

CRIMINAL LAW

Professor Blaze

Fall 2007

First Assignment

Read the attached news stories, Tennessee homicide statutes, and Tennessee case State v. McKim. (The McKim case is available as a separate document on the course materials section on the web.)

Be prepared to discuss under Tennessee law what criminal charges would be appropriate in each of the major factual circumstances described in the news stories and the McKim case. In addition, be prepared to discuss what punishment, if any, would be appropriate for each potential defendant, and why. Finally, be prepared to discuss the reasons, if any, for the disparate treatment of the various defendants or potential defendants.

RECENT NEWS STORIES

PUZZLING TRAGEDY: CHILDREN LEFT TO DIE IN CARS

ALLEN G. BREED AP National Writer
July 29, 2007

MANASSAS, Va. — Kevin Kelly is a law-abiding citizen who, much distracted, left his beloved 21-month-old daughter in a sweltering van for seven hours. Frances Kelly had probably been dead for more than four hours by the time a neighbor noticed her strapped in her car seat; when rescue personnel removed the girl from the vehicle, her skin was red and blistered, her fine, carrot-colored hair matted with sweat. Two hours later, her body temperature was still nearly 106 degrees.

What is the appropriate punishment for a doting parent responsible for his child's death? A judge eventually spared Kelly a lengthy term in prison. Still, it is a question that is asked dozens of times each year.

Since the mid-1990s, the number of children who died of heat exhaustion while trapped inside vehicles has risen dramatically, totaling around 340 in the past 10 years. Ironically, one reason was a change parent-drivers made to protect their kids after juvenile air-bag deaths peaked in 1995 — they put them in the back seat, where they are more easily forgotten.

An Associated Press analysis of more than 310 fatal incidents in the past 10 years found that prosecutions and penalties vary widely, depending in many cases on where the death occurred and who left the child to die — parent or caregiver, mother or father. Mothers are treated much more harshly than fathers. While mothers and fathers are charged and convicted at about the same rates, moms are 26 percent more likely to do time. And their median sentence is two years longer than the terms received by dads. Day care workers and other paid baby sitters are more likely than parents to be charged and convicted. But they are jailed less frequently than parents, and for less than half the time. Charges are filed in half of all cases — even when a child was left unintentionally.

In all, the AP analyzed 339 fatalities involving more than 350 responsible parties. July is by far the deadliest month, accounting for nearly a quarter of the total. A relatively small number of cases — about 7 percent — involved drugs or alcohol. In a few instances, the responsible parties had a history of abusing or neglecting children. Still others were single parents unable to find or afford day care. Many cases involved what might be called community pillars: dentists and nurses; ministers and college professors; a concert violinist; a member of a county social services board; a NASA engineer. And it is undisputed that none — or almost none — intended to harm these children.

"When you look at overall who this is happening to, it's some very, very, very good parents — might I say, doting parents," says Janette Fennell, founder and president of Kids and Cars, a nonprofit group that tracks child deaths and injuries in and around automobiles. "But no one thinks it's going to happen to them. I think people are lying if they say that there wasn't one situation in raising their child that, 'There but for the grace of God go I.'"

The AP's analysis was based largely on a database of fatal hyperthermia cases compiled by Fennell's organization. The AP contacted medical examiner's offices in several states where this most often occurs, and the group's numbers coincided almost exactly with recorded hyperthermia deaths. Some of these children crawled into cars or trunks on their own, but most were left to die by a caregiver. Most often, it was a parent who simply forgot the child was inside.

Texas leads the nation with at least 41 deaths, followed by Florida with 37, California with 32, North Carolina and Arizona with 14 apiece, and Tennessee with 13. There were deaths recorded in 44 states — most in the Sun Belt, but many in places not known for hot weather.

The correlation between the rise in these deaths and the 1990s move to put children in the back seat is striking. "Up to that time, the average number of children dying of hyperthermia in the United States was about 11 a year," says Jan Null, an adjunct professor of meteorology at San Francisco State University who has studied this trend. "Then

we put them in the back, turned the car seats around. And from '98 to 2006, that number is 36 a year."

Few understand just how quickly a car can heat up, even on a moderate day. According to one study, the temperature inside a vehicle can rise more than 40 degrees in the span of an hour, with 80 percent of that increase occurring during the first half hour. And researchers found that cracking the windows did little to help. Children, often too young to escape, are particularly vulnerable because their immature respiratory and circulatory systems do not manage heat as efficiently as adults'. After a short time, the skin grows red and dry, the body becomes unable to produce sweat, and heat stroke kills the child. Already this year, at least 16 children have died in hot vehicles from Hawaii to Virginia — including a 4-year-old New Orleans boy who died on Father's Day.

Since 1998, charges were filed in 49 percent of cases. In those that have been decided, 81 percent resulted in convictions or guilty pleas, and half of those brought jail sentences — the median sentence being two years. Parents were only slightly less likely to be charged and convicted than others, but the median sentence was much higher — 54 months. In cases involving paid caregivers, 84 percent were charged, with 96 percent of those convicted. But while they are jailed at about the same rate as parents, the median sentence in those cases was just 12 months.

Women were jailed more often and for longer periods than men. But when the AP compared mothers and fathers, the sentencing gap was even wider. Mothers were jailed 59 percent of the time, compared to 47 percent for fathers. And the median sentence was three years for dads, but five for moms. "I think we generally hold mothers to a higher standard in the criminal justice context than in just family life generally," says Jennifer M. Collins, a professor at the Wake Forest University School of Law who has studied negligence involving parents and such hyperthermia cases. A large segment of society, she says, thinks "fathers are baby-sitting, and mothers are doing God's work."

In 27 percent of the cases the AP studied, the children got into the vehicles on their own. Those cases are much less likely to be prosecuted, though sometimes parents are punished for negligence — particularly where substance abuse is involved. The AP identified more than 220 cases in which the caregiver admitted leaving the child behind. More than three-quarters of those people claim they simply forgot.

It's easy to forget your keys or that cup of coffee on the roof. But a child? How is that possible? The awful truth, experts say, is that the stressed-out brain can bury a thought — something as trite as a coffee cup or crucial as a baby — and go on autopilot. While researchers once thought the different parts of the brain worked in conjunction with each other, they now realize that different portions dominate at different times. "The value of the item is not only not relevant in these competing memory systems," says memory expert David Diamond, an associate psychology professor at the University of South Florida who also works at a Veterans Affairs hospital. "But, in fact, we can be more complacent because we tell ourselves, 'There's no way I would forget my child.'"

Nationwide, about 60 percent of cases where the child was left unintentionally result in charges. But policies vary wildly from one jurisdiction to the next. At least nine children in Las Vegas have died in hot vehicles since 1998, but charges were filed in only two of those cases. For several years, it has been the policy of the Clark County prosecutor's office not to file charges unless there is proof of "some general criminal intent ... to put the child in harm's way," says chief deputy DA Tom Carroll.

But in Memphis, Tenn., District Attorney General William L. Gibbons scoffs at the notion that he wouldn't charge someone — especially a parent — who claims to have simply forgotten a child. "It frankly boggles my mind that a parent can forget that a child is in a vehicle for two hours," says Gibbons, whose office has prosecuted five cases involving nine parents and day-care workers since 1998. Earlier this year, the state Supreme Court ordered Gibbons to grant pretrial diversion to youth minister Stephen McKim. McKim was late for a church meeting and forgot his 7-month-old daughter Mia in the back seat — even though the day care center was at the church. Under diversion, the charge would be dismissed after two years if McKim successfully fulfills certain court requirements. Gibbons thinks that's getting off too easy. "We're not talking in most cases about sending anyone to prison," he says. "We are talking about placing someone on probation, maybe requiring them to go to some parenting classes or something like that, and giving them a felony record as a result of what happened. And I think that's reasonable."

Not surprisingly, the harshest treatment is reserved for those who intentionally left their children. According to the

AP's analysis, those people are nearly twice as likely to serve time than people who simply forgot the child. And on average, they received sentences that were 5½ years longer.

In 2004, Tara Maynor was sentenced to 12½ to 60 years in prison on two counts of second-degree murder after leaving her two children in a car for four hours outside a suburban Detroit beauty parlor while she got a massage and hairdo. She told police she was "too stupid to know they would die."

But in many cases, police, prosecutors and judges must wrestle with whether to charge, try and punish an already grieving parent. In Lexington, Ky., Fayette Circuit Judge James Ishmael said the question of what to do with Leon Jewell was perhaps the toughest of his career.

According to police, Jewell admitted buying beer and vodka at a liquor store on Aug. 1, 2005, and drinking in his SUV on the way home. When his wife returned home from work later that day, she found 9-month-old Daniel, the couple's only child, still strapped in his car seat. Jewell pleaded guilty to second-degree manslaughter. Despite the prosecutor's recommendation of seven years, Ishmael placed the clearly remorseful and devastated Jewell on probation and ordered alcohol treatment. But six months later, on what would have been Daniel's second birthday, Jewell got drunk and was kicked out of his treatment program. Ishmael sent him to prison for seven years.

Judges often attempt to craft creative penalties: An Idaho mother was ordered to make a video about her case to be used in birthing classes. In addition to spending eight months in prison, a Louisiana baby sitter was ordered to pay the dead girl's funeral expenses and to make a \$500 annual donation to the hospital that treated her. Some day-care workers have been prohibited from supervising young children during their probation.

So what of Kevin Kelly? What did he deserve?

Would it influence your opinion to know that the day Frances died, May 29, 2002, the Manassas engineer was watching 12 children alone while his wife and oldest daughter were abroad visiting a cancer-stricken relative? Does it matter that when he returned home that day, he'd asked two teenage children — both of baby-sitting age — to attend to their younger siblings while he went back to school for another daughter who was late getting out of an exam? Or that during the next seven hours, he was accosted by an air conditioning repairman with news that he was going to have to spend several thousand dollars on a new unit? That he fixed lunch, did laundry, mended a gap in the fence that the little ones were using to escape the yard, drove to the store for parts to fix his air conditioner, took a son to soccer practice and fixed a leaking drain pipe in the basement?

Prince William County Commonwealth's Attorney Paul L. Ebert concluded that Kelly's failure to ask after Frances for seven hours rose to the level of a crime. Kelly was convicted of involuntary manslaughter and child endangerment. The jury recommended a year in prison. But Circuit Judge Rossie D. Alston Jr. had what he thought was a more humane solution. He ordered Kelly to spend one day a year in jail for seven years and to hold an annual blood drive around the anniversary of his daughter's death.

Kelly is still a convicted felon. He cannot vote, and his job was affected because he is barred from certain government properties. But waiting in line recently at the All Saints Catholic Church to donate blood, he said he is happy for the chance to honor his daughter by helping to save lives. "The judge was very, very merciful," he said as his red-haired children scurried around giving snacks and stickers to donors. "And I'm very grateful for what he did in allowing me to stay with my family and support my family."

BABY FOUND DEAD IN CAR IN CONCORD FATHER SAYS HE FORGOT ABOUT HIM

7/26/07

CONCORD, Calif. -- A man who said he mistakenly left his 11-month-old son in a hot car for more than six hours while he went to work was arrested Wednesday night in the boy's death.

Danny Takemoto, 46, of Benicia, was booked on suspicion of felony manslaughter, said Concord police Lt. David Chilimidos. Takemoto told police that he neglected to drop off the child at a day care center and instead drove to work Wednesday morning, Chilimidos said. "For whatever reason, the father forgot about the son," Chilimidos said.

Takemoto's wife phoned him shortly before 3:30 p.m. to ask why the day care had called her to report that her son was not there, prompting Takemoto to race out to the van and find the lifeless body of his son still strapped in the car seat, the lieutenant said. The temperature in Concord reached 81 degrees Wednesday but would have been much higher inside the vehicle. An autopsy likely would be conducted Thursday, authorities said.

At least 15 small children have died so far this year nationwide after being left in hot vehicles, according to a study published in *Pediatrics*, the Journal of the American Academy of Pediatrics and updated July 12. Last year, 29 children died, and 42 died in 2005, the study said.

Under California law, leaving a child, age 6 or younger, alone in a vehicle is a citable offense.

AUTHORITIES PUZZLED ABOUT MOTHER IN DEATHS OF CHILDREN LEFT IN HOT CAR (CNN.com 8/4/07)

HANAHAN, South Carolina (AP) -- Sametta Heyward was in a bind. The single mother was scheduled to start a double shift at 3 p.m., and her baby sitter had just canceled.

"She was either told to come to work or be fired, or she was afraid to call in sick -- one of those things," said police Lt. Michael Fowler. She made it to her job at a county-run group home July 29, a typically warm summer day. After eight hours, she called a supervisor and said she had to leave because of child-care issues. According to her employer, she didn't tell the supervisor or a co-worker that for all that time, she had left her 1-year-old daughter and 4-year-old son in her Chevy Cavalier hatchback, parked on a residential street. She had left Triniti and Shawn with battery-powered fans, food and drinks, but it was not nearly enough to combat the sweltering conditions inside. She later told relatives that when she got to the car at 11:30 p.m., the children were unconscious and had weak pulses. A day later, police found her at her apartment wailing, "Oh, my babies!"

Officers said in a police report that she tried to kick and bite them and asked them to kill her. The bodies of the children, bathed and dressed, were found wrapped in trash bags and stuffed under the sink. Heyward, 27, was charged with two counts of homicide by child abuse. A funeral for the children was held Saturday. Lab tests are pending that could help determine whether the children died in the stifling car or sometime after their mother rushed their limp bodies back to their tiny apartment.

A host of other questions remain unanswered: Why didn't she take the children inside the group home? Did she ever check on them? Why didn't she tell her supervisor that the baby sitter had canceled? If the children were alive when she got to them, why didn't she seek medical help?

People who know her say they considered her a loving mother, despite a life that turned tough long before she moved into the 252-square-foot efficiency apartment. "She and her kids were always happy, smiling and joking," said Tony Smith, who lived a few doors down and often shared meals with the family. Smith's wife, Sheryce Robertson, would sometimes baby-sit, but Robertson was sick when Heyward asked her to care for the kids that Sunday.

It was an average summer day by South Carolina standards: 88 degrees. But the inside of the car would have been like an oven, according to experts, who say the children may not have had much of a chance even if the windows were cracked. "If it's in direct sunlight, you can easily get temperatures of 130 or 140 degrees in a car in 10 or 15 minutes," said Dr. Keith Borg, an emergency room physician at the Medical University of South Carolina. "At that kind of temperature, it could kill an infant or a small child in minutes."

Her friends and her bosses -- and even the officers who arrested her -- say Heyward had been trying her best: working long hours and providing for her children. In May, she and her children had moved into the \$185-a-week apartment in Hanahan, a bedroom community of about 14,000 people some 15 miles from Charleston. She told the apartment complex manager they wouldn't be there long, that she was already looking for another place.

She had been arrested twice in the past three years, but she was not prosecuted on a charge of hindering an officer and was found not guilty of first-degree criminal domestic violence in February 2006. A few months before the move, she put a newborn up for adoption. A 12-year-old son lives with his father in Maryland. If those things affected her, it didn't show on the job. In a recent statement, the Disabilities Board of Charleston County said Heyward "was a valued employee who received good evaluations of her work" and was well-regarded by staff and clients.

Her lawyer, Andy Savage, said he hopes a mental evaluation will shed light on what happened. "Neighbors see her as a great mother. This isn't a woman who beat her kids," he said. "Suppose she went to work that night and left them at home. Would that have been better?"

UNEQUAL JUSTICE FOR TWO FATHERS IN HOT CAR DEATHS

(CNN.com 7/30/07)

(AP) -- Two hot cars. Two dead infants. Two grieving fathers. Two very different outcomes.

College professor Mark Warschauer says he simply forgot his 10-month-old son Mikey was in the car. Horse groom Antonio Balta claims he didn't know the car would get hot enough to harm his 9-month-old daughter, Veronika. Neither man meant to harm his child. But that doesn't always matter in the eyes of the law.

Mikey's Story

A baby lay lifeless on a stretcher, a car window shattered nearby, paramedics swarming. How sad, Mark Warschauer thought. Then he realized it was his car. It was Mikey.

If there was ever a miracle baby, Michael Kai Warschauer was it. For five years, Warschauer and his wife, Keiko Hirata, struggled with infertility. They had undergone in-vitro fertilization, only to see more than a dozen embryos fail. The grateful parents reveled in their dark-haired boy, filling page after page with photos of them cuddling, playing and laughing together. Appreciating what a precious gift they'd received, the couple studied parenting books and even brought in a child-safety expert to inspect their home. "Mikey was the most loved and adored baby on earth," says Warschauer.

Like many, the Warschauers were a two-career family. Mark Warschauer is a professor at the University of California, Irvine, a leading expert in the field of technology and learning. Hirata is an award-winning political-science professor specializing on Japan and East Asia.

The morning of August 8, 2003, Mark Warschauer was tired and stressed out. His wife was trying to wean Mikey, and he'd gotten up at 3 a.m. trying to get the bright-eyed 10-month-old back to sleep. When he drove to work that morning, he was "on automatic." Mikey had fallen asleep in the back, dozing quietly in his rear-facing car seat. Instead of going to day care, Warschauer went straight to campus, parked his car and went up to the office. His "life of grief" began three hours later.

"At your greatest moment of need, I failed you horrifically," Warschauer said in a eulogy for his son. "Worst of all, I

have no explanation for what I have done. I cannot understand how I, who loved you more than the air I breathed, who would have gladly given my own life for you, could have done such a thing."

Authorities ruled Mikey's death an accident and decided not to prosecute. But Warschauer cannot let himself off quite so easily. "I take full responsibility for Mikey's death," he said during a recent interview at a coffee shop across from campus. Warschauer has said these words to groups, written them on a Web site dedicated to his son, recorded them in public service announcements. It is a story he is loath to share, but feels obligated to do so. He wants to spare other parents the grief he has experienced.

Since Mikey's death, the Warschauers have had three more children, including twins. Warschauer knows Mikey's death was a tragic fluke, but he knows he can never fully trust himself again. Inside each of the two family cars is a leather briefcase strap. When Warschauer buckles a child in, he clips the strap to his belt loop, so he can't leave the car without being reminded that he's not alone. "It's my cue," he said

Veronika's Story

Nine-month-old Veronika Balta grew up around the ponies. Her father, Antonio, was a thoroughbred horse groomer who followed the racing circuit from New York to Kentucky to Florida. Her mother, Michelle Bashford, waited tables at the various track clubhouses. The couple couldn't afford day care, so Balta would park Veronika's stroller in the stables while he worked on the horses. Balta would talk to his little "mami" -- short for mami chula, Spanish for "pretty mommy" -- while he washed and brushed the horses.

"I had to be at work at 4 in the morning to 11 or 12 in the afternoon," the 30-year-old Peruvian native says in soft-spoken, heavily accented English. "Basically it was me and her relationship, because the mother used to work all day, 9 in the morning to 7. So I got her by myself all these hours."

On March 14, 2004, the couple were packing up to return to upstate New York. Bashford was finishing up her last shift at Gulfstream Park north of Miami; Balta decided to try and pick up a little more spending money at the betting windows. Veronika cried around large crowds, so Balta says he left her in the car. He cracked the windows just a hair, he says, because he was afraid someone might take her.

The first two times Balta left the air-conditioned betting parlor to check on Veronika, she was playing happily with a stuffed toy that he'd won for her in a Kentucky claw machine -- a rabbit dressed in a striped prison uniform. But then he got caught up in the races, and before he knew it, about 45 minutes had gone by. When he found Veronika, she was limp, her eyes rolled back into her head. "I tried to wake her up but when I carry her like this," he says, gesturing as if holding a baby over his right shoulder, "... milk came out of her mouth."

The temperature was mild when Balta got to the track that day. He says he had no idea the car could heat up that quickly. At trial, a psychologist testified that Balta's IQ was just 74. Balta's defense attorney called him "borderline retarded."

Balta pleaded guilty to aggravated manslaughter and threw himself on the mercy of the court. Circuit Judge Ilona Holmes had none. She declared Balta's actions "totally callous" and sentenced him to 20 years. When he gets out, he will be deported.

Sitting at a break room table in the maximum-security Desoto Annex prison in Arcadia, Florida, Balta fingers through photos of the little girl who shortly before her death had spoken her first word -- Daddy. "It's like I lost my soul," he says, almost in a whisper. "When I lost her, it's like a big chunk of my heart came out." Balta agrees that he deserves to be punished. But he wonders what good it will do to keep him locked up for 20 years.

"This place is not going to bring my daughter back," he says. "I have learned from my mistakes already. ... I'm not the same person. I never been a bad guy, never. I did a mistake."

Selected Provisions From Tennessee Code

39-13-201. Criminal homicide.

Criminal homicide is the unlawful killing of another person, which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide.

39-13-202. First degree murder.

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

39-13-210. Second degree murder.

(a) Second degree murder is:

(1) A knowing killing of another; or

(2) A killing of another that results from the unlawful distribution of any Schedule I or Schedule II drug, when the drug is the proximate cause of the death of the user.

39-13-211. Voluntary manslaughter.

(a) Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

39-13-212. Criminally negligent homicide.

(a) Criminally negligent conduct that results in death constitutes criminally negligent homicide.

39-13-215. Reckless homicide.

(a) Reckless homicide is a reckless killing of another.

39-11-302. Definitions of culpable mental state.

(a) "Intentional" refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to

engage in the conduct or cause the result.

(b) "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

(c) "Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

(d) "Criminal negligence" refers to a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.