

**DO YOU KNOW WHERE YOUR CHILDREN ARE?  
CAYLEE’S LAW AND A PARENT’S FIFTH AMENDMENT  
PRIVILEGE AGAINST SELF-INCRIMINATION**

*Daniela Catrocho\**

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\* J.D. Candidate, 2015, Seton Hall University School of Law; B.F.A., Rutgers University, Mason Gross School of the Arts, New Brunswick, 2003. I would like to thank the members and editors of the *Seton Hall Legislative Journal* for their advice, and give a special thanks to Professor Solangel Maldonado and Dean Mark Alexander for their invaluable contribution throughout the writing process. This is dedicated to Mehmet, Joshua and Magnolia for their endless love and support.

## I. INTRODUCTION

“I desire the law may punish not make offenders,  
I desire that our words and actions may be subject to the law;  
I would have thought free.”<sup>1</sup>

Caylee’s Laws began to surface after the much-publicized 2011 murder trial of Casey Anthony, a Florida mother accused of murdering her two-year-old daughter, Caylee, and lying to police about Caylee’s whereabouts after Caylee had gone missing for thirty-one days.<sup>2</sup> On July 5, 2011, Anthony was acquitted of murder and found guilty of lying to police.<sup>3</sup> Shortly after the verdict, public outcry sparked Caylee’s Law legislation throughout the nation.<sup>4</sup> Since the push for this legislation began over two years ago, twelve states have enacted or revised legislation as Caylee’s Law, with a number of other states proposing to follow suit.<sup>5</sup> As a result of these laws, parents can be prosecuted for failing to report the death or disappearance of their child within a certain time period.<sup>6</sup> The time periods vary from state to state, and often fluctuate

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<sup>1</sup> JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 33 (1959) (quoting from M.H. Maguire’s *Attack of the Common Lawyers on the Oath Ex Officio*, as administered in the Ecclesiastical Courts in England, c. 7 of *Essays in History and Political Theory in Honor of Charles Howard McIlwain*).

<sup>2</sup> *Casey Anthony Trial: Timeline of Key Events in the Murder Trial of the Florida Mother*, ABC NEWS (July 6, 2011), <http://abcnews.go.com/US/casey-anthony-trial-timeline-key-events/story?id=13990853> [hereinafter “*Casey Anthony Trial*”].

<sup>3</sup> *Id.*

<sup>4</sup> Mikaela Conley, *Public Irate Over Casey Anthony Verdict*, ABC NEWS (July 5, 2011), <http://abcnews.go.com/Health/casey-anthony-verdict-outrage-spills-online/story?id=14002257>; *Showbiz Tonight: The Worldwide Outrage Over Casey Anthony* (CNN television broadcast July 8, 2011), available at <http://transcripts.cnn.com/TRANSCRIPTS/1107/08/sbt.01.html>; Elizabeth Flock, *Casey Anthony Verdict Sparks Campaign for “Caylee’s Law,”* WASHINGTON POST BLOG (July 6, 2011, 10:06 AM), [http://www.washingtonpost.com/blogs/blogpost/post/casey-anthony-verdict-sparks-campaign-for-caylees-law/2011/07/06/gIQAbjHX0H\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/casey-anthony-verdict-sparks-campaign-for-caylees-law/2011/07/06/gIQAbjHX0H_blog.html). See also *Caylee’s Law*, FACEBOOK, <https://www.facebook.com/CreateCayleesLaw> (last visited Sept. 21, 2013).

<sup>5</sup> ALA. CODE § 13A-13-8 (2013); CAL. PENAL CODE § 273j (West 2013); CONN. GEN. STAT. § 53-21a (2012); DEL. CODE ANN. tit. 11 § 1102 (2012); FLA. STAT. § 837.055 (2012); 720 ILL. COMP. STAT. 5/10-10 (2013); KAN. STAT. ANN. § 21-5904 (2013); LA. REV. STAT. ANN. § 14:403.7 (2012); LA. REV. STAT. ANN. § 14:403.8; N.J. STAT. ANN. § 52:17B-89 (West 2012); N.J. STAT. ANN. § 2C:12-1.3 (West 2012); N.C. GEN. STAT. ANN. § 14-318.5 (West 2013); S.D. CODIFIED LAWS § 22-11-37 (2012); WIS. STAT. ANN. § 948.23 (West 2012). See, e.g., 2015 N.Y. Assembly Bill No. 2835 (Jan. 20, 2015); 2015 Miss. House Bill No. 295 (January 12, 2015).

<sup>6</sup> Jon Kuhl & Rich Williams, *Caylee’s Law*, NCSL, Feb. 2012 ed. at 9, available at <http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-february-2012.aspx#4>. See *infra* Part II.

according to the child's age.<sup>7</sup>

Since their inception in 2012, Caylee's Laws have sparked numerous debates. Proponents of these laws argue that the law will prevent similar crimes in the future, giving states another tool to prosecute neglectful parents who cannot otherwise be charged with abuse or murder because of a lack of evidence.<sup>8</sup> On the other hand, opponents argue that Caylee's Laws will not prevent child deaths.<sup>9</sup> Both sides also debate whether these laws are constitutional under the Fifth Amendment privilege against self-incrimination.<sup>10</sup>

This Note surveys Caylee's Laws in several states and explores several issues with the laws, focusing on their infringement of a parent's constitutional right against self-incrimination. Caylee's Laws violate the Fifth Amendment right against self-incrimination, and states should revise their Caylee's Laws to include a use immunity clause to protect parents against self-incrimination. Part II lays out the history of Caylee's Laws, beginning with an overview of the *State of Florida v. Casey Marie Anthony* case and its controversial outcome that became the social media catalyst for these laws. Part III examines various approaches states have taken when adopting Caylee's Laws, including reporting deadlines, age limitations, and penalties. Part IV briefly reviews pending legislation and debates regarding the laws, ending with the Fifth Amendment issue. This Note also discusses North Carolina's adoption of the use immunity clause in its Caylee's Law pertaining to reporting a missing child. Finally, Part V argues that Caylee's Laws violate Fifth Amendment rights against self-incrimination and that states should redraft the laws to include immunity clauses, similar to North Carolina. Using North Carolina as the model statute, states should incorporate immunity clauses in their Caylee's Laws pertaining to reporting requirements for missing *and* deceased children to

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> Laura Riparbelli, *Casey Anthony Trial Aftermath: "Caylee's Law" Drafted in Four States*, ABC NEWS (July 7, 2011), <http://abcnews.go.com/US/casey-anthony-trial-aftermath-caylee-law-drafted-states/story?id=14020260>; *Caylee's Law Report*, RENEWAL FORUM (Jan. 9, 2013), <http://renewalforum.org/wp-content/uploads/Caylees-Law-Report.pdf>; Kim Chandler, *Caylee's Law Becomes Law in Alabama*, AL.COM BLOG (June 10, 2013, 2:11 PM), [http://blog.al.com/wire/2013/06/caylees\\_law\\_becomes\\_law\\_in\\_ala.html](http://blog.al.com/wire/2013/06/caylees_law_becomes_law_in_ala.html). See also Camille Kimball, *Caylee's Law is about Tools, Not Tricks*, CAMILLE KIMBALL BLOG (July 23, 2011, 8:27 PM), <http://camillekimball.blogspot.com/2011/07/caylees-law-is-about-tools-not.html>.

<sup>9</sup> Jenny Carroll, Op-Ed., *Now There's Caylee: Laws of Good Intention*, NORTHJERSEY.COM, July 17, 2011, [http://www.northjersey.com/news/opinions/caylee\\_071711.html](http://www.northjersey.com/news/opinions/caylee_071711.html).

<sup>10</sup> *Id.*

protect parents and other innocent reporters from unjustifiable prosecution. For purposes of this Note, the “innocent reporter” is one who is presumably not responsible for the underlying offense that caused the child’s demise, but is guilty of violating the requirements under Caylee’s Law.

## II. THE ORIGINS OF CAYLEE’S LAW

The divisive verdict of *Casey Marie Anthony*, served as a catalyst for Caylee’s Laws. When the case began, media quickly referred to it as the “Trial of the Twenty-First Century,” with an attractive young mother and her doe-eyed child captivating the nation.<sup>11</sup> After the court announced the trial verdict, social media urged state legislatures to make it illegal for failure to timely report a missing child.

### A. *The Trial of the Twenty-First Century: State of Florida v. Casey Marie Anthony*

Before 2008, Casey Anthony was just an ordinary young, single mother of a beautiful bright-eyed, two-year-old girl named Caylee. All of this changed on July 15, 2008, when Cindy Anthony, Casey’s mother (and Caylee’s grandmother), frantically called 9-1-1 to report that her granddaughter had been missing since June 15, 2008, and that Casey’s car smelled like “a dead body ha[d] been in the damn car.”<sup>12</sup> Casey later admitted to police that she had not seen her daughter for thirty-one days.<sup>13</sup>

For the next several days, Casey lied to police about herself and Caylee.<sup>14</sup> Casey lied about where she worked, who her co-workers were, and whom her daughter was with for the previous thirty-one days.<sup>15</sup> These

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<sup>11</sup> See Drew Iden, *Casey Anthony: Trial of the Century*, HLNTV.COM (Mar. 7, 2012, 9:19 PM), <http://www.hlntv.com/article/2011/07/05/casey-anthony-trial-century>.

<sup>12</sup> JOSE BAEZ & PETER GOLENBOCK, PRESUMED GUILTY CASEY ANTHONY: THE INSIDE STORY 9 (2012); JEFF ASHTON, IMPERFECT JUSTICE: PROSECUTING CASEY ANTHONY 20 (2011). See *Casey Anthony Trial: Transcript of 911 Call*, 10 NEWS TAMPA (May 31, 2011, 1:06 PM), <http://www.wtsp.com/news/local/story.aspx?storyid=194785> (transcribing the 911 call placed by Cindy Anthony reporting Caylee Anthony’s disappearance).

<sup>13</sup> ASHTON, *supra* note 12, at 22.

<sup>14</sup> Jessica Hopper, *Listen to Casey Anthony’s Top Ten Lies*, ABC NEWS (June 2, 2011), [http://abcnews.go.com/US/casey\\_anthony\\_trial/casey-anthony-top-ten-lies/story?id=13742643](http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-top-ten-lies/story?id=13742643).

<sup>15</sup> ASHTON, *supra* note 12, at 32–41, 43–60. Casey stated several times in the early stages of the investigation that Caylee was with a fictitious nanny named Zenaida Gonzalez and led police to Gonzalez’s apartment before admitting Gonzalez did not exist. *Id.* Casey also lied about working at Universal Studios, and told police she had confided in co-workers that did not exist at Universal. *Id.*

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lies severely impeded the investigation, as Casey led police on a wild goose chase to places where she no longer worked, to see people she did not know and did not even exist in the first instance.<sup>16</sup> Several days into the investigation of Caylee's disappearance, Casey was arrested for lying to law enforcement and neglecting her child, both minor charges.<sup>17</sup> Casey originally insisted that a fictitious babysitter named Zenaida Gonzalez took Caylee.<sup>18</sup> However, before the trial began, Casey's defense settled on a new theory that Caylee had drowned in the family pool and Casey's father, George Anthony, was responsible for disposing of his granddaughter's body.<sup>19</sup>

Tragically, Caylee's remains were found in a swamp near the Anthony family home in December 2008, nearly six months after Caylee disappeared.<sup>20</sup> Casey Anthony was subsequently charged with first-degree murder, aggravated child abuse, aggravated manslaughter, and providing false information to law enforcement.<sup>21</sup> The defense requested a continuance the day the body was found to properly sift through discovery and allow both sides to prepare an adequate case, thereby waiving its client's right to a speedy trial.<sup>22</sup> Anthony's trial began May 9, 2011, and lasted through mid-summer, with "Tot-Mom" at the center of the most riveting trial this nation had seen since O.J. Simpson's murder trial in 1995.<sup>23</sup>

The prosecution sought the death penalty, theorizing that Casey drugged Caylee with chloroform, suffocated her with duct tape, and placed Caylee's body in the trunk of her car for some time, until she

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<sup>16</sup> *Id.* at 55.

<sup>17</sup> BAEZ & GOLDENBOCK, *supra* note 12, at 23. See *Casey Anthony Trial*, *supra* note 2.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 176.

<sup>20</sup> ASHTON, *supra* note 12, at 137. See *Casey Anthony Trial*, *supra* note 2.

<sup>21</sup> State of Florida v. Casey Marie Anthony, No. 48-2008-CF-010925, 2008 WL 8589437, at \*1 (Fla. Cir. Ct. Oct. 14, 2008); Anthony v. State, 108 So. 3d 1111 (Fla. Dist. Ct. App. 2013), reh'g denied (Mar. 25, 2013).

<sup>22</sup> BAEZ & GOLDENBOCK, *supra* note 12, at 112; ASHTON, *supra* note 12, at 135.

<sup>23</sup> Anthony Colarossi, *Why Did Casey Anthony Case Rivet Us?*, ORLANDO SENTINEL (July 9, 2011), [http://articles.orlandosentinel.com/2011-07-09/news/os-casey-anthony-what-it-means-20110708\\_1\\_casey-anthony-bella-vita-tattoo-body-language-expert-and-jury](http://articles.orlandosentinel.com/2011-07-09/news/os-casey-anthony-what-it-means-20110708_1_casey-anthony-bella-vita-tattoo-body-language-expert-and-jury); Chris Rovzar, *Nancy Grace Explains What the Heck "Tot Mom" Means*, N.Y. MAG. BLOG (July 12, 2011, 11:40 AM), [http://nymag.com/daily/intelligencer/2011/07/nancy\\_grace\\_explains\\_what\\_the.html](http://nymag.com/daily/intelligencer/2011/07/nancy_grace_explains_what_the.html) (explaining Nancy Grace's reason for dubbing Casey Anthony "Tot Mom" was to provide a short name for viewers to see below the television screens and know what topic Grace was covering during her show); *Casey Anthony Trial*, *supra* note 2.

disposed of the body in a swamp area.<sup>24</sup> Ultimately, the prosecution failed to prove the murder, child abuse, and manslaughter charges because they lacked evidence of the manner in which Caylee actually died.<sup>25</sup> On July 5, 2011, after less than eleven hours of jury deliberation, the jury acquitted Casey Anthony of first-degree murder, manslaughter, and aggravated child abuse.<sup>26</sup> The jury did, however, convict her of four counts of “providing false information to law enforcement,” misdemeanors under Florida law carrying penalties of one year imprisonment per count.<sup>27</sup>

### B. *The Social Media Push for Caylee’s Law*

The day the jury announced the verdict, a Facebook page dedicated to Caylee Anthony inspired an Oklahoma woman, Michelle Crowder, to petition state legislatures to enact Caylee’s Laws.<sup>28</sup> Crowder began her petition on Change.org, a public online petition platform used to instigate social change worldwide.<sup>29</sup> Just days after the verdict, Crowder’s petition was so successful that it “garner[ed] more than 250,000 signatures in less than 36 hours.”<sup>30</sup> The proposed Caylee’s Law would make it a felony for parents to fail to report the death or disappearance of a child within a certain time period.<sup>31</sup> Until January 2014, Crowder’s petition was the most successful petition on Change.org, attracting signatures every few hours, and spawning numerous other petitions dedicated to individual

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<sup>24</sup> ASHTON, *supra* note 12, at 158–172.

<sup>25</sup> BAEZ & GOLDENBOCK, *supra* note 12, at 306 (noting the jury’s reason for a not-guilty verdict).

<sup>26</sup> ASHTON, *supra* note 12, at 4.

<sup>27</sup> *Casey Anthony Trial*, *supra* note 2.

<sup>28</sup> *News9: Oklahoma Woman Creates Online Petition for Caylee’s Law* (News9 Oklahoma television broadcast July 6, 2011), available at <http://www.news9.com/story/15034710/oklahoma-woman-creates-campaign-for-caylees-law>. See also Michelle Crowder, *Create Caylee’s Law*, CHANGE.ORG, <http://www.change.org/petitions/create-caylee-s-law-3> (last visited Sept. 21, 2013); *Caylee’s Law Facebook*, *supra* note 4.

<sup>29</sup> *About*, CHANGE.ORG, <https://www.change.org/about> (last visited Mar. 1, 2014).

<sup>30</sup> Nina Mandell, *Caylee’s Law Petition Goes Viral*, N.Y. DAILY NEWS (July 7, 2011, 2:06 PM), <http://www.nydailynews.com/news/national/caylee-law-petition-viral-250-000-signatures-casey-anthony-verdict-article-1.160927>; Chloe Stepney, *Caylee’s Law Petition Drive*, CHRISTIAN SCIENCE MONITOR (July 7, 2011), <http://www.csmonitor.com/USA/Justice/2011/0707/Caylee-s-Law-petition-drive-Do-missing-child-laws-need-to-change>.

<sup>31</sup> Crowder, *supra* note 28.

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states.<sup>32</sup>

The petition for Caylee’s Law is not the first time social media has been used to mobilize legislatures. For example, Lady Gaga used Twitter and YouTube to push for Congress to repeal the “Don’t Ask Don’t Tell” policy in the military.<sup>33</sup> Similarly, the Caylee’s Law petition has played a significant role in state legislatures enacting Caylee’s Laws since 2012.<sup>34</sup>

### III. STATE APPROACHES TO CAYLEE’S LAW

Since the end of the Anthony trial in 2011, and as a result of the vast social media push previously discussed, twelve states have enacted Caylee’s Laws and twenty-six others have proposed legislation.<sup>35</sup> Although Caylee’s Laws serve the same purpose—to charge a parent or caregiver with a felony for failing to report the disappearance or death of a child—the terms vary from state to state in several respects. The most significant differences occur in: a) reporting deadlines, b) child’s age requirements, and c) the penalties imposed for violating the law.

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<sup>32</sup> Mandell, *supra* note 30. Tamara Dietrich, *Caylee’s law: outrage run amuck*, DAILYPRESS.COM (July 26, 2011), [http://articles.dailypress.com/2011-07-26/news/dp-nws-tamara-caylee-0727-20110726\\_1\\_caylee-s-law-casey-anthony-anthony-case](http://articles.dailypress.com/2011-07-26/news/dp-nws-tamara-caylee-0727-20110726_1_caylee-s-law-casey-anthony-anthony-case) (noting that, after Crowder’s petition went viral, numerous online petitions bombarded state lawmakers throughout the country). *See Crowder, supra* note 28.

<sup>33</sup> Onika Williams, *How Jon Stewart and Lady Gaga Made Congress Less Lame: The Impact of Social Media on the Passage of Bills Through the “Lame Duck” Session of the 111th Congress and Beyond*, 87 IND. L.J. SUPP. 17, 18–22 (2012).

<sup>34</sup> *See, e.g.*, Laura Riparbelli, *Casey Anthony Trial Aftermath: Caylee’s Law Drafted in Four States*, ABC NEWS (July 7, 2011), <http://abcnews.go.com/US/casey-anthony-trial-aftermath-caylee-law-drafted-states/story?id=14020260> (describing Oklahoma Rep. Paul Wesselhoft, who stated that, “the petition, created by Michelle Crowder . . . caught his eye and the eyes of his constituents”).

<sup>35</sup> Mark Randall & Hendrick deBoer, “*Caylee’s Law*”: *Legislation in Other States*, OLR RESEARCH REPORT 2012-R-0130 (Mar. 19, 2012), *available at* <http://www.cga.ct.gov/2012/rpt/2012-R-0130.htm>. *See* 2015 N.Y. A.B. Bill 2835 (Jan. 20, 2015); 2015 Miss. House Bill No. 295 (Jan. 12, 2015).

### A. Reporting Deadlines

All but three Caylee's Laws have explicit reporting deadlines—a specific timeframe in which a named actor is required to report a child missing or dead.<sup>36</sup> Most states require that missing children be reported within twenty-four hours.<sup>37</sup> A minority of states, however, has a forty-eight hour deadline in their Caylee's Law for reporting a missing child.<sup>38</sup> For instance, Louisiana requires caretakers of children under the age of thirteen to report a missing child within a two-hour window, after that child has been missing for twelve hours.<sup>39</sup> Wisconsin requires caretakers to report children under eighteen within seventy-two hours, but has incrementally shorter timeframes for children under ages sixteen and thirteen respectively.<sup>40</sup>

The Caylee's Law reporting deadlines have caused heated debate in some states, including New Jersey.<sup>41</sup> The New Jersey State Assembly debated the appropriate length of time for a parent to report a missing or dead child.<sup>42</sup> Determining that twenty-four hours was appropriate, the Law and Public Safety Committee considered situations, for instance, where a ten-year-old walks down the street to a friend's house and a parent would not necessarily realize that the child is missing much longer than twelve hours later.<sup>43</sup>

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<sup>36</sup> Alabama, Delaware, and Florida do not have any reporting requirements in their Caylee's Law. See ALA. CODE § 13A-13-8 (2013); DEL. CODE ANN. tit. 11, § 1102 (West 2012); FLA. STAT. ANN. § 837.055 (West 2012).

<sup>37</sup> CAL. PENAL CODE § 273j (West 2013); CONN. GEN. STAT. ANN. § 53-21a(d) (West 2012); 720 ILL. COMP. STAT. 5./10.-10. (2013); N.J. STAT. ANN. § 52:17B-89 (West 2012); N.C. GEN. STAT. ANN. § 14-318.5 (West 2013). See WIS. STAT. ANN. § 948.23(b)(1) (2012) (describing the twenty-four hour requirement that applies to a child under age 13).

<sup>38</sup> S.D. CODIFIED LAWS § 22-11-37 (2012). See WIS. STAT. ANN. § 948.23(b)(2) (2012) (stating that the forty-eight hour requirement applies to a child between 13–16 years old).

<sup>39</sup> LA. REV. STAT. ANN. § 14:403.7 (2012). The timeframe increases to twenty-four hours for children over age thirteen. *Id.*

<sup>40</sup> WIS. STAT. ANN. § 948.23(b)(1) (2012).

<sup>41</sup> See, e.g., *Hearing on Caylee's Law Before the Assemb. Comm. on Law and Pub. Safety*, 2010–2011 Leg., 214th Sess. 1 (N.J. 2011), available at [http://www.njleg.state.nj.us/MEDIA/OLS\\_MEDIA\\_PLAYER.HTM?wma=!{A}http://rmserver.njleg.state.nj.us/internet/2011/ALP/1208-0200PM-M0-1.wma!](http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmserver.njleg.state.nj.us/internet/2011/ALP/1208-0200PM-M0-1.wma!) (discussing that twelve hours was the originally proposed timeframe in New Jersey's Caylee's Law) [hereinafter "*NJ Public Safety Hearing*"].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



New Jersey already had a similar law in place where parents who failed to report the death or disappearance of a child could be charged with disorderly person conduct, a misdemeanor.<sup>44</sup> Its Caylee's Law, however, added the twenty-four hour notice requirement to the existing reporting law, which New Jersey Assemblyman John McKeon hoped would give children a "better chance at being found," despite admitting that, "we would never know whether this timeframe would have made a difference [for] Caylee . . . ."<sup>45</sup>

Florida, Alabama, and Delaware took a different approach by not including a reporting deadline within their Caylee's Laws.<sup>46</sup> Florida's law, for example, was the result of much consideration over the unintended consequences of setting time limits to report a child's death and disappearance.<sup>47</sup> The State Senate instead amended the existing Florida statute on providing false information to law enforcement, and decided against including a timeframe when parents are required to report.<sup>48</sup> Florida Senator, Joe Negron, expressed concern that setting a timeframe for reporting would confuse parents.<sup>49</sup> The result was a

<sup>44</sup> N.J. STAT. ANN. § 52:17B-89 (West 1968); Randall & deBoer, *supra* note 35. See Assoc. Press, *In Wake of Casey Anthony Trial, N.J. Lawmakers Push Caylee's Law*, THE STAR LEDGER (July 12, 2011, 7:01 AM), [http://www.nj.com/news/index.ssf/2011/07/in\\_wake\\_of\\_casey\\_anthony\\_trial.html](http://www.nj.com/news/index.ssf/2011/07/in_wake_of_casey_anthony_trial.html) (explaining that a disorderly person is a misdemeanor in New Jersey).

<sup>45</sup> Stacy Proebstle, *Gov. Christie Signs Caylee's Law*, NJ101.5.COM (Jan. 9, 2012, 3:22 PM), <http://nj1015.com/governor-christie-signs-caylees-law>. See *NJ Public Safety Hearing*, *supra* note 41.

<sup>46</sup> ALA. CODE § 13A-13-8 (2013); DEL. CODE ANN. tit. 11, § 1102 (West 2012); FLA. STAT. ANN. § 837.055 (West 2012). See KAN. STAT. ANN. § 21-5904 (2013) (citing Kansas' timeframe only as "promptly" rather than specific hours).

<sup>47</sup> Assoc. Press, *States' Efforts to Enact 'Caylee's Laws' Garner Support, Controversy*, FOX NEWS (Dec. 26, 2011), <http://www.foxnews.com/politics/2011/12/26/states-efforts-to-enact-caylees-laws-garner-support-controversy>.

<sup>48</sup> *Bill Analysis and Fiscal Impact Statement for S.B. 858*, 2012 114th Leg., Reg. Sess. (Fla. 2012) (Crim. Justice Subcomm.), available at <http://www.flsenate.gov/Session/Bill/2012/0858/Analyses/2012s0858.pre.cj.PDF>. See also *H.R. Staff Analysis for H.B. 37*, 2012 114th Leg., Reg. Sess. (Fla. 2012) (Justice Approp. Comm.), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0037c.JUA.S.DOCX&DocumentType=Analysis&BillNumber=0037&Session=2012>.

<sup>49</sup> Dara Kam, *House Unanimously Passes Watered-Down Caylee's Law*, POST ON POLITICS (Feb. 29, 2012), <http://postonpolitics.blog.palmbeachpost.com/2012/02/29/house-unanimously-passes-watered-down-caylees-law/>. See also *'Caylee's Law' Bill Strikes a Proper Balance*, THE DAYTONA BEACH NEWS-JOURNAL (Mar. 1, 2012, 5:30 AM), <http://www.newsjournalonline.com/article/20120301/ARTICLES/303019961/0/SEARCH?p=2&tc=pg>.

“watered-down” version of the law that settled the state’s legislative debates.<sup>50</sup>

Similarly, Alabama representatives cited the importance of preserving evidence as one reason for leaving out a specific timeframe.<sup>51</sup> Further, Delaware’s law was a result of revamping the existing child endangerment statute by adding “failing to report a missing child” to the present section pertaining to child abuse.<sup>52</sup> According to Delaware legislators, adding this language to the existing law was sufficient to “clear[] up any ambiguity about whether a parent must report a missing child as soon as possible.”<sup>53</sup>

Reporting deadlines in Caylee’s Laws also vary for reporting a deceased child. For example, in Illinois and Louisiana, a child’s death must be reported within one hour, while South Dakota has a six-hour window.<sup>54</sup> In South Dakota, the timeframe does not apply to healthcare providers or facilities.<sup>55</sup> Similar to South Dakota’s law, Louisiana’s Caylee’s Law requires that a caretaker report the death of a child under age seventeen within one hour of discovery, as long as that child is within the caretaker’s physical care.<sup>56</sup> Illinois’ reporting requirement drops to one hour for missing children under age two, but maintains a twenty-four hour requirement for children over age two.<sup>57</sup> On the other hand, Wisconsin requires that a child’s death be reported immediately.<sup>58</sup>

Supporters of Caylee’s Law have argued that reporting deadlines are crucial for increasing a missing child’s chances of recovery, and preserving evidence where a child is found dead.<sup>59</sup> Information leading

<sup>50</sup> Kam, *supra* note 49.

<sup>51</sup> *Alabama Gov. Robert Bentley signs Caylee's Law*, WRBL.COM (June 11, 2013, 4:02 PM), <http://www.wrbl.com/story/22555764/alabama-gov-robert-bentley-signs-caylees-law>.

<sup>52</sup> DEL. CODE ANN. tit. 11 § 1102(a)(1)(b) (West 2012).

<sup>53</sup> *Bipartisan Bill Would Strengthen Missing Child Reporting Laws*, NEWARK POST ONLINE (Jan. 27, 2012, 12:11 PM), [http://www.newarkpostonline.com/news/article\\_f58db83e-4909-11e1-81f3-0019bb2963f4.html](http://www.newarkpostonline.com/news/article_f58db83e-4909-11e1-81f3-0019bb2963f4.html).

<sup>54</sup> 720 ILL. COMP. STAT. 5/10-10 (2013) (applying the one hour timeframe to children under age two); LA. REV. STAT. ANN. § 14:403.8(A) (2012); S.D. CODIFIED LAWS § 22-11-38 (2012).

<sup>55</sup> See S.D. CODIFIED LAWS § 22-11-38.

<sup>56</sup> LA. REV. STAT. ANN. § 14:403.8.

<sup>57</sup> 720 ILL. COMP. STAT. 5/10-10.

<sup>58</sup> WIS. STAT. ANN. § 948.23 (West 2012).

<sup>59</sup> *Verdict Spurs Talk of Caylee's Law*, WKMG LOCAL 6 (Oct. 3, 2011, 3:14 PM), <http://www.clickorlando.com/news/Verdict-Spurs-Talk-Of-Caylee-s-Law/-/1637132/1931908/-/xukeau/-/index.html>.

to the discovery of a deceased child's body allows for crime scene evidence to be preserved; where a missing child is concerned, every hour affects that child's safety and rescue efforts.<sup>60</sup> The 2011 national statistics for missing children illustrate that over forty-six percent of abducted children were murdered within the first hour after abduction and that likelihood increases as time passes.<sup>61</sup> Supporters of the Caylee's Law reporting requirement, claim that it addresses those concerns by preventing child murders from occurring if the child's disappearance is reported in a timely manner. However, most Caylee's Laws require reporting a missing child within twenty-four hours, which opponents argue will not prevent most child murders.<sup>62</sup>

Opponents of Caylee's Laws have also posited that custody arrangements in divorced or separated families can further complicate the effectiveness of reporting deadlines. Some Caylee's Laws require custodial parents to report a missing child within a specific timeframe, and as Steve Chapman points out, that becomes problematic when "a divorced dad [is] . . . tardy returning the kids from a weekend outing."<sup>63</sup> These custody arrangements could cause unwanted results under Caylee's Law. For example, an ex-wife, as the custodial parent, could be prosecuted for not reporting her children missing if they were in their father's care at the time of their disappearance.<sup>64</sup>

<sup>60</sup> *Caylee's Law Fills a Gap in Missing Children Laws*, LAWYERS.COM, <http://criminal.lawyers.com/Criminal-Law-Basics/Caylees-Law-Fills-a-Gap-in-Missing-Children-Laws.html> (last visited Sept. 21, 2013); Deborah Highland, *Local Officials Support For Proposed "Caylee's Law"*, BOWLING GREEN DAILY NEWS (Mar. 16, 2012), [http://www.bgdailynews.com/news/local-officials-voice-support-for-proposed-caylee-s-law/article\\_289e9fc8-8e78-5209-9a9c-815ad2e3c4ca.html?mode=jqm](http://www.bgdailynews.com/news/local-officials-voice-support-for-proposed-caylee-s-law/article_289e9fc8-8e78-5209-9a9c-815ad2e3c4ca.html?mode=jqm).

<sup>61</sup> OFFICE OF JUV. J. AND DELINQUENCY PREV., *Investigative Case Management for Missing Children Homicides: Report II*, No. 98-MC-CX-0001, Op. Att'y Gen. Wash. 14 (2006), *available at* [http://www.missingkids.com/en\\_US/archive/documents/homicide\\_missing.pdf](http://www.missingkids.com/en_US/archive/documents/homicide_missing.pdf) [hereinafter "*Delinquency Report*"]; *Verdict Spurs Talk of Caylee's Law*, *supra* note 59.

<sup>62</sup> *Delinquency Report*, *supra* note 61, at 13 (providing that 88.5% of abducted children are murdered within twenty-four hours).

<sup>63</sup> Steve Chapman, *The Dangers of Caylee's Law*, REASON.COM (July 18, 2011), <http://reason.com/archives/2011/07/18/the-dangers-of-caylees-law>; Op-Ed., *Courtney, Cozzie and Caylee*, CREATORS.COM, *available at* <http://www.creators.com/opinion/daily-editorials/courtney-cozzie-and-caylee.html> (last visited Sept. 21, 2013). *See* ALA. CODE § 13A-13-8 (2013) (stating that a parent with legal custody is required to report a missing child).

<sup>64</sup> Marie Owens, *Caylee's Law Drafted to Protect Parents and Missing Children*, IT'S A MYSTERY TO ME! (Sept. 18, 2011), <http://itsamysterytome.wordpress.com/2011/09/18/caylees-law-drafted-to-protect-parents-and-missing-children>. *See* Express-Times, Op-Ed., *Caylee's Law Will Protect Politicians*,

So far, seven states have adopted the more common twenty-four hour timeframe for reporting under Caylee's Law, but a minority of states has declined to include any reporting timeframe at all. Differing approaches reflect debates state legislatures grappled with when initially crafting the laws. The next section will consider another area of Caylee's Laws that challenged state legislatures: age limitations for applicability.

### *B. Age Limitations of Caylee's Law*

In addition to the reporting requirements, state legislatures have attempted to determine the appropriate age of a child that triggers a state's Caylee's Law. Caylee's laws only apply to parents of children of a certain age, best categorized into three groups: "thirteen years and under," "thirteen to sixteen," and "under eighteen" years of age.

A majority of states have included age limitations in Caylee's Law at or below age thirteen.<sup>65</sup> For example, Caylee's Law in New Jersey now requires parents of children under age thirteen to report a missing child within twenty-four hours.<sup>66</sup> Louisiana's Caylee's Law follows this approach, creating a two-hour window to report the child missing after they have already been missing for twelve hours.<sup>67</sup> However, in Louisiana, children over age thirteen need to be reported missing within twenty-six hours after their disappearance.<sup>68</sup> Connecticut's law applies to children under age twelve.<sup>69</sup> Similarly, South Dakota also punishes parents, caretakers, or guardians who fail to report the disappearance of a child under the age of thirteen.<sup>70</sup> The South Dakota Association of Criminal Defense Lawyers heavily opposed South Dakota's law, citing concerns that the bill was too broad and could create unintended

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LEHIGHVALLEYLIVE, July 15, 2011, [http://www.lehighvalleylive.com/opinion/index.ssf/2011/07/opinion\\_caylees\\_law\\_will\\_prot\\_e.html](http://www.lehighvalleylive.com/opinion/index.ssf/2011/07/opinion_caylees_law_will_prot_e.html).

<sup>65</sup> CONN. GEN. STAT. ANN. § 53-21a (West 2012); 720 ILL. COMP. STAT. 5/10-10 (2013); KAN. STAT. ANN. § 21-5904 (2013); N.J. STAT. ANN. § 52:17B-89 (West 2012); S.D. CODIFIED LAWS § 22-11-37 (2012). See Wis. STAT. ANN. § 948.23 (West 2012).

<sup>66</sup> N.J. STAT. ANN. § 2C:12-1.3 (West 2012). California, Connecticut, and North Carolina's Caylee's Laws also have twenty-four hour reporting requirements. See also CAL. PENAL CODE § 273j (West 2013); CONN. GEN. STAT. ANN. § 53-21a (West 2012); N.C. GEN. STAT. ANN. § 14-318.5 (West 2013).

<sup>67</sup> LA. REV. STAT. ANN. § 14:403.7(A)(1)(b) (2012).

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

<sup>69</sup> CONN. GEN. STAT. ANN. § 53-21a.

<sup>70</sup> S.D. CODIFIED LAWS § 22-11-37. See S.B. 43, 87th Leg., Reg. Sess. (S.D. 2012).

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consequences.<sup>71</sup> Emphasizing that minors under age thirteen often run away from home, the Association worried that Caylee's Laws could lead to parents prosecuted for failing to report their runaway child.<sup>72</sup>

Other states treat the age requirement differently. Wisconsin's law differs from other Caylee's Laws because it has three age groups that correspond to different offenses, unlike other states where the law applies uniformly to a single age group.<sup>73</sup> Caretakers in Wisconsin are required to report missing children that fall within the following age groups: under thirteen, thirteen to sixteen, and under eighteen.<sup>74</sup> These three separate age groups in Wisconsin's statute involve distinct reporting deadlines for caretakers.<sup>75</sup>

The remaining six Caylee's Laws fall within two categories: the "thirteen to sixteen" and "under eighteen" age categories of Caylee's Law.<sup>76</sup> Both North Carolina and Florida have laws that apply to children under age sixteen, and California's law applies to children under fourteen.<sup>77</sup> Under Louisiana law, a caretaker must report the death of a child under the age of seventeen within one hour of discovery if the child was in that caretaker's physical custody at the time of death.<sup>78</sup> Delaware amended their existing Child Endangerment law, covering any child

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<sup>71</sup> *Hearing on S.B. 43 Before the Judiciary Comm.*, 87th. Leg. Assemb. (S.D. 2012) [hereinafter "*Hearing on S.B. 43 Before the Judiciary Comm.*"] available at <http://sdpb.sd.gov/SDPBPodcast/2012/sju08.mp3>. See Lindsey Riter-Rapp, *State Criminal Justice Network Legislative Update*, 36 *Champion* 55 (Nov. 2012); David Montgomery, "Caylee's Law" Bill Moves Out of Committee, *Will be Considered by Senate*, *RAPID CITY JOURNAL* (Jan. 24, 2012), [http://rapidcityjournal.com/news/caylee-s-law-bill-moves-out-of-committee-will-be/article\\_54c81d8e-469f-11e1-8c5c-001871e3ce6c.html](http://rapidcityjournal.com/news/caylee-s-law-bill-moves-out-of-committee-will-be/article_54c81d8e-469f-11e1-8c5c-001871e3ce6c.html). See, e.g. Alexis Shaw, "Street Smart" Boy Hops on Flight to Las Vegas Alone, *ABC NEWS* (Oct. 6, 2013), <http://abcnews.go.com/US/boy-boards-flight-minneapolis-las-vegas-ticket/story?id=20486346> (providing that a nine-year-old runaway's mother believed her son was at a friend's house before she reported him missing, and the runaway managed to board a plane alone without a boarding pass from his hometown near Minneapolis to Las Vegas).

<sup>72</sup> *Hearing on S.B. 43 Before the Judiciary Comm.*, *supra* note 71. See Chapman, *supra* note 63.

<sup>73</sup> WIS. STAT. ANN. § 948.23 (West 2012).

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

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

<sup>76</sup> See ALA. CODE § 13A-13-8 (2013); CAL. PENAL CODE § 273j (West 2013); DEL. CODE ANN. tit. 11 § 1102 (West 2012); FLA. STAT. ANN. § 837.055 (West 2012); LA. REV. STAT. ANN. § 14:403.8 (2012); N.C. GEN. STAT. ANN. § 14-318.5 (West 2013). See also WIS. STAT. ANN. § 948.23 (2012).

<sup>77</sup> FLA. STAT. ANN. § 837.055; CAL. PENAL CODE § 273j; N.C. GEN. STAT. ANN. § 14-318.5.

<sup>78</sup> LA. REV. STAT. ANN. § 14:403.8.

under eighteen.<sup>79</sup> Similarly, Caylee's Law in Alabama and Wisconsin applies to children under eighteen years of age.<sup>80</sup>

In sum, states use three age categories to determine how Caylee's Law applies to parents or caregivers of those children. Although only a small number of states have multiple age groups in their Caylee's Law, most states employ just one category. The most common group defined in Caylee's Law is the "under thirteen" category, seen in six states, while just three state laws apply to all children under age eighteen.

### C. Penalties in Caylee's Law

The penalties in Caylee's Laws vary widely from state to state. Several states with existing laws similar to Caylee's Laws have simply increased penalties from misdemeanors to felonies under the new Caylee's Laws.<sup>81</sup> While other states enacting new laws deliberated adequate penalties for a parent or caretaker failing to report under Caylee's Law, all states agree that a parent or caretaker may be charged with a felony for failing to report a child's disappearance and death.<sup>82</sup> Penalties for violating these laws range from four months to twenty-five years of imprisonment, coupled with fines ranging from \$5,000 to \$100,000.<sup>83</sup>

As mentioned in the previous section, states like Delaware and New Jersey revamped existing laws by increasing penalties instead of enacting new Caylee's Laws.<sup>84</sup> Under New Jersey's former law, the state could charge parents who failed to report with a disorderly persons offense.<sup>85</sup> However, this type of disorderly persons offense is punishable by a maximum of only six months imprisonment.<sup>86</sup> Now, parents or guardians who fail to report a missing child under New Jersey's Caylee's Law are guilty of a fourth-degree crime, which carries a prison term up to eighteen

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<sup>79</sup> DEL. CODE ANN. tit. 11, § 1102 (West 2012).

<sup>80</sup> ALA. CODE § 13A-13-8; WIS. STAT. ANN. § 948.23.

<sup>81</sup> See, e.g., N.J. STAT. ANN. § 52:17B-89 (West 2012); DEL. CODE ANN. tit. 11 § 1102.

<sup>82</sup> *Contra* S.D. CODIFIED LAWS § 22-11-37 (2012); S.D. CODIFIED LAWS § 22-6-2 (2005). South Dakota may penalize parents who fail to report a missing child with a class one misdemeanor—up to one-year imprisonment, \$2,000 fines, or both. *Id.*

<sup>83</sup> See, e.g., Randall, *supra* note 35.

<sup>84</sup> See *infra* Part II.C.i.

<sup>85</sup> N.J. STAT. ANN. § 52:17B-89 (West 1968); Assoc. Press, *In Wake of Casey Anthony Trial, N.J. Lawmakers Push Caylee's Law*, THE STAR LEDGER, July 12, 2011, [http://www.nj.com/news/index.ssf/2011/07/in\\_wake\\_of\\_casey\\_anthony\\_trial.html](http://www.nj.com/news/index.ssf/2011/07/in_wake_of_casey_anthony_trial.html).

<sup>86</sup> N.J. STAT. ANN. § 2C:43-8 (West 1978).

months and fines up to \$10,000.<sup>87</sup>

Similarly, Delaware's Caylee's Law amended the state's pre-existing Child Endangerment law, and now attaches a class E or G felony for failing to report.<sup>88</sup> Class E felony status applies when death occurs while the child is endangered, and carries a punishment of up to five years in prison.<sup>89</sup> Where the child sustains serious physical injuries or is the victim of a sexual offense while endangered, a class G felony applies, carrying a prison term of up to two years.<sup>90</sup>

A few states have penalties under Caylee's Laws with imprisonment terms of less than one to two years. For example, California and Connecticut provide for one-year imprisonment, while Alabama's law contains a wider range beginning at one-year imprisonment.<sup>91</sup> Illinois' prison term under Caylee's Law is a minimum sentence of eighteen months, which is also New Jersey's maximum prison sentence.<sup>92</sup> Additionally, North Carolina's penalty involves a maximum of twenty-five months, with a minimum sentence of four months.<sup>93</sup>

Another group of states impose stiffer prison sentences of five or more years for failing to report. For example, both South Dakota and Florida impose a five-year prison sentence for violators.<sup>94</sup> Wisconsin's penalties, on the other hand, begin with six-year imprisonment terms and can increase up to twenty-five years, depending on how much harm the child suffered.<sup>95</sup>

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<sup>87</sup> N.J. STAT. ANN. § 52:17B-89 (West 2012).

<sup>88</sup> DEL. CODE ANN. tit. 11, § 1102(b)(1)–(2) (West 2012).

<sup>89</sup> DEL. CODE ANN. tit. 11, § 4205(b) (West 1990).

<sup>90</sup> DEL. CODE ANN. tit. 11, § 1102(b)(1)–(2).

<sup>91</sup> ALA. CODE § 13A-13-8 (2013) (describing Alabama's imprisonment term which ranges from one to ten years); CAL. PENAL CODE § 273j(c) (West 2013); CONN. GEN. STAT. ANN. § 53-21a (West 2012).

<sup>92</sup> N.J. STAT. ANN. § 52:17B-89 (West 2012); 720 ILL. COMP. STAT. 5/10-10(e) (2013) (providing that the felony under Illinois' law can go up to three years).

<sup>93</sup> *Felony Punishment Chart*, N.C. COURT SYSTEM (2013), [http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/FelonyChart\\_1013MaxChart.pdf](http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/FelonyChart_1013MaxChart.pdf) (stating that North Carolina's Caylees Law is a Class I felony with jail terms beginning at four months). See KAN. STAT. ANN. § 21-5904(b)(3) (West 2013) (providing that the prison sentence maximum was twenty-three months under Caylee's Law). See also DEL. CODE ANN. tit. 11 § 1102; FLA. STAT. ANN. § 837.055(2) (West 2012) (providing that the prison term under Florida's Caylee's Law was two to five years).

<sup>94</sup> FLA. STAT. ANN. § 837.055; S.D. CODIFIED LAWS § 22-11-37 (2012).

<sup>95</sup> WIS. STAT. ANN. § 948.23 (West 2012).

Like Wisconsin's penalties, some states impose different penalties for those failing to report a child missing than those failing to report a deceased child. In Louisiana, the penalties for failing to report a missing child vary depending on whether a missing child is found alive, dead, or was physically and/or sexually abused.<sup>96</sup> For example, if a parent failed to report a missing child, but the child is later found unharmed, the parent may be imprisoned for six months and/or be required to pay a \$500 fine.<sup>97</sup> On the other hand, if the child is found dead, the parent may be imprisoned for two to five years, and fined up to \$50,000.<sup>98</sup> Furthermore, if the child is found alive, but abused, the penalty increases to ten years in prison and fines up to \$10,000.<sup>99</sup>

In addition to prison terms, most states can impose fines on violators of Caylee's Laws.<sup>100</sup> These fines range from \$1,000 to \$100,000 and are usually carried out at the court's discretion, unless the law stipulates different levels of harm, such as the fines in Louisiana's law.<sup>101</sup> Wisconsin, an outlier among the states, can inflict fines as high as \$100,000 for someone violating Caylee's Law.<sup>102</sup> In contrast, Delaware, Illinois, and New Jersey do not specify the fines imposed under their Caylee's Laws, but nonetheless reserve the right to impose fines on those who violate the law by including the word "fines" in the statutes.<sup>103</sup>

Given the vast range of penalties under Caylee's Laws throughout the country, states have some latitude to determine which penalties they impose on parents who violate the law. This wide range does not present an identifiable pattern of penalties, but a portion of states have opted for prison terms of two years or less, and fines between \$1,000 and \$5,000 dollars. In addition to penalties, reporting deadlines, and age limitations, other states have attempted to resolve some of the contemplated problems with Caylee's Laws in pending legislation.

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<sup>96</sup> LA. REV. STAT. ANN. § 14:403.7(C)(1)–(4) (2012).

<sup>97</sup> LA. REV. STAT. ANN. § 14:403.7(C)(4).

<sup>98</sup> LA. REV. STAT. ANN. § 14:403.7(C)(1).

<sup>99</sup> LA. REV. STAT. ANN. § 14:403.7(C)(3).

<sup>100</sup> See N.C. GEN. STAT. ANN. § 14-318.5 (West 2013) (stating that North Carolina does not list fines as a penalty for violating Caylee's Law).

<sup>101</sup> E.g., LA. REV. STAT. ANN. § 14:403.7(C)(1)–(4).

<sup>102</sup> WIS. STAT. ANN. § 948.23 (2012).

<sup>103</sup> DEL. CODE ANN. tit. 11 § 1102 (West 2012); 720 ILL. COMP. STAT. 5/10-10 (2013); N.J. STAT. ANN. § 52:17B-89 (West 2012); N.J. STAT. ANN. § 2C:12-1.3.



#### IV. PENDING LEGISLATION & THE FIFTH AMENDMENT PROBLEM IN CAYLEE'S LAW

Since 2011, some states have successfully passed Caylee's Laws, while other states are still considering whether to implement Caylee's Laws in the first instance.<sup>104</sup> This section briefly reviews some of the pending legislation and some of the issues debated by those state legislatures during attempts to adopt Caylee's Laws. Although details of these various issues are beyond the scope of this Note, they are offered here briefly to provide the reader with a glimpse of the controversy surrounding Caylee's Laws. These issues include several unintended consequences of Caylee's Laws, one of which is a violation of a reporter's Fifth Amendment right against self-incrimination. Finally, this Note will explore how North Carolina has uniquely addressed the Fifth Amendment issue in its Caylee's Laws to protect innocent reporters from prosecution.

##### A. *Pending Legislation & Problems with Caylee's Law*

Caylee's Law has faced much opposition in state legislatures since Crowder's Petition began demanding state legislatures to act. Some states have avoided passing or drafting legislation because lawmakers question whether stronger missing children laws are necessary if states have similar pre-existing laws.<sup>105</sup> In 2012, Iowa attempted to introduce

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<sup>104</sup> See, e.g., H.B. 295, 2015 Leg., Reg. Sess. (Miss. 2015) (introduced Jan. 12, 2015); H.B. 572, 2014 Leg. 434th Gen. Assemb., Reg. Sess. (Md. 2014) (introduced Jan. 29, 2014) (noting that the Judiciary Committee reported unfavorably) [hereinafter "*Proposed 2014 Legislation*"].

<sup>105</sup> Mike Glover, *Caylee's Law Stalls in Iowa*, HUFFINGTON POST (Feb. 23, 2012, 10:24 AM), [http://www.huffingtonpost.com/2012/02/23/caylee-law-stalls-in-iowa\\_n\\_1296308.html](http://www.huffingtonpost.com/2012/02/23/caylee-law-stalls-in-iowa_n_1296308.html). See *Iowa Opting Not to Pass So-Called Caylee's Law*, KCRG.COM (Apr. 23, 2014, 9:03 AM), <http://www.kcrg.com/news/local/Iowa-Opting-Not-To-Pass-So-called-Caylees-Law-140075693.html> (opposing Caylee's Law, Iowa's Attorney General noted that Iowa already has legislation that allows authorities to charge parents who fail to report the death of a child). See Johnny Anderson, *Rep. Anderson: Caylee's Law Issues Already Addressed in Utah Code*, UTAH REPS BLOG (Aug. 30, 2011), <http://www.utahreps.net/commentary/rep-anderson-caylees-law-issues-already-addressed-in-utah-code> (proposing that Caylee's Law would be an overlap of existing laws concerning body desecration and obstruct murder investigations, therefore not further protecting children from abuse or death).

Caylee's Law, but lawmakers could not agree on the specific terms.<sup>106</sup> The proposed legislation required that parents know where their children are during any given twenty-four-hour period.<sup>107</sup> Iowa lawmakers were concerned that the proposed law was "too vague," and that the law would have parents unnecessarily "check[ing] in daily on their children in summer camp."<sup>108</sup>

Similarly, Pennsylvania already has a law directed towards parents who conceal the death of their child: offenders are charged with a first-degree misdemeanor that carries a penalty of up to five years in prison.<sup>109</sup> Nevertheless, the public urged state lawmakers to introduce new legislation in the aftermath of the *Anthony* case, and legislators wanted to increase the penalties under the current law.<sup>110</sup> A companion bill passed in the Pennsylvania House of Representatives in early October 2013 increased the penalties for concealing a child's death.<sup>111</sup> Pennsylvania's 2013 bill also addresses an issue in Caylee's Law regarding innocent reporters potentially becoming ensnared in the law when reporting a missing child. Pennsylvania legislators added safeguards in the bill to ensure that innocent parents would not be prosecuted.<sup>112</sup>

Some states, such as New York, have yet to decide whether to propose any Caylee's Law legislation, but a recent New York case involving Levon Wameling, a nine-month old boy, highlights the need

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<sup>106</sup> "Caylee's Law" Legislation Stalled in Iowa, *Other States*, CBS NEWS (Feb. 23, 2012, 2:10 PM), [http://www.cbsnews.com/8301-504083\\_162-57383736-504083/caylees-law-legislation-stalled-in-iowa-other-states/](http://www.cbsnews.com/8301-504083_162-57383736-504083/caylees-law-legislation-stalled-in-iowa-other-states/).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 18 CONS. STAT. ANN. § 4303 (West 2015); Sara Ganam, *Proposed Caylee's Law Would Be a 'Balancing Test,' Pa. Lawmakers Say*, PENN LIVE (July 19, 2011, 11:15 AM), [http://www.pennlive.com/midstate/index.ssf/2011/07/proposed\\_caylees\\_law\\_would\\_be.html](http://www.pennlive.com/midstate/index.ssf/2011/07/proposed_caylees_law_would_be.html).

<sup>110</sup> Caroline Johnston, *Caylee's Law May Be Coming to PA*, POLITICS PA (July 12, 2011), <http://www.politicspa.com/caylee-s-law-may-be-coming-to-pa/26025/>; H.B. 494, 197th Leg., Reg. Sess. (Pa. 2013); H.B. 20, 197th Leg., Reg. Sess. (proposing a third-degree felony for parents who fail to report the death of a child, with a sentence of up to seven years and \$15,000 fine, and a misdemeanor for failing to report a missing child with \$10,000 fine); Ganam, *supra* note 109; John Timpane et. al, *Fueled by verdict anger, push for 'Caylee's Law' starts in Pa., N.J.*, PHILLY.COM (July 8, 2011), [http://articles.philly.com/2011-07-08/news/29750663\\_1\\_casey-anthony-trial-farnese-verdict](http://articles.philly.com/2011-07-08/news/29750663_1_casey-anthony-trial-farnese-verdict).

<sup>111</sup> H.B. 20, 197th Leg., Reg. Sess.; Rep. Karen Boback, *House Passes Boback's 'Caylee's Law' Bill*, PENN. HOUSE REPUBLICAN CAUCUS (Oct. 16, 2013), <http://www.pahousegop.com/NewsItem.aspx?NewsID=18772>.

<sup>112</sup> Boback, *supra* note 111.

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for Caylee's Law.<sup>113</sup> Levon Wameling's father delayed reporting his son missing for two weeks after the infant had disappeared.<sup>114</sup> Authorities eventually found Levon's body floating in a container in a Utica river in September 2013.<sup>115</sup> New York does not have a version of Caylee's Law, as the Codes Committee failed to pass it in February 2013.<sup>116</sup> In light of this tragic case, lawmakers hoped the New York legislature would reconsider a bill in the new session.<sup>117</sup> In January 2015, Caylee's Law was reintroduced to the State Assembly, and referred to the Committee on Codes.<sup>118</sup>

In addition to the issues discussed thus far, state legislatures have deliberated many other issues while considering Caylee's Law, demonstrating the extensive nature of the Caylee's Law debate. First, Caylee's Law may not effectively prevent future tragedies like Caylee Anthony's death. Supporters claim that had these laws had been in place at the time of Caylee's death, Casey Anthony would be in prison now.<sup>119</sup> Under Florida law, for example, Casey Anthony would have been sentenced to five years for each count that she failed to report the death and disappearance of her child for a maximum sentence of twenty years.<sup>120</sup> However, just because Casey Anthony could be imprisoned longer as a result of this law would not change the fact that Caylee died.<sup>121</sup> Although

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<sup>113</sup> Assemb. Will Barclay, *Missing Child Case in Utica Highlights Importance of Passing Caylee's*, OSWEGO CNTY. TODAY (June 24, 2013), <http://oswegocountytoday.com/missing-child-case-in-utica-highlights-importance-of-passing-caylees-law>.

<sup>114</sup> Erin Donaghue, *Levon Wameling Missing*, CBSNEWS.COM (Sept. 9, 2013, 2:02 PM), [http://www.cbsnews.com/8301-504083\\_162-57602010-504083/levon-wameling-missing-police-searching-for-missing-baby-discover-remains-of-an-infant-in-upstate-ny-river](http://www.cbsnews.com/8301-504083_162-57602010-504083/levon-wameling-missing-police-searching-for-missing-baby-discover-remains-of-an-infant-in-upstate-ny-river).

<sup>115</sup> *Id.*

<sup>116</sup> Barclay, *supra* note 113.

<sup>117</sup> *Id.* See Rocco LaDuca, *No Apology, No Answers as Wameling Heads to Prison for Son's Death*, UTICA OBSERVER-DISPATCHER.COM (Feb. 13, 2014), <http://www.uticaod.com/article/20140213/News/140219614/?tag=1>. Later, Levon Wameling's father was charged with second-degrees manslaughter in the death of his son after confessing to sinking the boy's body into the Mohawk River after the child apparently died from an untreated head injury. *Id.* Jevon Wameling is currently serving a prison sentence up to fifteen years. *Id.*

<sup>118</sup> 2015 N.Y. Assembly Bill No. 2835, 238th Legis. (Jan. 20, 2015).

<sup>119</sup> Bill O'Reilly, *Caylee's Law*, BILLOREILLY.COM (July 14, 2011), <http://www.billoreilly.com/newslettercolumn?pid=32950>.

<sup>120</sup> Michael Peltier, *Florida Governor Signs Caylee's Law*, ORLANDO SENTINEL (Apr. 6, 2012, 9:03 PM), [http://articles.orlandosentinel.com/2012-04-06/news/os-caylees-law-casey-anthony-0407-20120406\\_1\\_funeral-expenses-florida-governor-signs-caylee-s-law](http://articles.orlandosentinel.com/2012-04-06/news/os-caylees-law-casey-anthony-0407-20120406_1_funeral-expenses-florida-governor-signs-caylee-s-law).

<sup>121</sup> Dianne Williamson, *A Law Against Laws Named for Victims*, WORCESTER TELEGRAM (July 12, 2011), <http://www.telegram.com/article/20110712/COLUMN01/107129929/0>

Caylee's Law is meant to protect children like Caylee, the law cannot bring Caylee back.<sup>122</sup>

Second, proponents suggest that penalties under Caylee's Law may be insufficient to deter similar crimes in the future. In declining to support a Caylee's Law bill, Nebraska Senator Burke Harr posited that Caylee's Law is merely a "feel-good law" that will not prevent parents from murdering or abusing their children.<sup>123</sup> Caylee's Law is unlikely to deter parents if they have the propensity to overlook murder laws that carry much stiffer penalties.<sup>124</sup> Conversely, supporters claim the penalties in Caylee's Law may be enough to prevent the death of future child victims.<sup>125</sup>

Finally, much like other laws named after dead children, Caylee's Law may have unintended consequences. For example, Megan's Law, named after a New Jersey child who was raped and murdered by a neighbor with prior sexual convictions, requires that all convicted sexual offenders be registered on a national registry to alert parents of any predators that reside in their neighborhood.<sup>126</sup> However, this well-intentioned law has drained law enforcement, which spends a significant amount of time tracking down the valid and current addresses for each and every sex offender in a neighborhood.<sup>127</sup> Similarly, California's Polly's Law, named after Polly Klaas, who was abducted and murdered by a "recidivist offender," led to a three-strikes-out rule.<sup>128</sup> Now, California's prisons suffer from overcrowding with criminals who commit more than three petty offenses, in addition to more serious criminals.<sup>129</sup>

As the Crowder Petition for Caylee's Law continued to attract signatures well into 2014, state representatives received letters from

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(quoting Worcester County District Attorney Joseph Early, "it's too late to affect the case it was crafted for").

<sup>122</sup> Carroll, *supra* note 9.

<sup>123</sup> Glover, *supra* note 105.

<sup>124</sup> Chapman, *supra* note 63.

<sup>125</sup> See Assoc. Press, *States' Efforts to Enact 'Caylee's Laws' Garner Support, Controversy*, *supra* note 47.

<sup>126</sup> Michael Covin, *After Casey Anthony Verdict: Caylee's Law Might Be in the Works in New Jersey*, EXAMINER.COM (July 12, 2011), <http://www.examiner.com/article/after-casey-anthony-verdict-caylee-s-law-might-be-the-works-new-jersey>. See also Carroll, *supra* note 9.

<sup>127</sup> Carroll, *supra* note 9.

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

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

constituents urging them to enact Caylee's Law.<sup>130</sup> Despite tremendous public support for the law, many states have stalled legislation for numerous reasons, including disagreements in the legislature over whether the state needs stronger laws and if such laws can deter parents from hurting their children. Caylee's Law, like other laws named after high-profile victims, may come with unintended consequences. One unintended consequence of Caylee's Law is that a parent, innocently reporting a missing or dead child, can become embroiled in the legal system—his or her report could be used against that parent in a subsequent criminal proceeding.<sup>131</sup> This unintended consequence is a violation of a person's Fifth Amendment right against self-incrimination.

### *B. The Fifth Amendment Problem in Caylee's Law*

Both proponents and opponents of Caylee's Law have contemplated several issues in adopting Caylee's Law, as examined in the previous section, including unintended consequences. One consequence that opponents raise is a Fifth Amendment infringement upon a parent's right against self-incrimination.<sup>132</sup> This section will delve into this issue of Caylee's Law, followed by a discussion of the right against self-incrimination in Fifth Amendment, and the use of immunity statutes in some states that protect parties from having their words used against them in later criminal proceedings. This discussion serves as the foundation for this Note's argument in Part V.

Caylee's Law has been criticized as potentially violating the Fifth Amendment privilege against self-incrimination.<sup>133</sup> Under Caylee's Law, parents are criminalized for remaining silent on the whereabouts of their child.<sup>134</sup> Parents are essentially compelled to call in a missing or dead child, a call that ultimately can be used as evidence against them in court.

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<sup>130</sup> Crowder, *supra* note 28 (showing new signatures roughly every hour; the petition closed in 2014).

<sup>131</sup> Radley Balko, *Why Caylee's Law Is a Bad Idea*, HUFFINGTON POST (Sept. 10, 2011 5:12 AM), [http://www.huffingtonpost.com/2011/07/11/caylees-law-casey-anthony-\\_n\\_893953.html](http://www.huffingtonpost.com/2011/07/11/caylees-law-casey-anthony-_n_893953.html).

<sup>132</sup> John Kennedy, *'Caylee's Law' likely to join others named for children whose deaths sparked outrage*, PALM BEACH POST (July 8, 2011, 8:49 PM), <http://www.palmbeachpost.com/news/news/state-regional/caylees-law-likely-to-join-others-named-for-childr/nLtwX> (quoting Stetson University College of Law Professor Susan Rozelle).

<sup>133</sup> *Id.*; e.g., Carroll, *supra* note 9.

<sup>134</sup> *South Dakota lawyer challenges child death law*, FOXNEWS.COM (Sept. 9, 2012), <http://www.foxnews.com/us/2012/09/11/south-dakota-lawyer-challenges-child-death-law>.

Susan Rozelle, a law professor at Stetson University College of Law, pointed out that Caylee's Law effectively requires parents to turn themselves in when reporting.<sup>135</sup> Caylee's Law has been deemed no different than making it a crime to fail to report committing a murder.<sup>136</sup> Incidentally, a petition on Change.org opposing the enactment of Caylee's Law observes that by requiring a parent to report the death of a child, a parent is "effectively testifying against him [or] herself by proving the time of death."<sup>137</sup>

In a recent South Dakota case, this specific issue arose when a caretaker was charged and convicted under Caylee's Law for failing to report the death of a child in her care within the specified timeframe.<sup>138</sup> The defense challenged the constitutionality of Caylee's Law in South Dakota, noting in a 2012 court motion that this law, "presents a defendant with the proverbial choice between 'a rock and a hard place'—either incriminate herself or commit a crime for failing to do so."<sup>139</sup> Ultimately, the defendant was convicted under Caylee's Law, in addition to other child abuse charges that were filed.<sup>140</sup> Despite her conviction, the defense pointed to an important Fifth Amendment problem with Caylee's Law.

The Fifth Amendment privilege can be traced back to the English common law and inquisition origins.<sup>141</sup> It provides citizens with the privilege against self-incrimination, stating that no one may "be

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<sup>135</sup> Kennedy, *supra* note 132.

<sup>136</sup> Michael McNutt, *Oklahoma legislators asked not to rush into writing 'Caylee's Law'*, NEWS OK (July 13, 2011), <http://newsok.com/oklahoma-legislators-asked-not-to-rush-into-writing-caylees-law/article/3585059> (quoting David Tackett, founder of Oklahomans for Liberty, a watch-group).

<sup>137</sup> *Do Not Enact Caylee's Law*, CHANGE.ORG, <http://www.change.org/petitions/do-not-enact-caylees-law>.

<sup>138</sup> See Complaint, *State of South Dakota v. Laurie Cournoyer*, No. CR-12-257 (1st Cir. July 12, 2012). A two-year-old child under Mrs. Cournoyer's care was found dead in a closet after an older child in the home strangled the child. *Id.* Mrs. Cournoyer and her husband were under the influence of methamphetamines for two days and had not noticed the child was missing until her body was found. *Id.* See Kristi Eaton, *Taylor and Laurie Cournoyer Charged with Failing to Report Toddler's Death Under 'Caylee's Law'*, HUFFINGTON POST (Aug. 22, 2012), [http://www.huffingtonpost.com/2012/08/23/taylor-laurie-cournoyer-caylees-law-toddler-death\\_n\\_1824482.html](http://www.huffingtonpost.com/2012/08/23/taylor-laurie-cournoyer-caylees-law-toddler-death_n_1824482.html).

<sup>139</sup> *South Dakota lawyer challenges child death law*, FOXNEWS.COM (Sept. 9, 2012), <http://www.foxnews.com/us/2012/09/11/south-dakota-lawyer-challenges-child-death-law>.

<sup>140</sup> Gene Hetland, *Woman Sentenced Under Caylee's Law*, KSOO (Mar. 14, 2013, 12:36 PM), <http://ksoo.com/woman-sentenced-under-caylees-law>.

<sup>141</sup> Charles J. Walsh & Steven R. Rowland, *Immunized Testimony and the Inevitable Discovery Doctrine: An Appropriate Transplant of the Exclusionary Rule or an Excuse for a Broken Promise?*, 23 SETON HALL L. REV. 967, 970-71 (1993).

compelled in any case to be a witness against himself,” a privilege that was established in the colonies and woven into the Bill of Rights in 1791, after the creation of the United States.<sup>142</sup> Any involuntary statement made by someone raises a self-incrimination issue.<sup>143</sup> Where a person’s free will is “significantly impaired,” even without police wrongdoing, they are subject to the voluntariness standard of self-incrimination.<sup>144</sup> The test under the Fifth Amendment is whether “the free will of the witness was overborne.”<sup>145</sup> If a law requires a person to report something, it may raise self-incrimination issues because the statements may be deemed to be involuntary and thereby protected by the Fifth Amendment. A confession cannot be received as evidence if the person making the confession is making it under a threat.<sup>146</sup>

Further, a statement is incriminating if it:

Constitutes, or forms an essential part of, or, taken in connection with other matters *already* disclosed, is a basis for a reasonable inference of such a violation of the laws . . . as to subject him to liability to punishment. . . .<sup>147</sup>

The privilege against self-incrimination may be asserted when there is a real threat of criminal prosecution.<sup>148</sup> This privilege is often regarded as, “a fundamental right to remain silent.”<sup>149</sup> Additionally, state constitutions and state statutes often provide protection against involuntary self-

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<sup>142</sup> U.S. CONST., amend. V; William Wesley Patton, *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?*, 11 U.C. DAVIS J. JUV. L. & POL’Y 101, 103–04 (2007).

<sup>143</sup> *Bram v. United States*, 168 U.S. 532, 542 (1897) (noting that confessions can only be admissible if made “freely and voluntarily”). See also ALFREDO GARCIA, *THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH* 49–50 (2002) (citing *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961) (defining a voluntary statement has been as “the product of an essentially free and unrestrained choice by its maker,” where uttering such statements must be made of free will so as not to “render the confession inadmissible”).

<sup>144</sup> GARCIA, *supra* note 143, at 58 (citing WAYNE R. LAFAVE et al., *CRIMINAL PROCEDURE* 312–13 (3d ed. 2000)).

<sup>145</sup> STEVEN M. SALKY & PAUL B. HAYNES, JR., *THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION* 22 (2d ed. 2014) (citing *United States v. Washington*, 431 U.S. 181, 188 (1977)).

<sup>146</sup> 23 C.J.S. *Criminal Law* § 1252 (West 2015).

<sup>147</sup> MAGUIRE, *supra* note 1, at 39 (citing the MODEL CODE OF EVID. 202 (1942); UNIF. R. OF EVID., 24 (1953)) (emphasis added).

<sup>148</sup> JOHN C. MAYOUE, *BALANCING COMPETING INTERESTS IN FAMILY LAW* 6 (2nd ed. 2003) (citing various case law).

<sup>149</sup> R. H. HELMHOLZ, *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 2 (1997); LAWRENCE TAYLOR, *WITNESS IMMUNITY* 46 (1983). See also RONALD N. BOYCE et al., *CRIMINAL LAW AND PROCEDURE* 1396–97 (11th ed. 2010).

incrimination.<sup>150</sup>

Since 1857, states have adopted statutes to provide immunity for state citizens from the use of any compelled testimony.<sup>151</sup> These statutes can provide one of two types of immunity— transactional or use immunity—but ultimately must comply with the Fifth Amendment privilege against self-incrimination.<sup>152</sup> Transactional immunity provides immunity from prosecution for *any* offense that relates to compelled testimony.<sup>153</sup> This is a broad immunity power that protects citizens from being prosecuted for the offense the testimony relates to; however, this immunity is subject to denial on occasion.<sup>154</sup> Transactional immunity applies to present and future prosecution, but does not apply to any past convictions (as a pardon) a witness mentions in testimony.<sup>155</sup>

In contrast, use (or derivative use) immunity is immunity granted only for the *use* of compelled testimony and any derived evidence of that testimony.<sup>156</sup> Derivative evidence can include physical or testimonial evidence discovered during an investigation that the witness provided during immunized testimony.<sup>157</sup> Further, use immunity offers limited protection compared to transactional immunity because states are not precluded from prosecuting a witness for the offense to which the testimony refers.<sup>158</sup> Essentially, the state cannot merely *use* the witness' testimony or any "derivative evidence" against him or her in a subsequent prosecution for the actual crime.<sup>159</sup> These statutes may allow prosecutors to "have their cake and eat it too," because of the power this type of immunity gives a prosecutor to obtain testimony and still charge a witness with a crime.<sup>160</sup> Both types of immunity have been deemed constitutional,

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<sup>150</sup> MAYOUE, *supra* note 148, at 5 (giving examples of the MD. Declaration of Rights art. 22 and Georgia Annotated Code § 24-9-27(a) (1982 & Supp. 1997)).

<sup>151</sup> See Walsh & Rowland, *supra* note 141, at 973. See also Joshua M. Dickey, *Compelled Testimony and Self-Incrimination: Is "Use and Derivative Use" Immunity Worth Adopting?*, 28 PAC. L. J. 722, 725 (1997) ("[S]tatutes provide an essential function in accommodating the government's interest in compelling testimony while preserving a person's Fifth Amendment privilege against self-incrimination.").

<sup>152</sup> TAYLOR, *supra* note 149, at 47.

<sup>153</sup> 81 AM. JUR. 2D WITNESSES § 137 (2014). See 22 C.J.S. CRIMINAL LAW § 98 (2014).

<sup>154</sup> 81 AM. JUR. 2D WITNESSES § 137; 1 WHARTON'S CRIMINAL LAW § 80 (15th ed.).

<sup>155</sup> TAYLOR, *supra* note 149, at 75.

<sup>156</sup> 81 AM. JUR. 2D WITNESSES § 137 (2014); Taylor, *supra* note 152, at 79.

<sup>157</sup> TAYLOR, *supra* note 149, at 79.

<sup>158</sup> *Id.* at 79–80.

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

<sup>160</sup> *Id.* at 80.



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but the most popular immunity statute today is the use/derivative use immunity.<sup>161</sup>

Stemming from the increased adoption of use immunity statutes, in *Murphy v. Waterfront Commission*<sup>162</sup> the Supreme Court defined the scope of protection afforded by use immunity. Where a state statute has granted immunity, evidence that is gathered via an independent source in a related federal prosecution is not considered derivative evidence and is therefore admissible at trial.<sup>163</sup> The Court also posited that the Fifth Amendment privilege has two facets: 1) the government cannot use compulsion to elicit self-incriminating statements; and 2) the government cannot allow the use of self-incriminating statements elicited by compulsion as evidence in a criminal trial.<sup>164</sup>

It was not until 1972, in *Kastigar v. United States*,<sup>165</sup> that the Supreme Court articulated a standard for analyzing use and derivative use immunity statutes. The Court held that transactional immunity statutes provide broader protection than the Fifth Amendment privilege, but this privilege “has never been construed to mean that one who invokes it cannot subsequently be prosecuted;” use and derivative use immunity are coextensive with the Fifth Amendment.<sup>166</sup> After *Kastigar*, a witness testifying under a use immunity statute may be prosecuted for a crime related to that testimony, but the state has the burden of proving that the evidence of the crime is not tainted and was gathered from an “independent, legitimate source.”<sup>167</sup> Nevertheless, the Supreme Court has upheld use and derivative use immunity statutes.

In sum, Caylee’s Law has experienced strong opposition from those who claim the law violates a reporting parent’s or caregiver’s Fifth Amendment right against self-incrimination. This privilege has led states to adopt numerous immunity statutes, protecting their citizens from the use of compelled testimony against them; these statutes have withstood several constitutional challenges over time. North Carolina is one such

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<sup>161</sup> Patton, *supra* note 142. See *Kastigar v. United States*, 406 U.S. 441 (1972); *Zicarelli v. New Jersey State Comm’n of Inv.*, 406 U.S. 472 (1972) (ruling that transactional immunity and use/derivative use immunity in statutes was constitutional).

<sup>162</sup> 378 U.S. 52, 79 (1964); TAYLOR, *supra* note 149, at 81.

<sup>163</sup> TAYLOR, *supra* note 149, at 81.

<sup>164</sup> ALAN DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11* 41–42, 43 (2008).

<sup>165</sup> 406 U.S. 441 (1972).

<sup>166</sup> *Id.* at 453.

<sup>167</sup> TAYLOR, *supra* note 149, at 83.

state that has embedded this immunity statute into its Caylee's Law.

*C. North Carolina's Immunity Clause*

North Carolina's Caylee's Law is much like other Caylee's Laws, covered in Part III, and serves the same purpose—to penalize parents or caregivers who fail to report.<sup>168</sup> However, unlike other Caylee's Laws, North Carolina has added an immunity clause into its Caylee's Law.<sup>169</sup> This immunity clause, written into the section requiring parents to report the disappearance of a child, states:

Any person who reports the disappearance of a child as required by this section is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action, provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.<sup>170</sup>

Parents in North Carolina who report the disappearance of a child in good faith are immune from civil or criminal liability after reporting under Caylee's Law.<sup>171</sup> Further, any proceedings for liability against a reporting parent presume good faith.<sup>172</sup> Notably, this immunity clause is not included in the state's Caylee's Law statute relating to reporting the death of a child.<sup>173</sup> At a minimum, this immunity clause protects parents and other reporters, who are innocent of the potential underlying crime that caused the child's disappearance, from prosecution when reporting a missing child, but it still allows the state to prosecute parents who are responsible for their child's disappearance. By granting immunity to those who report, the law draws a distinction between those parents who are responsible for their child's disappearance (the underlying offense) versus those parents who are guilty of failing to *report* their child's disappearance under Caylee's Law.

Like Caylee's Laws in other states, North Carolina enacted its law three years after the Casey Anthony trial, suggesting that lawmakers did not want to rush legislation to placate public outcry without due diligence.<sup>174</sup> North Carolina legislators were concerned that Caylee's Law would impinge on a reporter's Fifth Amendment privilege against self-

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<sup>168</sup> See N.C. GEN. STAT. ANN. § 14-318.5 (West 2013).

<sup>169</sup> *Id.*

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

<sup>171</sup> *Id.* § 14-318.5(g).

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

<sup>173</sup> *Id.* § 14-401.22.

<sup>174</sup> *North Carolina lawmakers consider "Caylee's Law"*, WTOC.COM (July 15, 2011, 5:45 PM), <http://www.wtoc.com/story/15090538/north-carolina-lawmakers-consider-caylees-law> (describing Caylee's Law in North Carolina which was first introduced in 2011).

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incrimination.<sup>175</sup> Representative Kelly Hastings, who spearheaded the bill, ensured critics that the immunity clauses were implemented in this bill to specifically protect innocent reporters from unlawful prosecution.<sup>176</sup> Legislators also recognized that Caylee’s Law was meant to punish those “who know what’s happening in the house and fail to do something . . . when they could have intervened, should have intervened and didn’t intervene.”<sup>177</sup>

Thus, North Carolina included an immunity clause in its Caylee’s Law, something that no other state with Caylee’s Laws has chosen to include to date. This immunity clause protects innocent parents’ Fifth Amendment right against self-incrimination, assuming the parent is reporting in good faith, while leaving room for the state to prosecute those who are responsible for their child’s disappearance. As discussed in the next section, states should rewrite their Caylee’s Laws to include similar provisions.

#### V. CAN CAYLEE’S LAW BE FIXED TO PROTECT INNOCENT PARENTS?

Despite the many issues with Caylee’s Laws discussed in the previous sections, Caylee’s Laws are unconstitutional. Facially, these laws were created to protect the most vulnerable members of our society—our children. As North Carolina representatives pointed out, these laws are not meant to punish parents who are scared to act or make minor mistakes, but those who deliberately make a choice to not report a missing or dead child.<sup>178</sup> However, as applied, Caylee’s Laws violate a parent’s Fifth Amendment right to be protected against self-incrimination. This violation can be corrected if states add use immunity clauses to existing Caylee’s Laws. These immunity clauses, similar to North Carolina’s immunity clause, will protect reporters from incriminating themselves when the law compels them to report both a missing or deceased child.

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<sup>175</sup> See Justin Quesinberry, *Caylee’s Law continues moving through NC General Assembly*, WNCN (May 2, 2013, 12:32 PM) <http://www.wncn.com/story/22010888/caylees-law-continues-moving-through-nc-general-assembly>.

<sup>176</sup> *Id.*

<sup>177</sup> Matthew Burns, *Bill inspired by Florida girl’s death gets House nod*, WRAL.COM (Mar. 7, 2013), <http://www.wral.com/bill-inspired-by-florida-girl-s-death-gets-house-nod/12195280/> (quoting Rep. Rick Glazier).

<sup>178</sup> *Id.*

A. *Caylee's Law Violates the Fifth Amendment Privilege Against Self-Incrimination*

As Caylee's Laws are introduced in more states, one of the main concerns is the unintended consequence of parents incriminating themselves when reporting their child's disappearance as the law requires.<sup>179</sup> Caylee's Laws need to be revised to follow North Carolina's approach of including an immunity clause within their statute to protect innocent parents.

In most states, Caylee's Laws compel parents or caretakers to report a missing or dead child within a certain timeframe.<sup>180</sup> This need to report a missing child came after the extraordinary case of Casey Anthony. It is important to note, however, that most parents are not like Casey Anthony, and would report a missing child immediately.<sup>181</sup> Yet, a parent may not report a child missing or dead for many reasons, none of which being that he or she committed a crime. For example, in a recent Wisconsin case, Kevin Hooper was charged under Wisconsin's Caylee's Law for failing to report that his wife had stabbed his infant son during a psychotic episode she experienced.<sup>182</sup> Instead of reporting his child's death within the prescribed time under Caylee's Law, Hooper chose instead to bring his wife to a mental hospital once he determined the child could not be saved, and his other children were in danger. Although Wisconsin law requires reporting a child's death within two hours, Hooper reported the stabbing five hours later, after his children had been removed from the home.<sup>183</sup> Here, a bereaved father, who is innocent of the underlying crime (his child's death), is now guilty of violating Caylee's Law and potentially faces prison time.

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<sup>179</sup> See *infra* Part IV.B; see also *Proposed 2014 Legislation*, *supra* note 104.

<sup>180</sup> See *infra* Part III.A.

<sup>181</sup> Audrey Barrick, *Casey Anthony Acquittal Incites Push for Caylee's Law*, CHRISTIAN POST (July 7, 2011), <http://www.christianpost.com/news/casey-anthony-acquittal-inspires-caylees-law-51949/> (quoting Rep. Paul Wesselhoft of Oklahoma). *But See* Joe Trovato, *More Details Emerge in Death of Oconomowoc Infant*, LIVING LAKE COUNTRY (Sept. 18, 2012), <http://www.livinglakecountry.com/blogs/staffblogs/170246836.html>. See also WISN 12 News: *Caylee's Law to Be Used in Oconomowoc Infant Death Case* (WISN 12 ABC news broadcast Sept. 19, 2012), <http://www.wisn.com/news/south-east-wisconsin/waukesha/Caylee-s-Law-to-be-used-in-Oconomowoc-infant-death-case-/10150328/16657078/-/oa6ialz/-/index.html>.

<sup>182</sup> WISN 12 News: *Caylee's Law to Be Used in Oconomowoc Infant Death Case* (WISN 12 ABC news broadcast Sept. 19, 2012), <http://www.wisn.com/news/south-east-wisconsin/waukesha/Caylee-s-Law-to-be-used-in-Oconomowoc-infant-death-case-/10150328/16657078/-/oa6ialz/-/index.html>.

<sup>183</sup> *Id.*

It is well established in our jurisprudence that the government has the power to compel people to testify in court.<sup>184</sup> But this power must yield to the Fifth Amendment privilege against self-incrimination when a conflict arises between the two.<sup>185</sup> In Caylee's Law, the requirement to report a missing or deceased child directly conflicts with a parent's Fifth Amendment right, and that Fifth Amendment right must prevail.

Most Caylee's Laws today are written such that they violate the Fifth Amendment privilege against self-incrimination. Josh Blackman, a law professor at South Texas College of Law, remarked that the purpose of the law is to allow parents to be easily arrested and prosecuted without "sufficient cause to show they committed [an] underlying offense."<sup>186</sup> Even if a parent is innocent, a report made under the law may be used against the parent (or other reporter) in a subsequent criminal proceeding involving that child's disappearance or death. A parent's phone call to law enforcement as required under the law could be evidence used against him in a criminal prosecution for that child's disappearance or death. Any further statements made by a parent reporting a child missing or dead could reasonably be connected to other facts of the case; as a result, that parent could be punished for his child's disappearance or death.

Thus, the very core of Caylee's Law—requiring parents to report missing or dead children—violates Fifth Amendment rights against self-incrimination. Although the goal of Caylee's Law was not to punish innocent parents, the current language in the statutes does not protect innocent parents at all. This problem could be resolved by adding use immunity clauses to all parts of Caylee's Law.

### *B. Caylee's Law Needs An Immunity Clause*

As previously discussed, states are becoming more attuned to this self-incrimination issue in Caylee's Laws and are finding ways to safeguard innocent parents. For example, the safeguard problem Pennsylvania's legislators addressed in their 2013 proposed Caylee's Law specifically referred to this Fifth Amendment issue. Pennsylvania's proposed bill was designed to protect innocent parents from self-incrimination, while still allowing the state to prosecute those parents

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<sup>184</sup> *Kastigar v. U.S.*, 406 U.S. 441, 443 (1972).

<sup>185</sup> *Dickey*, *supra* note 151.

<sup>186</sup> Josh Blackman, *Black Swans and Caylee's Law*, JOSH BLACKMAN.COM (July 6, 2011), <http://joshblackman.com/blog/2011/07/06/black-swans-and-caylees-law/>.

responsible for their child's disappearance or death.<sup>187</sup>

North Carolina's immunity clause is a prime example of use immunity granted to a reporter when complying with the statute. North Carolina has provided a path for legislators to employ immunity clauses to protect innocent reporters from prosecution under Caylee's Laws. As of today, only North Carolina's citizens are protected from self-incrimination as long as they are reporting a missing child in good faith.<sup>188</sup> The statute compels a parent to report, but the immunity granted is limited to testimony from that report only and does not grant parents immunity from any future prosecution if there is other evidence that the parent is somehow responsible for the child's disappearance.

States should adopt North Carolina's safeguard approach to Caylee's Law, but take it one step further by adding the same immunity clause to all provisions of the law, including reporting a deceased child. North Carolina's law offers a worthy protection with an immunity clause for missing children reports, but this protection is not complete. When a parent or caregiver is required to report a *dead* child, the law should also immunize the reporting parent from prosecution.

Public policy supports including a report of a deceased child because our society generally has sympathy toward grieving parents who have lost a child.<sup>189</sup> Even when the parent's own neglect causes a child's death, juries struggle to convict because of this overwhelming sympathy.<sup>190</sup> This sympathy grows exponentially when a grieving parent is falsely prosecuted for their child's death. Although it is not entirely clear why North Carolina did not include an immunity clause in the death-reporting portion of Caylee's Law, the legislature recognized that Caylee's Law was intended to target parents who know something about their child's whereabouts. Naturally, this should be extended to include reporting circumstances where a child's death occurs, and a bereaved parent inadvertently fails to report the child's death within the prescribed time,

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<sup>187</sup> See *infra* Part IV.A.

<sup>188</sup> See *infra* Part IV.C.

<sup>189</sup> Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 153 (2007).

<sup>190</sup> Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 810–11 (2006) (citing Ruth Teichroeb, *Cases Among Toughest to Prosecute: "Juries Don't Want to Believe a Parent Could Kill a Child,"* SEATTLE POST-INTELLIGENCER, Nov. 1, 2002, at A1 (reporting that "prosecutors . . . say child homicides are among the toughest cases to prove beyond a reasonable doubt" and that "when young children die because of parental neglect, the chance of convicting a parent is so small prosecutors rarely file any charges").

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as illustrated earlier in *Hooper*.

However, as stipulated in other immunity clauses, parents should only be immunized when they are not responsible for their child's disappearance or death. If there is sufficient evidence that a parent is responsible for the child's disappearance or death, then the immunity clause should be void and the parent may be prosecuted. Voiding the parent's immunity will ensure that parents who are responsible will be properly prosecuted. Adding an immunity clause to Caylee's Law still allows the law to punish parents who are irresponsible, while also protecting innocent parents from possible incrimination.

Immunity clauses also protect innocent parents from overzealous prosecutors who do not have enough evidence to charge that parent with a crime. Arguably, one of the issues with the prosecution in the Casey Anthony case was the lack of evidence to convict Anthony of murdering her child.<sup>191</sup> The impressive number of signatures on the Caylee's Law petition serves as evidence of the public opinion of Casey Anthony that she was somehow responsible for her child's death. This was exacerbated by the fact that she did not report it for thirty-one days and only reported it when her mother called the police. An immunity clause will force prosecutors to develop a solid case against that reporting parent because the parent is otherwise immune from prosecution unless independent evidence shows bad faith.

Opposing views note that Casey Anthony would have been in prison much longer than four years had she been convicted under Caylee's Law. Under Florida's law, Casey Anthony would have been sentenced to five years for each count that she failed to report the death and disappearance of her child, a maximum sentence of twenty years.<sup>192</sup> However, Casey Anthony's potential imprisonment under Caylee's Law would not change the fact that Caylee is dead. Caylee's Law cannot bring back Caylee and it is not the goal of our criminal justice system to make criminals out of innocent parties for the sake of punishing one wrongdoer.

Use immunity would also encourage good faith reporting under Caylee's Law, making Caylee's Laws much more effective. This type of immunity has similarly encouraged people to report child abuse under

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<sup>191</sup> Phil Gast, *Analysts: Anthony Jury Troubled By No Cause of Death, Other Factors*, CNN.COM (July 6, 2011, 9:28 AM), <http://www.cnn.com/2011/CRIME/07/05/florida.casey.anthony.legal/>.

<sup>192</sup> Michael Peltier, *Florida Governor Signs Caylee's Law*, ORLANDO SENTINEL (Apr. 6, 2012, 9:03 PM), [http://articles.orlandosentinel.com/2012-04-06/news/os-caylees-law-casey-anthony-0407-20120406\\_1\\_funeral-expenses-florida-governor-signs-caylee-s-law](http://articles.orlandosentinel.com/2012-04-06/news/os-caylees-law-casey-anthony-0407-20120406_1_funeral-expenses-florida-governor-signs-caylee-s-law).

mandatory child abuse reporting laws in all fifty states. Laws mandating that suspected child abuse be reported were enacted beginning in the 1960s.<sup>193</sup> Prior to 1980, there was evidence of underreporting child abuse because people feared prosecution.<sup>194</sup> After legislative debates, the Federal Child Abuse Prevention and Treatment Act now requires states to extend “immunity for persons reporting instances of child abuse and neglect from prosecution . . . arising out of such reporting.”<sup>195</sup> This provision encouraged people to report child abuse by removing the threat of legal action.<sup>196</sup>

Similar to the immunity clause in North Carolina, all jurisdictions today require that child abuse reports be made in “good faith,” with about twenty states “presuming good faith.”<sup>197</sup> Certain states expressly deny immunity if “the reporter is charged with or suspected of abusing or neglecting the child” who was at issue in the report.<sup>198</sup> Caylee’s Law could be as effective as child abuse laws have been in protecting children if innocent parents did not have to fear prosecution when reporting a child missing or deceased.

Finally, fear of prosecution under Caylee’s Laws may also lead to parents over-reporting. For example, a common scenario may result when a teen heads to a friend’s home for a sleepover and his parents may

<sup>193</sup> IRVING J. SLOAN, CHILD ABUSE: GOVERNING LAW & LEGISLATION 15 (1983).

<sup>194</sup> See, e.g., *Child Abuse Reporting: Hearing Before the Assemb. Comm. on Criminal J.*, 16–18, 1977–1978 Reg. Sess. (Cal. 1978); *Thomas v. Chadwick*, 224 Cal. App. 3d 813 (Cal. Ct. App. 4th Dist. 1990) (“One of the problems perceived by Congress was inadequate reporting . . . Congress clearly intended to authorize immunity for reporters in order to encourage more extensive reporting.”).

<sup>195</sup> SLOAN, *supra* note 193, at 31.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 34–5; U.S. DEP’T OF HEALTH AND HUMAN SERV., ADMIN ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, IMMUNITY FOR REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2011), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/immunity.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/immunity.pdf).

<sup>198</sup> SLOAN, *supra* note 192, at 35; U.S. DEP’T OF HEALTH AND HUMAN SERV., ADMIN ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, IMMUNITY FOR REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2011), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/immunity.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/immunity.pdf). See ALASKA STAT. ANN. § 47.17.050(b) (West); COLO. REV. STAT. ANN. § 19-3-309 (West); CONN. GEN. STAT. ANN. § 17a-(e) (West); MASS. GEN. LAWS ANN. ch. 119, § 51A (West); MINN. STAT. ANN. § 626.556(c) (West); N.D. CENT. CODE ANN. § 50-25.1-09 (West); IND. CODE ANN. § 31-33-6-1 (West); WASH. REV. CODE ANN. § 26.44.060 (West); TEX. FAM. CODE ANN. § 261.106 (West); S.D. CODIFIED LAWS § 26-8A-14 (1991); TENN. CODE ANN. § 37-1-410(6) (West); VT. STAT. ANN. tit. 33, § 4913 (West); ARIZ. REV. STAT. ANN. § 13-3620(J) (2013); FLA. STAT. ANN. § 39.203(1)(b) (West); WIS. STAT. ANN. § 48.981 (West).



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feel they have to report to authorities the moment their child does not check in with them the following morning. Parents in this scenario may over-report to law enforcement out of fear of becoming suspects and potential prosecution.<sup>199</sup> An immunity clause curbs these false reports under Caylee's Law, allowing public resources to instead address legitimate reports.

Over-reporting places an undue burden on law enforcement because police are forced to investigate calls for missing children who may not be missing at all.<sup>200</sup> Specifically, police officers are burdened with the administrative task of writing reports on non-missing children, when they could be focusing on children who are genuinely missing. Police are generally in favor of increasing penalties under existing laws for providing false information to police.<sup>201</sup> However, with the rise of Caylee's Laws, states have seen opposition from law enforcement for these reasons. An immunity clause would curb the number of false reports law enforcement receives under Caylee's Law because parents or caretakers acting in good faith would be reporting without fear of subsequent prosecution.

North Carolina has partially solved the Fifth Amendment problem in Caylee's Law by including a use immunity clause in its missing report statute. But this does not shield parents who are reporting a deceased child. States should revise their Caylee's Laws to include similar immunity statutes that would apply to reporters, whether they are reporting a missing or a dead child. Accordingly, adding immunity clauses will ensure that Caylee's Law more effectively prevents future harm to children, and also protects innocent parents from inadvertently becoming entangled in the legal system.

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<sup>199</sup> Ilya Somin, *Political Ignorance and Caylee's Law*, THE VOLOKH CONSPIRACY (July 11, 2011, 8:00 PM), <http://www.volokh.com/2011/07/11/political-ignorance-and-caylees-law/>.

<sup>200</sup> Chapman, *supra* note 63.

<sup>201</sup> Assoc. Press, *Police Agencies Against Caylee's Law Proposals*, CBS MIAMI (Oct. 4, 2011, 10:14 AM), <http://miami.cbslocal.com/2011/10/04/police-agencies-against-caylees-law-proposals>.

## VI. CONCLUSION

Legislation should be based on a deep and rational analysis of the consequences that these laws could have on society, rather than on emotional considerations. As journalist John Stossel highlights, “the passage of these laws could adversely affect innocent parties.”<sup>202</sup> In the past, the media has successfully driven state legislatures to quickly enact emotionally charged laws, such as Caylee’s Law.

As a society, we want strong laws that keep our children safe and punish those who harm our children. Caylee’s Law serves the noble purpose of punishing those parents or caretakers who may not have the same inclinations, as the majority of parents do, to report a missing or deceased child. The criminal justice system can, and should, play an important role in protecting our children, but not at the cost of disregarding a parent’s constitutional right against self-incrimination under the Fifth Amendment. As states continue to propose Caylee’s Laws, the law’s purpose would be better served by including use immunity clauses; states with existing laws should strongly consider similar revisions to protect innocent reporters from prosecution.

Perhaps Caylee’s Law is just another way for Americans to avoid the weak prosecution problem, by giving prosecutors an easier way to charge parents that they cannot charge under current laws where substantial proof is required but does not exist.<sup>203</sup> Perhaps this law will punish parents and caretakers in ways all other laws failed to punish Casey Anthony years ago. Regardless of the goal, Caylee’s Law should not be a tool prosecutors can use against parents who are simply reporting in good faith under the law’s requirements.

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<sup>202</sup> *O’Reilly Factor: John Stossel on Caylee’s Law*, (Fox News television broadcast July 12, 2011), available at <http://www.businessinsider.com/john-stossel-on-caylees-law-are-we-going-to-pass-a-law-every-time-we-dont-like-a-ruling-2011-7>.

<sup>203</sup> Balko, *supra* note 131.