

Touro College Jacob D. Fuchsberg Law Center

From the Selected Works of Michael E Lewyn

January 5, 2017

Health and Safety Overregulation

Michael Lewyn



Available at: <https://works.bepress.com/lewyn/120/>

My paper is about two common policies: anti-jaywalking laws and overenforcement of child neglect laws. What do these two policies have in common, you may ask? Both have been used to punish walking, and both do so in the name of protecting the laws' victims- pedestrians.

First I'd like to talk about jaywalking. State and local ordinances generally define jaywalking as walking either (a) outside an intersection (that is, in midblock) or (b) at an intersection, but in violation of a traffic light that tells pedestrians not to walk.

These laws create a variety of social harms. From a libertarian perspective, these laws are obviously paternalistic- that is, they punish people primarily for endangering their own safety rather than that of others. From a utilitarian perspective, they are harmful because they privilege driving over walking. How so? Because requiring pedestrians to use crosswalks or intersections limits them to only a tiny strip of a street, while drivers can use all of the street. And because these laws privilege driving, they encourage driving, thus increasing automobile-related pollution and reducing public health by making active commuting less attractive. From a social equity perspective, these laws are targeted like a laser beam at minorities and the poor, since poorer households are less likely to own a car and suffer more from traffic fines- that is a \$200 fine affects a low-income household more than it affects the rest of us.

So why do these laws still exist? The traditional answer, of course, is safety. But in fact this claim is specious for two reasons. First, traffic lights may protect a pedestrian from traffic coming right at them, but they don't protect pedestrians from motorists making left or right turns. So if you are at a four way intersection you still have to look in multiple directions. By contrast, if you cross a street midblock you only need to look in one direction at a time. Second, places with no jaywalking laws or lenient jaywalking laws tend to have fewer traffic deaths. In Mass., the fine for jaywalking is only \$1 by state law- and both Mass. and its biggest city (Boston) have pedestrian fatality rates well below the national average.

Similarly, government's war on child pedestrians limits walking. There have always been vague laws against child neglect- but as parenting has become more protective, police and child protection bureaucrats have come to interpret these laws to prevent children from walking alone. For example, in Silver Spring outside Washington DC, a family allowed their 10 and 6 year old daughters to walk home from a playground; the children were held by police and Child Protection Services for five hours. CPS employees later threatened to remove the children if the parents did not sign a government-drafted safety plan. So a parent who lets their child walk to school faces a risk of prosecution for child neglect, and even losing their child to foster care. In the Silver Spring case, the middle-class parents fought for their interests and made the government back down- but lower income households might be less aggressive.

Government justifies these policies in the name of safety- the idea that there is a child molester lurking under every bush, and that even if abductions by strangers happen only a few dozen times a year, any risk of victimization is too much. But this argument proves

too much. After all, children are sometimes present when their parents are attacked by robbers and rapists- and in some of these cases the children are harmed, or at least traumatized. So if any risk is too much, children should never be with their parents at all, just in case their parents are attacked by the Manson Family – obviously an absurd result.

More importantly, punishing parents for letting their children walk creates its own health and safety risks. Children who walk less exercise less, and less exercise means worse health. Over the past few decades, the percentage of children who walk to school has nosedived, and by an odd coincidence childhood obesity has increased. Moreover, parents who drive their children everywhere expose them to a risk of injury and death from car crashes; several hundred children per year die in car crashes.

So what policies would be better? My paper endorses legalizing jaywalking. The issue of child neglect is more complicated, of course, because obviously cases of real child neglect exist. My paper discusses a variety of options, ranging from changing jury instructions to make juries more aware of the difference between small and large risks, to bright-line risks designed to immunize parents from legal liability for letting their children walk to school or other destinations.