails and attend a meeting later in the day.⁶ She pulled into the university parking lot, grabbed her bags off the passenger seat, and walked to her office. Not even an hour had passed since she arrived, and she sent her friend an email with a picture of Jenna, commenting about how fast she was growing. She cleaned her office and put up a new picture of Jenna and her brother on her office bulletin board. Around 4:00 P.M., Jenna's mom packed up her belongings and headed home. As she began to reverse her vehicle out of the parking spot, she saw her daughter – still strapped into in her car seat – exactly where she had placed her in the morning.⁷ She was dead. Jenna's mom had managed her new schedule that day. Almost.

We have the best medicine available in the world, innovative technologies that allow us to track people, and lightening-speed resources that help us engage in global economies. But we still routinely forget things —arguably more so today than ever before because of our fast-paced world. When we forget our keys or our cell phones, we are annoyed, but we recover.

But sometimes we forget things that are far more precious and from which we cannot recover: a child left in a car who quickly dies of hyperthermia. It seems almost impossible that this can happen in a world so heavily focused on alarms, warnings, alerts, and notifications. But as neuroscience teaches us, if you are human, you are capable of forgetting your keys, your cell phone, or your child in your car.

This article examines how and why parents forget their children in cars and provides a guide for prosecutorial analysis and community reform. Section I discusses the evolution of child-safety features in cars,

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

with a focus on car seats, and describes how these well-meaning advances can backfire and hinder child safety by enhancing a parent's forgetfulness. Section II discusses the neuroscience concerning parents who forget their children in a car. Section III examines recent cases involving hot-car child deaths and identifies the inconsistencies among the prosecutions or lack of prosecution, as well as identifying three categories of parents: those who truly forget their children in the car, those who take calculated risks with their children because they are uneducated about the danger of leaving children in cars, and those who commit criminally negligent and intentional filicide. It also discusses why forgetful parents should not be prosecuted. And finally, Section IV suggests how prosecutors can use community engagement and community prosecution, as well as existing safety and educational tools, to reduce the ranks for the first two parent groups and the resulting hot-car child deaths.

I. CHILD-SAFETY FEATURES

A. The historical context of the child in the backseat

Part of the reason parents can forget their children in the car is because of where the children are placed in a vehicle. Children, especially those under the age of three, are almost always in a rear-facing car seat. Consequently, when a parent looks behind them in the backseat, whether or not the child is in the car, they see the same thing—the back of the child's car seat — not the child. But it was not always this way.

For most of America's history, children were without any child-safety device. It wasn't until the late 1970s that child-passenger safety became a concern.⁸ From the 1970s until the mid-1980s, states began to develop child-safety laws, and the Academy of Pediatrics and the National Highway Institute created child-passenger safety guidelines in the 1990s.⁹

During the 1990s, children were legally mandated to be in a car seat, and sometimes those children were placed in the front seat. Placing children in the back seat did not become mainstream until the mid-1990s after child deaths from deploying airbags began to be reported.¹⁰ For that reason, in the mid-1990s the National Transportation Safety Board issued

⁸ Jin Yung Bae et al., *Child Passenger Safety Laws in the United States, 1978-2010: Policy Diffusion in the Absence of Strong Federal Intervention*, 100 SOC. SCI. & MED. 30, 31 (2014).

⁹ *Id.*

¹⁰ Dennis R. Durbin, *Child Passenger Safety*, 127 PEDIATRICS 1050, 1051 (2011).

a report urging that the National Highway Transportation Association, along with the National Association of Broadcasters, create a nationwide campaign warning parents about the dangers of placing rear-facing car seats in a passenger seat equipped with an airbag.¹¹ From there, parents started to place children in the rear seat and in a rear-facing car seat. This created a new danger because parents could no longer see their children while driving or exiting the vehicle. Amplifying the problem, children frequently fall asleep during car rides and thus remove potential triggers that indicate their presence, such as crying, cooing, babbling, or talking. Often the parent only has his or her memory to remind them that a child is in the backseat. Not surprisingly, more than half of the children who die from vehicular heatstroke are under the age of two and in rear-facing car seats.¹²

As parents heeded the advice concerning front-seat airbags, the number of children dying in vehicles as a result of hyperthermia increased. In fact, more children died from hyperthermia than ever died due to front-seat airbags.¹³ These deaths are a lethal combination of the human tendency to forget and the unique danger of how fast cabin temperature can rise inside a vehicle.¹⁴

B. Understanding how this happens: the vehicle becomes a death zone

According to the American Academy of Pediatrics, a child's body heat rises three to five times faster than an adult's.¹⁵ A child's organs begin to shut down when the child's temperature reaches 104 degrees, and a child will die if their temperature reaches 107 degrees.¹⁶ In fact, a child can be in danger of his or her organs shutting down when the outside temperature is as low as 57 degrees Fahrenheit if they are left unattended in a vehicle while the sun is shining.¹⁷

Temperatures rise inside a vehicle exponentially faster than many

¹¹ Nat'l Transp. Safety Bd., Safety Recommendation H-95-017, (Nov. 2, 1995), 6–7 https://www.nts.gov/safety/safety-recs/_layouts/nts.recsearch/Recommendation.aspx?Rec=H-95-017

¹² Jan Null, *Heatstroke Deaths of Children in Vehicles*, NO HEAT STROKE (updated Feb. 14, 2020), <https://www.noheatstroke.org/>.

¹³ *Child Vehicular Heatstroke Deaths by Year*, KIDSANDCARS.ORG, <https://www.kidsandcars.org/how-kids-get-hurt/heat-stroke/> (last visited Mar. 24, 2020).

¹⁴ *Id.*

¹⁵ NAT'L SAFETY COUNCIL, PEDIATRIC VEHICULAR HEATSTROKE REPORT 8 (2018).

¹⁶ *Id.*

¹⁷ *Id.*

parents may imagine. On average, a vehicle's temperature can rise more than forty degrees during a sixty-minute period.¹⁸ The National Highway Traffic Safety Institute advises that within the first ten minutes of a child being left unattended, the interior temperature of the vehicle can rise twenty degrees.¹⁹ When the outside temperature is ninety degrees, a child left in a vehicle can die in as little as 10 minutes.²⁰

Further, contrary to popular opinion, cracking a window about one and one-half inches does not reduce the rate the temperature rises inside the vehicle.²¹ And compounding the problem is the public's lack of understanding about just how quickly vehicles rise in temperature — leaving parents unable to appreciate the risk of leaving their child in the car, where even a few minutes can be the difference between life and death.²²

II. GOOD PARENTS DO FORGET: THE NEUROSCIENCE BEHIND FORGOTTEN BABY SYNDROME

Forgotten-Baby Syndrome has become so unexceptional that over twenty-five percent of parents with children under 3 years of age have forgotten that their child was in the car.²³ To understand how this can happen, a review of neuroscience principles is needed. Researchers and scientists have long studied how memory is formed, stored, and recalled.²⁴ The science of memory is sophisticated and rapidly advancing. This article cannot possibly replicate the body of scientific literature on the subject. Nevertheless, a summary of the core science will help in understanding how a parent could forget that a child is in a vehicle.

¹⁸ *Id.* at 9.

¹⁹ *Child Safety*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/road-safety/child-safety#topic-heatstroke> (last visited Mar. 24, 2020).

²⁰ NAT'L SAFETY COUNCIL, *supra* note 13, at 9.

²¹ *Id.*

²² Although this article only addresses the parents who have forgotten their child, children also die from being purposefully left in the car while a parent runs an errand, goes to work, or lets the child continue to sleep. These deaths are also considered hot-car deaths, although they are classified differently.

²³ David Diamond, *Cognitive and Neurobiological Perspectives on Why Parents Lose Awareness of Children in Cars*, (Aug. 9, 2018), http://psychology.usf.edu/faculty/data/ddiamond/Research_on_Why_Parents_Forget_Children_in_Hot_Cars.pdf.

²⁴ See, e.g., Martin A. Conway & Catherine Loveday, *Remembering, imagining, false memories & personal meanings*, 33 CONSCIOUSNESS AND COGNITION 574, 577 (2015).

A. The brain and memory function

The hippocampus, the prefrontal cortex, the amygdala, and the basal ganglia are all implicated when a memory failure occurs.²⁵ The hippocampus and the prefrontal cortex work together to optimize decision making and multi-tasking, while the amygdala controls emotional-memory processing.²⁶ The basal ganglia are responsible for habit-based behaviors and thus play another vital role in brain function and memory.²⁷

First, the basal ganglia have the ability to override the hippocampus and prefrontal cortex memory system, creating an “autopilot” system when travelling a familiar route.²⁸ This has happened to anyone who has ever forgotten to stop at the store and pick up milk as their spouse requested, which would have required a detour from the routine drive home.²⁹ When it happens, it is not that big of a deal—they can get milk tomorrow.

But this exact scenario can happen with a child. For instance, a parent who normally does not take the child to day care can drive to work and forget that the child is in the backseat of the car. You may ask yourself how a person can forget that a child is in the car. But the change in the parent’s routine coupled with the absence of triggers to remind the parent that the child is in the backseat, or snap the hippocampus/prefrontal-cortex memory system back into effect, allows the parent to travel to work based on routine, using the basal ganglia’s autopilot system.³⁰ The basal ganglia overrides any other memory system, which can cause the parent to forget that the child was in the vehicle and revert to the structure of that parent’s day—the parent’s habit of heading to work without stopping at daycare overrides the short-term memory of the need to drop off their child.³¹

This override of the basal ganglia was likely in play for Mary Parks. Mary was a working mother of two boys.³² She was married, an

²⁵ Lee T. Robertson, *Memory and the Brain*, 66 J. OF DENTAL EDUC. 30, 37 (Sept. 9, 2001).

²⁶ *Id.*; David Diamond, *An Epidemic of Children Dying in Hot Cars: A Tragedy That Can Be Prevented*, KIDSANDCARS.ORG (June 20, 2016, 6:05 AM), <https://www.kidsandcars.org/2016/06/29/an-epidemic-of-children-dying-in-hot-cars-a-tragedy-that-can-be-prevented/>.

²⁷ Diamond, *supra* note 26.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Melissa Balmain, *Tragedy in the Backseat: Hot-Car Deaths*, PARENTING,

accountant, and usually stayed home from work if one or both of her children were ill.³³ In 2007, Mary's four-year-old son, Byron, had been sick with a fever. Mary and her husband decided to swap the usual roles; her husband decided to stay home and care for Byron, while Mary went to work.³⁴ Mary, therefore, only had to take her younger son, Juan, to daycare.³⁵ After packing him in the car, she began to head to his daycare.³⁶ Mary recalled realizing her son must have fallen asleep in the backseat because he was so quiet.³⁷ She continued to drive. But instead of heading to the daycare, she headed straight to work.

Mary worked the entire day, talking with her supervisor about how her son was sick and her other son, Juan, was at daycare.³⁸ She even mentioned to her boss that she might need to leave early if the daycare called and said that Juan was sick.³⁹ Mary then left work and headed to the daycare to pick up Juan.⁴⁰ When she arrived, the teacher asked, "Was Juan out sick today?" Mary responded, "No, I brought him in this morning."⁴¹ The daycare worker responded, "He wasn't here today."⁴²

Mary recalled that, "a light in my head went on. I took off running toward the car. My heart was already in my feet because I knew how hot it had been that day. I got to the car, jerked open the door, and saw him. I reached over to him. I remember screaming at him, 'Juan! Juan! You've got to wake up!'"⁴³

Juan was dead. His cause of death was hyperthermia.⁴⁴

That is just one example of the habit-system of the basal ganglia overriding the short-term memory center, the hippocampus.

But it is not always habit that gets in the way of remembering a child in the car. A parent could forget a child due to a high-stress event that triggers the amygdala to control the brain, which can also override

<https://www.parenting.com/baby/tragedy-in-the-backseat-hot-car-deaths/> (last visited Mar. 24, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

the hippocampus/prefrontal-cortex memory system.⁴⁵ If a person becomes stressed during the drive to the child's school or day care, the amygdala is activated, which allows the brain to function through high stress.⁴⁶ To allow the brain to handle the stressful event and keep operating the vehicle, the basal ganglia steps in to again put the stressed person on a form of autopilot. This autopilot is necessary for the stressed person to operate a car, talk on the phone, and interpret traffic signals during the stressful event.⁴⁷

Lyn Balfour was an army reservist who was described as a no-nonsense, get-things-done multitasker and a mom.⁴⁸ In March 2007, she was driving her 9-month-old son, Bryce, to the babysitter when her phone rang, and she began to talk to her boss about a crisis at work.⁴⁹ That phone call was coupled with another phone call from her nephew who needed financial help.⁵⁰ The drive was filled with stressful events and her son, Bryce, was quietly sleeping in the back, unable to give her a trigger to remind her that he was in the car.⁵¹ Other events were also at play on that day.

First, Bryce was awake much of the night before, cranky from a cold.⁵² Because Lyn was up with him, she was short on sleep.⁵³ This was also why Bryce fell asleep in the car as Lyn drove, unable to trigger her mind with his babbles or cries.⁵⁴ Lyn was also planning to bring Bryce's car seat to the fire department for professional installation, so she put Bryce in a different car seat behind the driver's seat, and she drove her husband's car because they had loaned their car to a relative.⁵⁵ Usually Bryce's seat was behind the passenger seat—within her view from the driver's seat.⁵⁶

When Lyn Balfour arrived at her destination, the Army JAG office where she worked, she parked her car and went to work—never

⁴⁵ Diamond, *supra* note 23.

⁴⁶ *Id.*; Robertson, *supra* note 25, at 37–38.

⁴⁷ Diamond, *supra* note 23.

⁴⁸ Gene Weingarten, *Fatal Distraction*, WASH. POST, Mar. 8, 2009, at 14, 25.

⁴⁹ *Id.* at 14.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

realizing that her son Bryce was in the backseat.⁵⁷

It is undisputed that Lyn Balfour handled two stressful phone calls as she drove to work that day. It is also undisputed that her basal ganglia probably helped her drive the vehicle as her brain processed the stress. But what is probably the most undisputed is that her brain did not remember that her child was in the car because the memory system that normally recalls and retrieves new memories was overridden by the habit-based memory system, the basal ganglia.⁵⁸

This memory overriding is what a non-scientific person would call forgetting. “Memory is a machine . . . and it is not flawless. Our conscious mind prioritize[s] things by importance, but in a cellular level, our memory does not. If you’re capable of forgetting your cellphone, you are capable of forgetting your child.”⁵⁹

B. False memories: how the brain can remember events that never happened

Further, the brain can create a false memory. While the idea of forgetting is uncontroversial, the brain is also capable of incorporating incorrect information into our memories.⁶⁰ When our brain remembers whole events that never happened, this is called confabulation.⁶¹

For example, Dr. David Diamond, a neuroscientist, explained that it is possible for a parent to think that they dropped off their child—and even remember doing it. He explained that “[e]ach parent’s brain appears to have created the false memory that he or she had brought their child to daycare Having this ‘false memory’ caused them to be oblivious to the fact that their child had remained in the car all day.”⁶² “[T]he brain is very good at filling in the gaps, so you will remember what you assume you did.”⁶³

Additionally, devastating, catastrophic events can occur despite multiple levels of defense. Psychologist, James Reason, coined the term the “Swiss Cheese Model,” and explained that “like layers of Swiss

⁵⁷ *Id.* at 22.

⁵⁸ Diamond, *supra* note 23.

⁵⁹ Weingarten, *supra* note 48 at 12.

⁶⁰ Rebecca M. Nichols, Daniel Bogart, & Elizabeth F. Loftus, *False Memories*, in 8 INT’L ENCYCLOPEDIA SOC. & BEHAV. SCI. 709, 709 (2nd ed., 2015).

⁶¹ *Id.* at 710.

⁶² David Diamond, *Children dying in hot cars: a tragedy that can be prevented*, THE CONVERSATION (June 20, 2016, 6:05am) <https://theconversation.com/children-dying-in-hot-cars-a-tragedy-that-can-be-prevented-60909>.

⁶³ Balmain, *supra* note 32.

cheese, piled upon each other, five or six deep, the holes represent small, potentially insignificant weaknesses.⁶⁴ Things will totally collapse only rarely, he says, but when they do, it is by coincidence—when all the holes happen to align so that there is a breach through the entire system.”⁶⁵

This type of catastrophic piling of events happened to Wakesha Ives, a teacher, who was convicted of criminally negligent homicide in Texas after she forgot her daughter in the backseat and proceeded to teach her elementary class for the school day.⁶⁶ Ms. Ives appealed her conviction claiming that there was insufficient evidence to support the manslaughter charge.⁶⁷ During her trial, she presented evidence from Dr. Diamond about the neurobiology of memory failure.

When defense counsel asked Dr. Diamond to explain how a person could forget that a child was in the back seat, he explained that the short-term memory system, the hippocampus, and the habit-evidence structures, the basal ganglia, compete against each other.⁶⁸ He explained that the basal ganglia allows a person to travel from point A to point B with minimal effort, operating on a subconscious level.⁶⁹ He further explained:

[I]f you’re going home from work, you don’t have to think about every single turn, and so the basal ganglia is allowing you to do that because you’ve done it many times. If you plan on stopping on the way home from work, it is your hippocampus that will tell you [that] you want to go to the store, whereas normally you would not go to the store. So, your hippocampus is processing this new information thus interrupting the basal ganglia. So these two actually are competing against each other. The basal ganglia wants to get you home, the hippocampus wants you to stop on the way and go to the store.⁷⁰

The defense then asked if imaging studies of the brain evidences the two systems competing against each other. Dr. Diamond indicated that “[n]umerous imaging studies have shown that when the basal ganglia is activated as you’re doing something out of habit, you actually see reduced activity in the hippocampus. Now, that memory is not gone, and so it is

⁶⁴ Weingarten, *supra* note 48 at 14.

⁶⁵ *Id.*

⁶⁶ Ives v. State, No. 08-16-00026-CR, 2017 WL 38887444 at *1 (Tex. App. Sept. 6, 2017).

⁶⁷ *Id.*

⁶⁸ *Id.* at *2

⁶⁹ *Id.*

⁷⁰ Brief of Appellant at *18-19, Ives, 2017 WL 38887444, *1.

suppressing that memory. And so potentially that hippocampus of course may still be functioning, but its capacity to remind you of that new information is suppressed.”⁷¹

Research also reveals that stress and sleep deprivation is linked with Forgotten-Baby Syndrome.⁷² Most parents with young children will admit that less sleep occurs during the child’s infant and toddler years. It is not hard, therefore, to understand how forgetting a child in the car could happen to any parent who battles these all-too-common family stressors.

In fact, in another criminal prosecution for a hot-car death in Texas, Dr. Diamond described the similarities among parents who have lost a child. He explained that “[t]heir brains are on autopilot. They have a lapse in their prospective memories.”⁷³ He paused and stared at the jurors. “This can happen to anyone. It’s just part of being human.”⁷⁴ Later, he told a journalist, “a lot of people are still in denial about all of this. There’s still this idea that if we only had better parents, then there wouldn’t be this problem.”⁷⁵

As neuroscience explains, the brain is a powerful organ that allows us to handle many things at one time, but it is not without its flaws. Criminal law, in fact, has long recognized the human frailties that affect the mind and its ability to process information. For instance, through science and expert testimony, criminal law has long recognized the defenses of insanity, diminished capacity, and even intoxication to mitigate criminal conduct.⁷⁶ Naturally it follows then then, that lack of mens rea—no mind state at all—should also be within the prosecutor’s awareness at the time of case review. When the mens rea is absent, as in many hot-car death cases, prosecutors should avoid pressing charges despite the public’s outrage.

Prosecutors must, for sound investigations and ethical considerations, realize that forgotten-baby cases are not about bad parenting or neglect, but rather neuroscience memory complications. Brain and memory science should be the foundation for understanding

⁷¹ *Id.* at *19–20.

⁷² *Id.* at *20.

⁷³ Skip Hollandsworth, *The Utterly Heartbreaking and Horrifying Hot-Car Death of Baby Fern Thedford*, TEXAS MONTHLY (Aug. 23, 2018), <https://www.texasmonthly.com/news/hot-car-death-children-michael-thedford-texas/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See, e.g., Jeff Feix & Greg Wolber, *Intoxication and Settled Insanity: A Finding of Not Guilty By Reason of Insanity*, 35 J. AM. ACAD. PSYCHIATRY & L. 172 (2007) (discussing mitigating defenses such as insanity, diminished capacity, and intoxication).

and investigating each case involving a hot-car death. Simply stated: if a parent who has forgotten their child did not possess a mens rea at the time of their inaction, a crime has not occurred.

III. CRIMINAL PROSECUTION OF FORGETFUL PARENTS

When a child dies after being forgotten in a car, the public is outraged.⁷⁷ Prosecutors must manage what the public, with limited knowledge, expects and the fairness that the criminal justice system demands. This balancing of interests is complicated.

First, prosecutors must account to the community for the child's death. The community has limited knowledge about the case, not to mention limited understanding about the neuroscience of forgetting. The community, without the benefit of the neuroscience information, expects that the parent who forgot their child in the car will be criminally charged for the child's death. This public expectation is satiated some when the police arrest the parent on preliminary criminal charges, but because of the constant media cycle through various platforms, the public rarely has the opportunity to learn the details surrounding these cases.

Second, prosecutors must ensure that a proper investigation occurs. This investigation must address nontraditional concerns—how much sleep did the parent get the night before? What type of stressors were present in the parent's life? What was the parent's normal habit and everyday responsibilities? Who was normally responsible for daycare drop off? Daycare pickup? It also requires prosecutors to understand the neuroscience behind forgetting: the prosecutors must educate themselves about the possibility that the parent's brain did not process that a child was in the back seat. The investigation must also include traditional objectives—review of any surveillance footage, interviewing eyewitnesses, talking to family members and daycare personnel, and examining the parent's and child's home life.

Third, and most difficult, the prosecutor must determine if the

⁷⁷ See ABC News, *Hot car safety tips to remember on National Heatstroke Prevention Day*, FACEBOOK (July 31, 2019), <https://www.facebook.com/ABCNews/posts/10158655602498812>. A scroll through any social media posting about a child dying from being forgotten in a car will reveal anger, frustration, and disbelief that a parent could forget a child. For example, one person wrote on an ABC News Facebook post about hot car deaths, "How in the hell do parents forget about their children in their car, I had 3 kids and all young at the same time and not once did I ever forget about them, what is wrong with people today, hold them accountable for their actions." Thomas Mason, Comment to *id.*

investigation's findings support criminal liability—and if they do, the prosecutor must charge the parent.

Generally, parents who have lost a child to a hot-car death fall within one of three categories: those who truly forget their child in the car, those who take calculated risks with their child because they are uneducated about the danger of leaving children in cars, and those who commit criminally negligent and intentional filicide. The parent who truly forgets their child in the car is much different from the other two groups of parents.

Those who take calculated risks or act criminally negligent have very different stories to tell. For example, a 26-year-old father purposely left his four-year-old son in the car while he worked.⁷⁸ It was May in St. Paul, Minnesota, with a high temperature that day of 70 degrees, but the father did not think that it was “that hot” outside.⁷⁹ He left his son in the backseat of the car parked directly in the sun and cracked the window.⁸⁰ He returned to the car almost three hours later and discovered that his son was unresponsive.⁸¹ An autopsy revealed that the little boy died of hyperthermia.⁸²

In another case, a mother from Detroit, Michigan, purposely left her three-year-old toddler and ten-month-old baby in a vehicle so she could go to a hair and massage appointment.⁸³ Both her children died, and she drove with their dead bodies in the car for hours trying to decide how to explain to the police what happened.⁸⁴ She eventually admitted what she had done and said she was “too stupid” to know that children could die inside a vehicle.⁸⁵

Finally, Justin Ross Harris, a father from Georgia, left his son in the backseat of his car while he worked.⁸⁶ Evidence revealed that even

⁷⁸ Dana Thiede, *4-year-old dies after being left in car, father charged*, KARE (May 6, 2019), <https://www.kare11.com/article/news/4-year-old-dies-after-being-left-in-car-father-charged/89-6b95297a-4f67-45e4-a20c-ce249c1c2e7c>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 829 (2006).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Mayra Cuevas, *Justin Ross Harris sentenced to life for son's hot car death*, CNN (Dec. 6, 2016), <https://www-m.cnn.com/2016/12/05/us/justin-ross-harris-sentence/index.html?r=https%3A%2F%2Fwww.google.com%2F>.

though Justin Harris seemed distraught when he realized his son was in the backseat, he had done an internet search days earlier for babies in hot cars.⁸⁷ A jury convicted Justin Harris of murder, and he was sentenced to life without parole.⁸⁸

All these examples involved people who *knowingly* left their children in the car. Each had a criminal state of mind—whether it was intentional, as with Justin Harris, or reckless or negligent, as with the young mother or working father. The parents were aware they were leaving a child or children in the car; they did so purposefully.

In each case, a risk-benefit analysis was at play. In the first case, the dad *decided* to leave his child in the car because he had to work—he engaged in a risk-benefit analysis when deciding what to do with his child. He decided that it was more important to maintain his job and risk leaving his child unattended than to stay home with his son and risk losing his job or bring his child to work and risk discipline or termination. But it is of critical importance that he *decided* to leave his son—even if he was unaware of the severity of the risk, he still made a conscious decision to leave his son in the car.

Likewise, the young mother who left her children in the car to get her hair cut also *decided* to leave her children unattended. She also entered into a risk-benefit analysis when she determined that leaving her children unattended in the car was justifiable because of her need to have her hair cut and get a massage. While the young mother claimed that she did not know leaving her children in the car could be dangerous, she still *decided* to leave her children in the car.

In these cases, prosecutors had an obligation to charge the parents because each parent made the critical decision to take the risk. Both types of parents, those who acted negligently and those who acted criminally, engaged in some thought about leaving the child in the car. Parents who forget that their child is in the car have not engaged in any risk-benefit analysis or knowing behavior. This crucial distinction is discussed in more detail below.

A. The oxymoron: the loving, attentive, and careful

⁸⁷ Ralph Ellis, Carma Hassan, and Vivian Kuo, *Toddler's dad researched hot-car deaths of children online*, CNN (June 28, 2014), <https://www.cnn.com/2014/06/28/justice/georgia-toddler-death/index.html>.

⁸⁸ *Id.*

parent who forgets their child is in the car*1. Karen Osorio—Sofia's mom*

Karen Osorio is a senior scientist at Proctor and Gamble.⁸⁹ She is married to another scientist at Proctor and Gamble, and together they had a daughter, their only child, Sofia Aveiro.⁹⁰ On August 23, 2018, Karen's meeting for work was canceled, so she let her daughter sleep in more than usual.⁹¹ Sofia's daycare was only five minutes away, but Sofia never arrived.⁹² Instead, Karen drove to her office, leaving Sofia in the back seat of the car because Karen thought she had already dropped Sofia off at daycare.⁹³

Karen worked all day; in fact, at 4:45 pm that day, she called her husband to see if he had picked Sofia up yet because she saw on the daycare app that Sofia had not been picked up.⁹⁴ Her husband quickly called her back when he arrived at the daycare to tell her that Sofia had not been dropped off that morning.⁹⁵ Karen said to him, "Someone stole our baby."⁹⁶ In fact, Karen had left Sofia in the car, worked all day, and never realized Sofia was strapped into her car seat—untouched since Karen strapped her in.⁹⁷ Karen sprinted to her car.⁹⁸ Sofia was dead.⁹⁹

Karen was overwhelmed with grief as she screamed to the 911 operator, "My baby just died, my baby just died. I left her in the car, she's dead."¹⁰⁰

The prosecuting attorney at the time stated that he reviewed the Proctor and Gamble video surveillance of Karen on the phone with her husband and when she realized what had happened, "at that processing moment she stops, she starts walking and then it's the dead sprint to the car."¹⁰¹ He further explained that there was no evidence that Karen knew

⁸⁹ Ellen Byron, *Sofia Aveiro's Story*, KIDSANDCARS.ORG (May 3, 2018 at 9:43 AM), https://www.kidsandcars.org/child_story/sofia-aveiros-story/.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

she had left her child in the car.¹⁰² He elaborated that “[t]he closest charge that might be applicable is involuntary manslaughter . . . and the closest felony is endangering children, where parents create a substantial risk,” he said during a press conference to explain his decision.¹⁰³ “However, in both of these, the mental state of a parent must be reckless.”¹⁰⁴ He continued to explain that “[r]ecklessness is more than a mistake, even if it’s a deadly mistake, and there’s no evidence that she acted with heedless indifference.”¹⁰⁵ Therefore, Karen was not criminally charged.

2. Nicole Engler—Remi’s mom

Nicole Engler is a family nurse practitioner.¹⁰⁶ Like Karen Osorio, she is smart, highly educated, and was heading to work the day she forgot that her daughter, Remi, was in the car.¹⁰⁷ Nicole worked all day, meeting with families and patients, and around 4:30 PM, she got into her car to drive home.¹⁰⁸

Nicole’s screams could be heard throughout the medical parking lot as she realized her daughter was still in her car seat from earlier in the morning.¹⁰⁹ Remi was blue.¹¹⁰ Nicole grabbed Remi and ran with her for help so frantically that she tripped in the parking lot.¹¹¹ The medical staff at Nicole’s work tried to revive Remi, but their efforts were unsuccessful.¹¹² Nicole explained that she had previously heard about child deaths from being forgotten in a hot car, and she wondered how that tragedy could ever happen to a parent—she never thought it would happen

¹⁰² *Id.*

¹⁰³ Lawrence Budd, *No charges in Mason hot car baby death: Mom ‘made a horrible mistake’*, DAYTON DAILY NEWS (Sep. 20, 2017), <https://www.daytondailynews.com/news/crime—law/charges-mason-hot-car-baby-death-mom-made-horrible-mistake/d7vVxrEJxqCX6dMSwjwcpO/>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Remi Engler*, KIDSANDCARS.ORG, https://www.kidsandcars.org/child_story/remi-engler/.

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*; Shane Dixon Kavanaugh, *A hot car, a dead child: Oregon mom’s lawyer explains how it happened*, THE OREGONIAN (June 28, 2018, updated Jan. 30, 2019), https://www.oregonlive.com/pacific-northwest-news/2018/06/a_hot_car_a_dead_child_oregon.html.

¹⁰⁹ Kavanaugh, *supra* note 108.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

to her.¹¹³ Nicole was so overcome by grief that she begged the police to let her commit suicide, as she sobbed and pulled the hair out from her head.¹¹⁴

The police arrested her for second-degree manslaughter, alleging that with criminal negligence she had caused the death of her daughter.¹¹⁵ The prosecutor did not pursue the charges and dismissed the case. He indicated, “I have made my decision based on the totality of the evidence that is available to me, the limits of Oregon law in this matter and the likelihood that a conviction can be obtained.”¹¹⁶

3. Brett Cavaliero—Sophia Rayne “Ray Ray’s” dad

Brett Cavaliero, along with his wife, Kristie Reeves, loaded their daughter into her car seat on a fateful May day in 2011.¹¹⁷ Ray Ray, as she was affectionately called, waved to her mom as her dad got in the driver seat to take her to daycare.¹¹⁸ Brett approached the key intersection and, for an unknown reason, instead of turning left towards the daycare, he turned right and went to work.¹¹⁹ He then met his wife for lunch (she came to pick him up), and as they were talking about how beautiful their little girl had looked in her dress that morning, Brett began to panic and told his wife to go back to his work immediately.¹²⁰ He told her he could not remember dropping off Ray Ray at school. Kristie Reeves ran red lights, drove the wrong way down one-way streets, and called 911 as they pulled into the parking lot.¹²¹

It was too late. Ray Ray had been forgotten in the car for over three hours—she died of heatstroke.¹²² Brett was investigated by authorities, but a grand jury declined to charge him criminally.¹²³ Not

¹¹³ Remi Engler, *supra* note 106.

¹¹⁴ Kavanaugh, *supra* note 108.

¹¹⁵ DA: No criminal charges against Roseburg mother in death of daughter left in hot car, KVAL (Oct. 15, 2018), <https://kval.com/news/local/da-calls-press-conference-to-discuss-investigation-into-death-of-child-left-in-hot-car>.

¹¹⁶ *Id.*

¹¹⁷ Kristie Reeves-Cavaliero, Sophia Rayne “Ray Ray: Cavaliero, KIDSANDCARS.ORG, https://www.kidsandcars.org/child_story/sophia-rayne-ray-ray-cavaliero/.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.*

¹²³ *Id.*

everyone, however, fares the same result.

4. *Wade Naramore—Thomas's dad*

Wade Naramore was a circuit court judge in Arkansas in July 2015 when he packed up his 18-month-old toddler, Thomas, and headed to his daycare.¹²⁴ That day started like most, with Thomas in his car seat and him and his father saying their morning prayers in the car.¹²⁵ What was different that day was that instead of eating breakfast at home, like Judge Naramore usually did, he stopped at a McDonalds.¹²⁶ He also had a case on his docket that was worrisome to him.¹²⁷

Judge Naramore pulled into work, handled his docket, and left work early that day.¹²⁸ He ran a few errands, and when he went to pick his son up from daycare, he heard a noise in the rear seat when he turned the vehicle.¹²⁹ It was then that he realized that his son Thomas was still in the car seat and had been left in his car nearly five hours while he worked.¹³⁰ He frantically called 911, but it was too late. Thomas's body temperature was 107 degrees, and he was declared dead on the scene.¹³¹

Judge Naramore was investigated for over six months before the prosecutor charged him with negligent homicide.¹³² Upon that criminal charge, the Judge was suspended from the bench as he awaited trial.¹³³ The county spent several thousand dollars to bring in a special judge to preside over the case, which resulted in a not guilty verdict from the jury.¹³⁴

5. *Kari Engholm—Clare's mom*

Kari Engholm was the Chief Executive Officer of a very busy

¹²⁴ Sarah Chaffin, *Judge arrested in hot car death of son*, KATV (Feb. 11, 2016), available at <https://katv.com/news/local/arrest-warrant-issued-for-judge-in-hot-car-death-of-son>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.*

¹³³ David Showers, *Fill-in costs for Arkansas judge acquitted in hot-car death of son exceed \$68,000*, ARK. DEMOCRAT GAZETTE (Feb. 21, 2017), <https://www.arkansasonline.com/news/2017/feb/21/fill-in-costs-for-acquitted-judge-excee/>.

¹³⁴ *Id.*

hospital in Perry, Iowa.¹³⁵ Usually her husband, who worked at Iowa State University, would drop their daughter, 7-month-old Clare, off at the babysitter's house, and then Kari would take their three-year-old son to his daycare center.¹³⁶ But on this particular day, Kari's husband had to be at work early, so Kari was going to drop off both children.¹³⁷ Kari dropped her son off at the daycare center and headed to work, not realizing that she had yet to take her daughter to the babysitter's house.¹³⁸ Kari was distracted that day because of the slew of meetings waiting for her at work.¹³⁹ When Kari arrived at work, she didn't know her daughter was still in the backseat.¹⁴⁰

When Kari left work, she drove to her son's daycare to pick him up. As they walked back to the minivan together, she smiled at the artwork he had made for her at school.¹⁴¹ When she opened the minivan door to put him in the car, she discovered 7-month-old Clare was still strapped in her car seat and had been in the vehicle since 7:00 AM.¹⁴² Kari screamed in horror.¹⁴³

Kari was charged with involuntary manslaughter and neglect of a dependent child.¹⁴⁴ She faced twelve years in prison but was found not guilty.¹⁴⁵ The judge, when revealing the verdict stated, "The court cannot hold the mother accountable in a criminal proceeding, even for reprehensible conduct, if that conduct does not fall within the statutory elements of the crime charged."¹⁴⁶

When a child dies from a hot-car death, we have a visceral response to blame someone: someone must have done something wrong for a child to have suffered. And this is a natural, normal reaction. But it does not mean it is the right one.

¹³⁵ *Hospital CEO Leaves Child to Die in Hot Car*, ABC NEWS (Jan. 7, 2006), <https://abcnews.go.com/US/story?id=92943&page=1>.

¹³⁶ Scott Edwards, *Baby Clare: A Hot Car Story (Nightmare)*, VANCOUVER FAM. MAG. (June 27, 2014), <https://vancouverfamilymagazine.com/baby-clare-hot-car-story-nightmare/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Distracted Mom Found Innocent*, CBS NEWS (Dec. 10, 2001), <https://www.cbsnews.com/news/distracted-mom-found-innocent/>.

¹⁴⁵ *Id.*; Edwards, *supra* note 136.

¹⁴⁶ *Distracted Mom Found Innocent*, *supra* note 144.

What's even more concerning is how all five of the parents mentioned above suffered similar circumstances that day but suffered different legal consequences. Two of the five parents were criminally charged. Both were found not guilty, and both had to relive the tragedy all over again while fighting for their freedom. Other parents, similarly situated, never faced criminal liability. That severe disparity in treatment, in nearly identical cases, illustrates the power of the prosecuting attorneys and why prosecutors must educate themselves on forgotten-baby syndrome and hot-car deaths.

Most forgetful parents who are criminally charged are charged with a crime based in criminal negligence and sometimes, although rare, recklessness. Criminal negligence is defined as more than just mere negligence needed for tort liability.¹⁴⁷ Although every state's statute has variation, it usually means two things: the defendant's conduct, under the circumstances known to him, must involve a high degree of risk of death or serious bodily injury, and the defendant must be aware of the fact that his conduct creates this unreasonable risk.¹⁴⁸ "Actual awareness of risk should be required."¹⁴⁹

Criminal negligence, therefore, does not apply to the parent who forgets that their child is in the car because that parent is not *aware* that the child is in the car, and further, has no awareness that they are engaging in conduct that involves a high degree of death or serious bodily injury. Simply stated, the parents who truly forget their children honestly believe that their children are safe in the arms of a caregiver or daycare—not in the back of the car.

Criminal liability only attaches to culpable behavior. When society finds a person to be blameworthy, we sentence that person to punishment. Therefore, "it is deeply rooted in our moral sense of fitness that . . . punishment may not justly be imposed where the person is not blameworthy."¹⁵⁰ Punishment is when "an agent of the government, pursuant to authority granted [after a] criminal conviction, intentionally inflicts pain on [a defendant] or otherwise causes [the defendant] to suffer some consequence that is ordinarily considered to be unpleasant."¹⁵¹ What could be more unpleasant or induce more suffering than reliving the

¹⁴⁷ WAYNE R. LAFAVE, CRIMINAL LAW 838 (5th ed. 2010).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 839.

¹⁵⁰ Joshua Dressler, UNDERSTANDING CRIMINAL LAW 5 (8th ed. 2018) (citing Sanford Kadish, *Why Substantive Criminal Law—A dialogue*, 29 CLEV. ST. L. REV. 1 (1980)).

¹⁵¹ *Id.* at 14.

tragic, preventable death of your own child? Arguably, nothing.

In fact, many prosecutors, when asked why they did not charge a forgetful parent, have commented on the parent's suffering. For instance, the prosecutor in the Sofia Aveiro case stated, "There's nothing any law is going to do more than they are going to punish themselves for the rest of their lives."¹⁵² This sentiment is true, but it is not the legal reason why a parent should not be charged. Instead, as explained below, a parent who has truly forgotten their child lacks any mens rea element needed for any level of criminal culpability and especially criminal negligence.

B. Mens rea: the missing link in forgotten-baby cases

In this setting especially, it is crucial not to lose sight of what makes behavior criminal. Most crimes (but not all)¹⁵³ need both an actus reus and a mens rea. The actus reus represents the physical components of the crime, and the mens rea represents the mental component of the crime.¹⁵⁴ Further, the actus reus and the mens rea must operate concurrently, meaning that the mens rea must be the driving force behind the actus reus. The required mental state to cause the action or event must drive one's action in furthering the crime.¹⁵⁵ This is a concept known as concurrence. The last piece, harm, must also result from the concurrence of the actus reus and the mens rea to justify society's desire to punish behavior as criminal.

Concurrence has different meanings. At a minimum, the concurrence has to be temporal, meaning that the mens rea and actus reus must occur within a time frame.¹⁵⁶ Some scholars have also suggested that having mere temporal concurrence is not enough—one needs more than just the mens rea to occur at the same time as the actus reus.¹⁵⁷ Those scholars argue that the mens rea must actuate the actus reus—it must be the driving factor for why the person acted.¹⁵⁸ In any event, under either the temporal view or the actuating view, there is no concurrence when the forgetful parent leaves a child in a car.

¹⁵² Budd, *supra* note 103.

¹⁵³ Some crimes do not require a mens rea—often called strict liability crimes. A strict liability crime is complete upon the actus reus elements.

¹⁵⁴ Dressler, *supra* note 150, at 85.

¹⁵⁵ *Id.* at 199–200.

¹⁵⁶ Alexander F. Sarch, *Knowledge, Recklessness and the Connection Requirement between Actus Reus and Mens Rea*, 120 PENN ST. L. REV. 1, 3 (2015).

¹⁵⁷ *See id.* at 4.

¹⁵⁸ *Id.*

Mens rea has become the “mantra” of criminal law.¹⁵⁹ As the Supreme Court has stated, “[t]he contention that an injury can amount to a crime only when inflicted by [mens rea] is no provincial or transient notion. It is [] universal and persistent in mature systems of law.”¹⁶⁰ It is not a crime, therefore, if the mens rea and actus reus do not align: if a person thinks about the crime, but never takes any action toward its completion, there is no crime. Likewise, it is not a crime if a person acts but does not possess the requisite mens rea to bring about the result. Finally, it is not a crime if there is a mere coincidental meeting of the mens rea and actus reus.¹⁶¹

Experts understand how important mens rea is when deciding criminal charges. Joshua Dressler is a staple in criminal jurisprudence. As an author of numerous casebooks and treatises, he explains: if a person breaks and enters into someone’s home at night (the actus reus of common law burglary) with only the intent to escape the cold, but once inside sees a large amount of cash on a table and decides to steal it, the crime of common law burglary has not been met.¹⁶² The mens rea required for the crime of burglary is that at the time of the actus reus elements (the breaking and entering the dwelling of another) the actor must have the intent to commit a felony once inside: the key being the intent to commit the felony must be present at the time of the breaking and entering.¹⁶³ Stated simply, in the preceding example, no concurrence of the actus reus and the mens rea existed because at the time of the actus reus the actor only wanted to get warm—not to commit a felony inside. Therefore, the person is not guilty of burglary.

Because mens rea is crucial to evaluate criminal conduct, it has to be scrutinized. For example, the grading of criminal liability is based on the degree of risk that the actor is willing to appreciate.¹⁶⁴ As the actor

¹⁵⁹ Dressler, *supra* note 150, at 113 (quoting *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993)).

¹⁶⁰ *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

¹⁶¹ For example, if I want to kill my neighbor’s dog because he barks at me every time I walk on my driveway, it is not a crime if the dog escapes his fenced-in area and darts in front of my car as I am driving through the subdivision and he dies. The coincidence of my actus reus of the car hitting the dog and my mens rea of hating the dog did not align to cause the dog’s death. Hence, the mens rea has to motivate the actus reus and here, it coincidentally aligned, but did not motivate any of my actions.

¹⁶² Dressler, *supra* note 150, at 85.

¹⁶³ *Id.*

¹⁶⁴ See Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199 (2011).

proceeds with the criminal act, despite the knowledge or awareness, the actor becomes more criminally culpable.¹⁶⁵

What complicates this analysis is the many varying views about criminal culpability, criminal negligence, and awareness or knowledge. Many scholars have navigated the philosophy of why society should or should not punish negligence in a criminal context, as well as what it means to act with knowledge, recklessness, or negligence. Some of these scholars and their theories support my position that the forgetful parent does not possess the mens rea and actus reus connection needed to reach a finding of criminal culpability.

C. Latent Knowledge: What does it mean to know?

The argument for criminally prosecuting parents who forget their child is that those parents were aware, at least at some point, that a child was in the car. So that previous knowledge, some would argue, becomes the basis for the mens rea needed for criminal behavior (knowledge, negligence, or carelessness). Without realizing it, that argument advocates that latent knowledge (knowledge that is not readily accessible to us now but was at an earlier time) is active knowledge.¹⁶⁶ The most interesting question facing latent knowledge or latent risk awareness is whether a prosecutor can consider latent knowledge as actual knowledge.

Alexander Sarch offers an example of how a person can at one time possess knowledge but later act without it.¹⁶⁷ Sarch's example is about a fund manager named Frank.¹⁶⁸ Frank passes smaller private investors through to larger investment managers.¹⁶⁹ Frank is shown strong evidence that one of his investment managers, Bernie, is perpetrating a massive fraud.¹⁷⁰ Frank obviously makes the conscious choice not to pass any further investors to Bernie.¹⁷¹ But later that day when presented with the list of transfers to investment managers that he must approve or reject (which still includes Bernie), Frank finds out that his family has been in a terrible accident.¹⁷² In shock, Frank prepares to rush to the hospital, but

¹⁶⁵ See *id.*

¹⁶⁶ See J. Bruce Morton, *Active Versus Latent Representations: A Neural Network Model of Perseveration, Dissociation, and Decalage*, 40 DEVELOPMENTAL PSYCHOBIOLOGY, 255, 257 (2002).

¹⁶⁷ Sarch, *supra* note 156, at 18–20.

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

his supervisor tells him he must approve or reject the transfers before he can leave.¹⁷³ Obviously full of grief and shock, Frank signs the documents quickly.¹⁷⁴ He has a slight recall that there may be an issue and he should not approve everything, but he rushes ahead so he can get to the hospital.¹⁷⁵ In Sarch's example, Frank has not forgotten or lost the information about Bernie, but the information was no longer readily available because of the shocking news he received.¹⁷⁶ If Frank had paused rather than rushing ahead, he may have recalled Bernie's fraud and not approved any transfers to Bernie.¹⁷⁷

As stated, Frank has not completely forgotten the warnings about Bernie's activities, and he would certainly have made different decisions if he had recalled the information.¹⁷⁸ But instead, because of the distressing phone call, Frank simply failed to recall the information when presented with the task.¹⁷⁹ The knowledge was blocked from having an impact on his actions, as it would have under normal circumstances.¹⁸⁰ But for the phone call, Frank would have known he was aiding in Bernie's fraud,¹⁸¹ Sarch explains:

That is, the knowledge is not connected to his action in a way that demonstrates that he gave too little weight to the existence of the fraud or otherwise reveals that he was insufficiently concerned with the interests of the victims of the fraud Accordingly, since the connection requirement does not seem to be satisfied as between Frank's knowledge and his action in aid of Bernie's crime, we have reason to conclude that Frank should not be guilty as an aider and abettor.¹⁸²

Another theory of criminal liability is called counterfactual risk-avoidance, which contemplates whether the actor would have avoided the risk if he or she had conscious knowledge of the risk or instead would have acted the same way.¹⁸³ Applying this theory to the forgotten-baby

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 18–19.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 19.

¹⁸¹ *Id.*

¹⁸² *Id.* at 19–20.

¹⁸³ See Kenneth W. Simons, *Should the Model Penal Code's mens rea provisions be*

scenario, a parent who leaves a child in the car even after bringing to consciousness the latent knowledge that the child was in the car, would satisfy the connection requirement.¹⁸⁴ But if the forgetful parent would not have left the child in the car were the parent's latent knowledge brought to consciousness, then the connection requirement is not satisfied.¹⁸⁵ So under this theory of criminal liability, the truly forgetful parent would not be subject to prosecution.

Latent knowledge, then, is not the same type of knowledge required under statutes that require an active decision. Take, for example, the Michigan Child Abuse First statute, which states that a person is guilty of child abuse when he or she acts with knowledge or intention.¹⁸⁶ Here, the actor must have active knowledge or intent—simple latent knowledge would not suffice.

A “should have known” analysis, likewise, does not reach the actual-knowledge threshold. So then, what is the criminal basis for prosecuting parents who truly forgot that their child was in the car? It depends on the language in each particular state's statute. Arguably, if the state statute requires a knowing, intentional, or willful or wanton disregard, parents who have truly forgotten their child could not have the necessary criminal mens rea. If, however, state statutes establish recklessness or criminal negligence as the basis for a finding of criminal behavior, then a prosecutor must evaluate what level of risk awareness was present. If the parent truly forgot the child and no triggers indicated that the parent should have been reminded that the child was in the back seat, then the parent never embraced a criminal mindset and prosecution would not be appropriate.

Even from a failure-to-act argument¹⁸⁷—where the failure to take the child out of the car after placing the child in the car becomes the act—the mens rea is still required to form a crime. Again, at issue is not what the parent failed to do but *why* the parent failed to act and what the parent's state of mind was at the time. In true “forgetting cases” the parent

amended? 1 OHIO ST. J. CRIM. L. 179, 194 (2003).

¹⁸⁴ See Sarch, *supra* note 156, at 27–28.

¹⁸⁵ *Id.*

¹⁸⁶ MICH. COMP. LAWS ANN. §§ 750.136b(2)-(7) (West 2017).

¹⁸⁷ Dressler, *supra* note 150, at 85, 102–105. The general rule is that a person must do a voluntary act to perform the actus reus. But there are exceptions to that rule where a criminal offense can be based on an omission. This duty to act occurs in five circumstances: 1. Status relationship (parents to their minor children, married couples to one another, and employers to employees). 2. Contractual obligation; 3. Statutory obligation; 4. Creation of the risk; and 5. Voluntary assumption of the risk.

is not ignoring any awareness that risk exists—substantial or slight. In fact, as explained earlier, the parent may, in certain circumstances, have created a false memory that the child is safe at daycare because the parent has created a memory of dropping the child off as expected.¹⁸⁸

Prosecuting a parent when a child is forgotten in the car ignores the neuroscience behind memory and the need for a mens rea to be concurrent with an actus reus. While prosecutors are justified in their desire to hold someone accountable for the needless death of a child, a prosecutor cannot use that desire to circumvent the elements of a crime. But the prosecutor can, as a community leader, act as a conduit for public-health messaging. Working with the parents in a meaningful way would give prosecutors unique opportunities to raise awareness and educate hospitals, daycares, community centers, and parents about how to avoid these tragedies.

IV. USING THE PROSECUTING ATTORNEY AS A COMMUNITY LEADER TO RAISE AWARENESS

Raising awareness begins with convincing people that the issue could affect them. But when it comes to hot-car deaths, that has proven to be a more complicated undertaking. In a recent study on health messaging about forgotten children in vehicles, researchers discovered that the public believes that a single, low-income, working, or unfit parent is the type of parent who might forget a child in the car.¹⁸⁹ In fact, a majority of the participants in a recent study shared two beliefs: 1) denial that they could forget *their own child* in a hot car, and 2) belief that it would never happen to *parents like them*.¹⁹⁰

But forgetful parents are caring, conscientious parents: Karen was a college-educated scientist who thought her best talent was her ability to use her brain.¹⁹¹ Her husband said that Sofia was Karen's "first, second, and third priority."¹⁹² And after Karen lost her daughter's life due to a lapse in her memory, she searched through her parenting books looking for information about children dying from being forgotten in the car.¹⁹³

¹⁸⁸ Diamond, *supra* note 62.

¹⁸⁹ Castle A. Williams & Andrew J. Grundstein, *Children Forgotten in Hot Cars: A Mental Models Approach for Improving Public Health Messaging*, 24 INJ. PREVENTION 279, 283 (2018).

¹⁹⁰ *Id.*

¹⁹¹ Ellen Byron, *supra* note 89.

¹⁹² *Id.*

¹⁹³ *Id.*

She could not find anything.¹⁹⁴

Nicole Engler admitted that before her daughter Remi died, she found it hard to understand how a parent could forget a child.¹⁹⁵ She said that in 2014 she had heard about a parent in Utah who had forgotten a baby.¹⁹⁶ After her daughter's death, she explained that the same mother "was kind enough to reach out to me for support when she heard of my case, despite me judging her harshly on social media at the time."¹⁹⁷

Similarly, when Brett Cavaliero realized that he had forgotten his daughter in the car, he and his wife immediately realized that "[o]ne phone call to alert us of Ray Ray's absence from school could have saved her life—but no one, neither us nor the daycare center, ever even considered this risk to child passenger safety and the need for a safety net around morning drop-off until we were faced with the tragic loss of our beautiful princess."¹⁹⁸

Further, most participants in the research study about public-health messaging and children forgotten in cars admitted that they had not seen any advertisements, public-service announcements, or materials involving children being forgotten in hot cars.¹⁹⁹

A. Using community prosecution to build awareness

Using the prosecuting attorney's office to raise awareness about hot-car deaths is consistent with the trend of community prosecution and engagement. Community prosecution is a collaboration for justice and progress, through use of the laws, but also through law enforcement, other community agencies, and the people of the community.²⁰⁰ While the title indicates a prosecution, community prosecution is not about prosecuting as much as it is about problem solving.²⁰¹ Although traditional community prosecution efforts began in the early 1990's to combat a rise in drug and violent crime, community prosecution has evolved into a unique tool used

¹⁹⁴ *Id.*

¹⁹⁵ *Remi Engler, supra* note 106.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Reeves-Cavaliero, supra* note 117.

¹⁹⁹ *Williams & Grundstein, supra* note 189, at 283.

²⁰⁰ *Community Prosecution*, NAT'L DISTRICT ATTORNEYS ASS'N, <https://ndaa.org/programs/community-prosecution/> (last visited Mar. 25, 2020).

²⁰¹ *See* Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety through Community Engagement: Community Justice and Community Prosecution*. 42 IDAHO L. REV. 313, 327–28 (2006).

by prosecutors to educate and lead their communities.²⁰²

Community prosecution doesn't always involve a criminal case or defendant; in fact, community prosecution doesn't involve a courtroom most of the time.²⁰³ Instead it involves reaching out to the community to educate, problem solve, and collaborate for awareness and change. For example, in Boston, Massachusetts, the district attorney sponsored high school round tables to teach young people about vandalism, while a District Attorney in Denver, Colorado, launched community boards and justice councils to help aid law enforcement in creating solutions to crime problems.²⁰⁴ One District Attorney described community prosecution efforts as "showing that you can be an effective prosecutor and an effective community leader."²⁰⁵

Using the prosecutor as a community leader places the prosecutor in the best position to combat forgotten-baby syndrome, as well as raise awareness about the universal threat all parents face. As prescribed by the American Bar Association, a prosecutor's duty is much more than just being a "case-processor":

[A prosecutor is] a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action.²⁰⁶

One prosecutor, actively involved in community engagement and prosecution, said "I want my prosecutors to have dockets of problems, not cases. Their purpose is community efficacy."²⁰⁷ These efforts, though not falling neatly within a prosecutor's crime-fighting role, nonetheless further any prosecutor's mission to protect the community. Just as prosecutors enter the community to combat drug violence and theft, prosecutors are also best suited to address hot-car deaths in similar forums

²⁰² Paula Park, *DAs Still Getting Out on Street*, 87 A.B.A. J. 26, 26–27 (2001).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(f) (Am. Bar Ass'n 2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

²⁰⁷ Dickey & McGarry, *supra* note 201, at 316.

like community meetings and roundtables.

Additionally, the prosecutor's involvement with hot-car death investigations is why the prosecutor is so uniquely situated to raise awareness in the communities. Prosecutors, unlike any other type of attorney, work closely with the police to navigate whether criminal culpability exists. That decision comes after evaluating all the facts and circumstances in light of their legal training. Their deep understanding of the criminal law, coupled with the facts of the criminal investigation, allow prosecutors to decide whether to charge a crime. In the cases of truly forgetful parents, where charges are not founded, prosecutors can utilize the tragic stories for community engagement and prosecution efforts that educate the community about the risk.

For instance, imagine the effectiveness of a grieving parent, alongside the prosecuting attorney, speaking at a community meeting urging parents to check their back seat every time they got out of their car. Imagine the power behind that parent sharing their story about what happened—not because they are facing bogus homicide charges, but because the prosecutor saw an opportunity to use an awful, non-criminal act to teach the community about that risk. That type of community engagement is the most effective way to build awareness and educate the community about how to prevent forgotten-baby syndrome, and prosecutors should use their leadership role to facilitate these discussions.²⁰⁸

Even Congress has recognized that it can use its authority to influence and prevent hot-car deaths. While at least twenty-one states have laws against leaving children unattended in a vehicle, there is little to address the unique nature of hyperthermia deaths.²⁰⁹ But in 2019, Congress introduced the Hot Cars Act of 2019.²¹⁰ This Act would require all new passenger vehicles to have standard safety equipment that is

²⁰⁸ This is not to suggest that prosecutors should wait until they have a hot-car death to educate the community. Ideally, prosecutors should be proactive in their education rather than reactive.

²⁰⁹ *Good Samaritan state laws specific to rescuing people or animals in cars*, KIDSANDCARS.ORG. For example, in 2015, Texas passed House Bill 2574, which mandated that vehicular-heatstroke education be included in all hospitals for all new parents along with education about several other topics, including Sudden Infant Death Syndrome, postpartum depression, shaken-baby syndrome, immunization requirements, newborn screening requirements, and pertussis. See H.B. 2574, 84(R) Leg. Sess. (Tx. 2015), *available at* <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB2574>.

²¹⁰ S. 1601, 116th Cong. (2019).

designed to alert the driver or passenger that a child is in the backseat of the vehicle.²¹¹ The proposed new law would require both a visual and auditory signal to the driver, coupled with a haptic (vibration) alert as well.²¹²

The Bill is receiving support. Consumer Reports recently issued a statement urging Congress to adopt the Bill. A senior policy analyst for Consumer Reports said, “The good news is that the technology to prevent these tragedies is available. That’s why we strongly urge Congress to pass the Hot Cars Act of 2019 without delay, to provide parents with a simple, integrated, and reliable way to help prevent forgetting their child in the back seat when they get out of the car.”²¹³

Even large government agencies have tried to educate the public to no avail. For example, the National Weather Service tried a slogan: “Beat the heat, check the backseat.”²¹⁴ And the National Highway Traffic Safety Administration tried, “Where’s baby? Check for baby.”²¹⁵ But considering that child deaths from being forgotten in a car have increased in recent years, it is fair to say the efforts were not effective.

B. The private sector’s efforts to raise awareness: organizations, baby products, and the auto industry.

Further, corporations are also attempting to spread the word. In 2018, Proctor and Gamble, along with Karen Osorio and her husband, launched the campaign “Bag in the Back.”²¹⁶ This campaign aims to educate parents to place a bag, purse, computer, or other item that would be retrieved out of habit from the back seat where the car seat is located so they will be prompted to open the back door, thus preventing hot-car deaths when dropping off the child is out of the normal routine.²¹⁷ But the “bag in the back” campaign is not mainstream. It has been slow to reach

²¹¹ *Id.*

²¹² *Id.*

²¹³ Press Release, Consumer Reports, Consumer Reports Urges Congress to Pass the ‘Hot Cars Act of 2019’ (July 22, 2019), *available at* https://advocacy.consumerreports.org/press_release/consumer-reports-urges-congress-to-pass-the-hot-cars-act-of-2019/.

²¹⁴ *Beat the Heat, Check the Backseat!*, NAT’L WEATHER SERV., https://www.weather.gov/arx/heat_backseat; Williams & Grundstein, *supra* note 189, at 285.

²¹⁵ *Child Safety*, NAT’L HIGHWAY TRAFFIC SAFETY COMM’N, <https://www.nhtsa.gov/road-safety/child-safety>; Williams & Grundstein, *supra* note 189, at 285.

²¹⁶ Byron, *supra* note 89.

²¹⁷ SOFIA FOUND. FOR CHILD SAFETY, Bagintheback.org.

pediatrician offices, baby stores, or other toddler-appropriate places, if it is reaching these places at all.

As parents mourn the loss of their child from these tragedies and try to learn how this happened, many create foundations or organizations that promote awareness and prevention of hot-car deaths.²¹⁸ Janette Fennell founded Kidsandcars.org after her family was locked in the trunk of their vehicle during a kidnapping.²¹⁹ It was then that Janette dedicated her life to preventing needless deaths from non-moving vehicle accidents.²²⁰ Her website connects parents who have suffered tragedies from hot-car deaths, window strangulation, back-overs, front rollovers, and trunk entrapment.²²¹

Similar to the Kidsandcars website, Jan Null, a Research Meteorologist in the San Jose State University Department of Meteorology and Climate Science, created noheatstroke.org.²²² This website contains detailed, recent data on vehicular heatstroke deaths in the United States, including the name, location, and age of the child victim.²²³

Safekids.org is another website dedicated to preventing childhood injuries.²²⁴ Safekids.org was founded by pediatric trauma surgeon Martin R. Eichelberger, M.D. and public-relations professional Herta Feely.²²⁵ Dr. Eichelberger created the organization after too many encounters with parents who suffered the death of a child and asked him what they could have done to prevent their child's death.²²⁶

Child-care industries have also begun to respond to hot-car deaths and their response validates parental forgetfulness and seeks to prevent its consequences. As any new or excited parent can explain, there is an industry full of baby innovations, toys, products, and resources that can seem overwhelming at times. But slowly emerging from underneath the latest highchair or organic diaper cream is a movement to remind parents that a child is in the car.

The industry has designed plenty of clips, sensors, and monitors

²¹⁸ See Byron, *supra* note 89; Reeves-Cavaliero, *supra* note 117.

²¹⁹ *Our Story*, KIDSANDCARS.ORG, <https://www.kidsandcars.org/about-us/our-story/>.

²²⁰ *Id.*

²²¹ *Id.*

²²² Null, *supra* note 12.

²²³ *Id.*

²²⁴ *Our History*, SAFE KIDS WORLDWIDE, <https://www.safekids.org/our-history>.

²²⁵ *Id.*

²²⁶ *Id.*

that parents can connect to their car seat to alert them that a child is in the car. Even some car seats come equipped with built in weight sensors with Bluetooth capacity that will alert a parent that a child remains in a car seat.²²⁷

The market is not short on devices and initiatives that parents can use to remind them of their baby in the car. But interestingly, none of these products are what parents think about when they are preparing for the child's arrival; hence, these products remain unknown to most parents. Further, parents who are aware of these products think they have no need for them because they believe, incorrectly, that they could never forget their child in the car. This is why the prosecuting attorneys, through community prosecution, must educate the community and shape awareness about the risk all parents face.

C. Automotive advances

Even the automotive industry has begun to recognize that hot-car deaths can happen to any consumer. Since 2017, General Motors has offered rear-seat reminder technology.²²⁸ The rear-seat reminder is standard in several models. Further, Nissan has also joined General Motors in offering rear-seat reminders on eight of its models in 2019, with all of their four-door vehicles having rear-seat reminders by 2022.²²⁹

²²⁷ For example, The ChildMinder System's KeyFob Remote is an alarm that will sound when the parent and child are more than fifteen feet apart. The KeyFob Remote Alarm will beep to indicate that a child remains in the car seat and may have been inadvertently left unattended in an automobile. As the parent moves closer to the vehicle, the beeping will cease. *Multi-KeyFob® Remote Alarm, BABY ALERT INT'L*, <https://www.babyalert.info/keyfob-remote-alarm-white-ws.html> (last visited Mar. 25, 2020). Additionally, Elpho's eClip clips on to the car seat's shoulder strap and syncs via Bluetooth to either a smartphone or an accompanying key fob. Similar to the ChildMinder, this device will set off an alarm when a driver gets out of the car and walks more than fifteen feet away. If the driver does not return to the vehicle after hearing the alarm, the eClip will text a spouse, relative, or friend. Finally, this device will alert the driver if temperatures in the back seat get either too hot or too cold because it has a built-in thermometer. Dave Baldwin, *Life-Saving Car Seat Alarms That Remind Parents There's a Baby in the Back Seat*, FATHERLY (Feb. 7, 2020), <https://www.fatherly.com/gear/best-car-seat-alarms/>.

²²⁸ Shahrzad Warkentin, *13 cars with Rear Seat Reminders so You Don't Forget Your Kid This Summer*, RED TRICYCLE (June 12, 2018), <http://redtri.com/cars-back-seat-alerts/>.

²²⁹ Nathan Bomey, *Nissan Rear-Door Alert System to Become Standard on All 4-door Cars, SUVs, Pickups*, USA TODAY, (Jul. 31, 2018), <https://www.usatoday.com/story/money/cars/2018/07/31/nissan-rear-door-alert/847616002/>.

Rear-seat reminders are activated when a rear door is opened; once activated, the vehicle is programmed to give an alert when the car is turned off.²³⁰ The downside of this technology is that the reminder is only activated once during each ignition cycle.²³¹ So if the driver stops to get gas, the system will notify the driver to check the back seat, but if the driver does not open the rear door while at the gas station, the system will not notify the driver during the next ignition cycle.²³² Said another way, if the parent never reopens the rear door after getting gas, the rear-safety alert will not get reset because its trigger is the opening of the rear door.²³³ This creates a loophole for the system—it only works for drivers who travel directly to their destination during that ignition cycle. It would not remind a parent, for example, who stopped to get gas and finally arrived at the daycare.²³⁴

In response to some of the criticisms of rear-seat technology that is activated by opening doors, Hyundai created an ultrasonic sensor that detects movement from the backseat.²³⁵ When the driver arrives at their destination, the rear-seat reminder will display on the center instrument panel.²³⁶ But what is really unique about the Hyundai system is that if the car detects movement from the backseat, the car begins to honk the horn, flash the lights, and send a message to the driver's phone through their Blue Link technology.²³⁷ These automotive advances respond to the evidence that forgetting a child in the car can happen to anyone. And as the automotive and child-product industry have caught on and begun to address the risk, so too must the prosecuting attorney address this risk in the community.

CONCLUSION

Since this article was written, it is likely that more children have died in hot cars—deaths that were preventable if only people were more

²³⁰ *Id.*; Warkentin, *supra* note 228.

²³¹ See Sarah Messer, *How 4 technologies Designed to Prevent Hot Car Deaths Work*, ABC NEWS (Jun. 14, 2017), <https://abcnews.go.com/US/technologies-designed-prevent-hot-car-deaths-work/story?id=47991074>.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Press Release, Hyundai Motor, Hyundai Motor Announces New Rear Occupant Alert Reducing Child Heat Hazards (Oct 3, 2017), *available at* <https://www.hyundainews.com/en-us/releases/2383>.

²³⁶ *Id.*

²³⁷ *Id.*

aware that this could happen to them. In criminal law, the public often tries to protect themselves from the rawness of tragedy by trying to distinguish themselves or their lifestyle from the victim. In cases of child hot-car deaths, some people distinguish themselves by suggesting that the parents who have forgotten their children are bad parents, people who brought it on themselves, or people who were not as careful as they should have been. But that, according to the neuroscience, is mistaken.

What the science proves is that the brain is capable of creating a false memory that would indicate to a parent that their child was safe at school or home—rather than the reality that the child is forgotten in the back seat. Neurology also indicates that stress, sleep deprivation, and habit memory can override short-term memory. Therefore, the most powerful way to fight the brain's ability to forget (and create a false memory) is to build awareness so that all parents think about checking the backseat every time they exit a vehicle.

The criminal law, specifically prosecuting attorneys, must become community leaders and educate the public about the parents who have forgotten their child in a car. Rather than view the prosecutor as the chief law enforcement officer of the community, the prosecutor should also become the chief informer of the community. Further, the parents who have suffered the loss of a child should not feel ashamed to discuss their tragedy but instead empowered to explain the common thread of factors that travel through these tragedies through community prosecution and engagement. Parents, together with the local prosecutor, must begin to share their stories and bring awareness to their communities. Prosecutors must look at this tragedy from a public-health perspective as well as a law enforcement lens and use their platform to bring awareness to this issue.

In sum, prosecuting the parents who have forgotten their child in the car is not supported by criminal jurisprudence. Further, with the growing body of neuroscience showing that this unthinkable oversight could happen to any parent, prosecutors must be willing to suspend their bulldog instincts and work hand-in-hand with affected families to tell these stories in the community. Prosecutors must embrace not only their duty to refrain from pursuing unjustified prosecutions, but also their unique opportunity, as community leaders, to prevent future tragedies. Until hot-car deaths become a mainstream topic discussed among parent groups, hospitals, pediatrician offices, and law enforcement, these senseless child deaths will continue. Prosecuting unwitting parents is not the answer.