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THE CRIMINALIZATION OF WALKING

Michael Lewyn*

The simple act of walking is sometimes criminalized in the United States. Anti-jaywalking statutes and ordinances—originally motivated by auto-industry lobbyists in the 1920s—call for fines and, sometimes, imprisonment for crossing the street. Additionally, some localities have interpreted statutes against “child neglect” to encompass a parent’s decision to let their kid walk outside alone. The result of this criminalization? Such policies have reduced pedestrian liberty, increased automobile traffic and pollution, and created a disincentive for physical activity in the midst of an obesity and diabetes epidemic. In addition to discussing these effects, this Article argues that the purported safety benefits of criminalizing walking pale in comparison to those of decriminalization. In the context of currently vague child-neglect laws, this Article suggests a bright-line rule that would empower parents’ decision to allow their children to do the unthinkable: walk themselves to school.

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I. INTRODUCTION

Logically, one might think that the law should encourage walking. Walking makes people more fit, and people who walk (unlike users of motorized transport) do not create pollution. But in two major respects, the law sometimes punishes, and even criminalizes, walkers. First, state and city laws against something often referred to as “jaywalking” limit walkers’ ability to cross streets.¹ As a result of these laws, police can fine or arrest walkers, and should a jaywalker’s child be injured by a vehicle, prosecutors may even seek to imprison the walker rather than the driver.² Second, bureaucrats and police sometimes interpret vague laws against “child neglect” as if they were legal requirements that preteen children may never walk on their own, and they have even sought to imprison the walkers’ parents or place the children in state care.³

The purpose of this Article is to analyze these practices and their justifications. Jaywalking laws generally provide that walkers should cross streets only at certain times and locations (usually at a crosswalk or when a traffic light signals that they may walk).⁴ But it is not at all clear that crossing at a light or at a marked crosswalk is significantly safer than crossing mid-block.⁵ Similarly, bureaucratic attempts to prevent children from walking are based on the assumption that children are safe only when in their parents’ company—an equally questionable assumption

1. See *infra* text accompanying notes 40–41 (describing laws).

2. See *infra* Part II. In addition, a walker who sues a driver for negligence in an action arising out of a collision is more likely to be held contributorily negligent if she was jaywalking at the time. See, e.g., *Leonard v. Irwin*, 721 N.Y.S.2d 198, 198 (App. Div. 2001). But, because most states have comparative-negligence systems (allowing a plaintiff’s negligence to be weighed against that of a defendant, rather than barring recovery) this practice often merely reduces a plaintiff’s recovery rather than eliminating liability. See *Coleman v. Soccer Ass’n of Columbia*, 69 A.3d 1149, 1159–60 nn.2–3 (Md. 2013) (stating that all but four states have adopted comparative negligence).

3. See *infra* Part III.

4. See *infra* Part II.

5. See *infra* Section II.C.

because the dangers of walking may be offset by the dangers of a sedentary lifestyle or by the car crashes, congestion, and pollution that result when parents drive their children to destinations rather than allowing them to walk.⁶

II. JAYWALKING

Because jaywalking is usually illegal in the United States, readers might think that anti-jaywalking laws are the result of objective decision-making by expert planners. The discussion below will suggest that these laws, in fact, began as special-interest legislation pushed by the auto industry to deflect public attention from deaths caused by car crashes.⁷ I will then discuss the merits of jaywalking laws⁸ and propose reforms.⁹

A. *The History of Jaywalking: Special-Interest Legislation*

Until the 1920s, streets were not just for cars, but for walkers as well, and children routinely played in streets.¹⁰ In the 1920s, however, fast cars began to threaten this *status quo*. During that decade, over 200,000 Americans were killed in traffic accidents.¹¹ In cities, three-fourths of these victims were pedestrians.¹²

At first, public officials were sometimes willing to blame drivers for collisions with walkers. In 1923, one safety expert explained that “[j]uries in accident cases involving a motorist and a pedestrian almost invariably give the pedestrian the benefit of the doubt.”¹³ One Philadelphia judge lectured drivers in his courtroom, prophetically expressing concern that “[i]t won’t be long before children won’t have any rights at all in the streets.”¹⁴ Some states responded with lower speed limits.¹⁵ Because these speed limits were unenforceable, most American police chiefs favored laws requiring automobile manufacturers to limit vehicle speed through speed governors.¹⁶

Rather than tolerating such measures, the auto industry and its allies sought to drive pedestrians off the streets. For example, Charles M. Hayes, President of the Chicago Motor Club (a local chapter of the American Automobile Association, which promoted automobile owner-

6. See *infra* Section III.B.

7. See *infra* Section II.A.

8. See *infra* Sections II.B.–II.C.

9. See *infra* Sections II.D.

10. See Peter D. Norton, *Street Rivals: Jaywalking and the Invention of the Motor Age Street*, 48 *TECH. & CULTURE* 331, 331–32 (2007).

11. *Id.* at 332 n.6 (“[W]ell over 210,000 Americans were killed in traffic accidents between the years 1920 and 1929 . . .”).

12. *Id.*

13. *Id.* at 337.

14. *Id.* at 338.

15. *Id.*

16. *Id.* at 339. See generally, *What is a Car Speed Governor?*, REFERENCE, <http://www.ask.com/vehicles/car-speed-governor-f6d2e3eafe907c6d> (explaining more about speed governors) (last visited March 14, 2017).

ship),¹⁷ wrote in a newspaper article that bad publicity over traffic deaths might lead to “almost unbearable restrictions” upon automobiles¹⁸ and that the auto lobby should prevent such restrictions, arguing that “streets are made for vehicles to run upon.”¹⁹ Similarly, one car dealer wrote that “[t]he streets are for vehicle traffic, the sidewalks for pedestrians.”²⁰

As part of this propaganda campaign, the automobile lobby used the term “jaywalker.”²¹ The term “jay” originally meant “a country hayseed out of place in the city.”²² Thus, a jaywalker was a pedestrian out of place in the city—one oblivious to the dangers of motor traffic.²³ Automobile lobbyists and lobbyist-influenced “safety groups” used this term to stigmatize walkers. For example:

- * Chicago taxicab company president John Hertz asserted: “We fear the ‘jay walker’ worse than the anarchist”²⁴
- * In 1920, self-styled safety advocates dragged San Francisco pedestrians into mock courtrooms to lecture them on the perils of jaywalking.²⁵
- * In Los Angeles, an automobile club posted signs warning that “jay walking” was prohibited, even though at the time this term was not in the city’s traffic code.²⁶
- * In some cities, auto lobbyists used their advertising power to take over the press. For example, in 1923 the Chicago Motor Club bought space in the Chicago Tribune for advertisements claiming that pedestrians caused 90% of auto collisions.²⁷ The National Automobile Chamber of Commerce, another industry group,²⁸ created an “accident news service” designed to show that most accidents were caused by careless pedestrians.²⁹
- * Auto lobbyists also hijacked public education, using peer pressure to influence students.³⁰ For example, in 1925 a student jury in a Detroit public school tried a fellow student for jaywalk-

17. See COMM’N ON CHI. LANDMARKS, CHICAGO MOTOR CLUB BUILDING, 1, 3, 11 (Mar. 1, 2012), http://www.cityofchicago.org/dam/city/depts/zlup/Historic_Preservation/Publications/Chicago_Motor_Club_Bldg.pdf (describing Hayes and Motor Club).

18. See Norton, *supra* note 10, at 340.

19. *Id.*

20. *Id.* at 343.

21. *Id.* at 343–45.

22. *Id.* at 342.

23. *Id.*

24. *Id.* at 344.

25. *Id.* at 345.

26. *Id.* at 350.

27. *Id.* at 356.

28. *Id.* at 354 (describing organization).

29. *Id.* at 356.

30. *Id.* at 358.

ing, sentencing the defendant to wash school blackboards for a week.³¹

Ultimately, auto lobbyists persuaded governments to supplement industry propaganda with state coercion.³² In Los Angeles, the automobile club created a coalition called the Los Angeles Traffic Commission, which drafted a model traffic ordinance that included anti-jaywalking provisions.³³ The city council passed the ordinance in 1925.³⁴ Violators were fined or even arrested.³⁵ Other cities quickly followed suit.³⁶

Today, jaywalking is almost universally prohibited in the United States.³⁷ Jaywalking may be governed by state law³⁸ or by municipal ordinance.³⁹ These laws generally require walkers to obey traffic lights (such as “Walk/Don’t Walk” signs)⁴⁰ and to use crosswalks when crossing streets,⁴¹ rather than crossing in the middle of a block.⁴² In at least one

31. *Id.*

32. I note that some politicians seek to employ similar strategies against bicyclists. California is now considering legislation to require bicyclists not only to wear helmets but also to wear reflective clothing, despite the absence of evidence supporting such laws. See Eben Weiss, *Don’t Make Bicyclists More Visible. Make Drivers Stop Hitting Them.*, WASH. POST (Apr. 15, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/04/15/dont-make-bicyclists-more-visible-make-cars-stop-running-them-over/>.

33. See Norton, *supra* note 10, at 350–52.

34. *Id.* at 351.

35. *Id.* at 352–53.

36. *Id.* at 357–58.

37. See Philip M. Nichols, *Are Facilitating Payments Legal?*, 54 VA. J. INT’L L. 127, 140 (2013) (“Most states and municipalities prohibit jaywalking . . .”). I note that jaywalking is not technically a crime in every jurisdiction. See *State v. Tyler*, 7 P.3d 624, 628 (Or. Ct. App. 2000) (explaining that in Oregon, jaywalking is a “violation” rather than a “crime” and, thus, not subject to imprisonment). But see *State v. Barton*, No. 21815 2007 WL 1429625, at *1 (Ohio Ct. App. May 11, 2007) (noting that jaywalking is a misdemeanor in Ohio); *infra* notes 45–47 (describing arrests and imprisonment for jaywalking in other jurisdictions).

38. See *infra* notes 40–41, 48 (citing examples).

39. See *infra* note 49 (citing examples).

40. See, e.g., FLA. STAT. § 316.130(1) (2016) (“A pedestrian shall obey the instructions of any official traffic-control device specifically applicable to the pedestrian . . .”); 625 ILL. COMP. STAT. 5/11-1001 (2016) (similarly worded); OR. REV. STAT. § 814.010 (2016) (noting that pedestrians may generally cross streets where they are facing traffic control devices with green lights, but not when they are facing traffic-control devices with yellow or red lights); *Alliance v. Bush*, No. 2007CA00309 2008 WL 2878321, at *3 (Ohio Ct. App. July 21, 2008) (citing *Alliance*, Ohio traffic ordinance providing that no pedestrian or driver “shall disobey the instructions of any traffic control device”).

41. CAL. VEH. CODE § 21955 (2016) (“Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk.”); See, e.g., 75 PA. CONS. STAT. § 3543(c) (2016) (“Between adjacent intersections in urban districts at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk.”); *State v. Shorts*, No. 11CA009965 2011 WL 6016525, at *7 (Ohio Ct. App. Dec. 5, 2011) (quoting *State v. Salas*, No. 218912004 WL 2674616, at *4 (Ohio Ct. App. Nov. 24, 2004)) (citing an Akron, Ohio, ordinance providing that “[b]etween adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except marked crosswalk[s]”). A more moderate version of this statute provides that pedestrians crossing outside crosswalks shall yield the right-of-way to vehicles. See, e.g., GA. CODE ANN. § 40-6-92(a), (c) (2016) (stating that, where adjacent intersections are unmarked, a pedestrian outside a crosswalk need only “yield the right of way to all vehicles upon the roadway unless he has already, and under safe conditions, entered the roadway”; however, “[b]etween adjacent intersections at which traffic-control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk”); 625 ILL. COMP. STAT. 5/11-1003(a).

city (Los Angeles), walkers are ticketed even when flashing “countdown clocks” list the number of seconds left to cross the street before the traffic light changes.⁴³ Although Americans frequently jaywalk,⁴⁴ jaywalkers can be fined hundreds of dollars,⁴⁵ arrested,⁴⁶ and even jailed.⁴⁷ The penalty ultimately depends on the applicable state statute⁴⁸ or city ordinance.⁴⁹

In some jurisdictions, jaywalking can lead to more serious charges. In 2010, Raquel Nelson of Cobb County, Georgia, watched as her son was killed by a hit-and-run driver.⁵⁰ Because the nearest crosswalk was half a mile away, Nelson and her children had crossed midblock.⁵¹ Rather than ticketing her for jaywalking, the county government chose to prosecute Nelson for her child’s death; the Georgia Court of Appeals upheld this decision, stating that Nelson could be tried for vehicular homicide under Georgia law.⁵²

42. See *Jones v. Cont’l Elec. Co.*, 182 A.2d 168, 170 (N.J. Super. Ct. App. Div. 1962) (“[C]rossing . . . in the middle of the block [is] ‘jaywalking.’”).

43. See Adrian Glick Kudler, *Los Angeles Might Finally Do Something About the Dumbest Jaywalking Tickets*, CURBED L.A. (May 5, 2015, 2:02 PM), <http://la.curbed.com/archives/2015/05/los-angeles-might-finally-do-something-about-the-dumbest-jaywalking-tickets.php>. Cf. Jon Hillekevitch, *More Pedestrians to Be Put on Clock*, CHI. TRIB. (Mar. 20, 2006), http://articles.chicagotribune.com/2006-03-20/news/0603200209_1_countdown-signals-intersections-walk (describing the “countdown clock” concept).

44. See *United States v. Mills*, 472 F.2d 1231, 1239 (D.C. Cir. 1972) (noting that a “huge proportion of the public is guilty of some sort of petty infraction almost every day” and citing jaywalking as one of several examples); Michael L. Rich, *Limits on the Perfect Preventive State*, 46 CONN. L. REV. 883, 925 (2014) (citing jaywalking as one example of “minor offenses that are committed by broad swathes of the population”).

45. See Kudler, *supra* note 43 (noting that jaywalking tickets cost between \$190 and \$250 in Los Angeles); Joe Linton, *Interview with Luke Klipp of Jaydancing*, STREETS BLOG L.A. (June 15, 2015), <http://la.streetsblog.org/2015/06/16/interview-with-luke-klipp-of-jaydancing> (explaining that parking tickets cost only \$70 in same city).

46. See Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 338 (2014) (citing case upholding warrantless arrest for jaywalking).

47. Dave Huddleston, *Jailed for Jaywalking: Pedestrian Crime Lands Some Behind Bars*, WSB-TV (Nov. 3, 2014, 3:14 PM), <http://www.wsbtv.com/news/news/local/jailed-jaywalking-pedestrian-crime-lands-some-behi/nhygy>.

48. See, e.g., HAW. REV. STAT. § 291C-73 (2007) (setting forth \$100 fine for various violations of traffic code by pedestrians, including crossing outside crosswalk); N.J. STAT. ANN. § 39:4-36 (West 2010) (setting a \$200 fine for a variety of offenses, including a pedestrian’s failure to yield to automobiles when former not in crosswalk); CAL. R. OF CT. 4.102(21955) (2012), <http://www.courts.ca.gov/documents/Final-2012-JC-BAIL.pdf> (listing fines for various pedestrian offenses, including an \$194 fine for “Crossing Between Controlled Intersections (Jaywalking)”).

49. See *Jaywalking in Arizona*, ARIZ. BIKE L. (Feb. 15, 2012), <http://azbikelaw.org/blog/jaywalking-in-arizona/> (“In Arizona, cities are authorized to enact their own pedestrian regulations.”); Kiera Hay, *Committee Kills Jaywalking Ordinance*, ALBUQUERQUE J. (Jan. 23, 2013, 11:24 AM), <http://www.abqjournal.com/162568/north/committee-kills-jaywalking-ordinance.html> (describing the city council’s rejection of a proposal to increase jaywalking fines).

50. See Erik Kain, *Was Raquel Nelson Jaywalking When Hit And Run Driver Killed Her Child*, FORBES (July 19, 2011, 10:51 AM) <https://www.forbes.com/sites/erikkain/2011/07/19/raquel-nelson-was-not-jaywalking-when-hit-and-run-driver-killed-her-child/#1cb208fb5486> (last visited Mar. 28, 2017); Amir Shaikh, *Jaywalking Mom Raquel Nelson Appeals Retrial Denial*, ATLANTA FAMILY NEWS L. BLOG (Nov. 14, 2011, 3:25 PM), <http://atlantafamilylawnews.com/2011/11/jaywalking-mom-raquel-nelson-appeals-retrial-denial.html> (last visited March 28, 2017).

51. *Id.*

52. See *Nelson v. State*, 731 S.E.2d 770, 772, 774 (Ga. Ct. App. 2012) (upholding a lower court’s decision to grant trial rather than dismissing charges). Ultimately, the county reversed itself and

Jaywalking laws, like anti-loitering laws and other rarely enforced legislation,⁵³ may also be selectively enforced against unpopular minorities. For example, police sometimes target racial minorities⁵⁴ and the homeless⁵⁵ for jaywalking citations. In Ferguson, Missouri, police used jaywalking tickets to punish black walkers the police perceived as insufficiently respectful of police authority.⁵⁶ In the 1970s, police routinely stood outside Denver's most popular gay/lesbian bar and issued jaywalking citations.⁵⁷

B. *The Social Harm Caused by Jaywalking Laws*

Jaywalking laws are inconsistent with a wide variety of social values. By punishing behavior that primarily harms the perpetrator, jaywalking laws are certainly offensive from a libertarian perspective. To the extent that they discourage walking, jaywalking laws reduce public health and increase pollution. And, because jaywalking fines disproportionately affect the poor, they are arguably inequitable.

1. *The Libertarian Perspective*

The clearest argument against jaywalking laws is a libertarian one—that government should “prevent or regulate [an individual’s] conduct only when it may harm another.”⁵⁸ Even if a jaywalker endangers her own safety⁵⁹ by crossing midblock or ignoring a traffic light, the jaywalker

dropped the charges, settling for a \$200 fine. See *Jaywalking Mom Avoids Retrial for Son's Death*, URBANMECCA (June 14, 2013), <http://urbanmecca.net/news/2013/06/14/jaywalking-mom-avoids-retrial-for-sons-death/>.

53. See Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 19 (1996) (“[C]ities also enforce existing but often unenforced laws—such as prohibitions on loitering, littering, jaywalking, and carrying open containers—selectively against homeless people.”) (emphasis added).

54. See, e.g., Max Ehrenfreund, *The Risks of Walking While Black in Ferguson*, WASH. POST (Mar. 4, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black> (noting that 95% of persons arrested for jaywalking in Ferguson, Missouri, were black and that the Department of Justice found that these arrests were sometimes in retaliation for constitutionally protected conduct).

55. See George Lipsitz, “In An Avalanche Every Snowflake Pleads Not Guilty”: *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1757–58 (2012) (discussing police enforcement of anti-jaywalking laws against homeless occupants of Los Angeles’ Skid Row); Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step from State to State*, 19 PUB. INT. L. REP. 8, 9 (2013) (noting that municipalities seek to exclude the homeless through “disparate enforcement of laws, such as jaywalking or littering, against persons appearing to be homeless”).

56. Ehrenfreund, *supra* note 54.

57. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 691–92 (2015).

58. John R. Dorocak, *Is the Constitution Only Libertarian and Not Socially Conservative? U.S. v. Windsor and the Unconstitutionality of DOMA's Definition of Marriage to Exclude Same-Sex Couples- Requiem for a Heavyweight?*, 24 GEO. MASON UNIV. CIV. RTS. L.J. 263, 264 (2014).

59. See *infra* Section II.C (criticizing this assumption).

creates no direct⁶⁰ harm to others. Hence, a libertarian society would eliminate anti-jaywalking legislation.

It could be argued that jaywalkers create the social harm of obstructing automobile traffic. But this argument assumes that streets should be dominated by auto traffic—which, of course, was the original goal of anti-jaywalking laws.⁶¹ Thus, such an argument is essentially circular: government assumes that streets are for cars and accordingly creates laws that keep walkers off most sections of the streets most of the time, thus, ensuring that streets are, in fact, dominated by cars.

2. *The Public-Health/Environmental Perspective*

It is not clear to what extent jaywalking laws are enforced⁶² or to what extent they affect travel behavior. But, if they do affect travel behavior, such laws may cause people to drive more and walk less. If this is the case, these laws adversely affect the health of both would-be walkers (who, other things being equal, suffer from the ill effects of reduced physical activity) and of the population as a whole (who experience more automobile-related air pollution and traffic congestion).

a. *Jaywalking Laws Disfavor Walking*

To the extent they are enforced, jaywalking laws may discourage walking. Today, walkers are threatened not only by speeding vehicles, but also by fines or arrest should they misunderstand the law. Moreover, by discouraging walking, these laws also reduce transit ridership because someone who wishes to take a bus or even train will often wish to walk to that bus or train. Thus, jaywalking laws favor driving over other modes of transportation.

Moreover, these laws limit walking far more than traffic signals or speeding laws might limit motorists. A green light at an intersection allows a driver to pass through the intersection in only a few seconds. Consequently, even if a driver comes to the intersection long after the light turns green, she can usually avoid waiting at a red light. But, walkers are much slower than drivers. Because the typical pedestrian walks 3.5 feet per second,⁶³ and the typical traffic lane is 12 feet wide,⁶⁴ the typical pedestrian must spend 3.4 seconds per lane crossing a street, or 13 seconds crossing a four-lane street. This difference presents no problem if the

60. It could also be argued that jaywalkers, when injured, create externalities, such as the cost of higher health insurance premiums, and that these externalities justify regulation. This argument is addressed in *infra* Section II.B.2.b (criticizing this argument by noting that any policy that reduces walking actually impairs public health) and *infra* Section II.C (questioning whether jaywalking laws improve pedestrian safety).

61. See *supra* Section II.A.

62. Cf. *supra* notes 44, 53 (suggesting that some laws are rarely enforced).

63. Gary Richards, *Pedestrians to Get More Time to Cross Streets*, MERCURY NEWS (Aug. 23, 2010, 1:16 PM), http://www.mercurynews.com/ci_15871665.

64. See JEFF SPECK, WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA, ONE STEP AT A TIME 170 (2012).

walker comes to the intersection right after the light changes in her favor; however, a walker who comes to the intersection in the middle of a light cycle may not have time to cross the street before a sign switches to “Don’t Walk.” Thus, traffic signals, combined with jaywalking laws, may force walkers to wait for part of a “Walk” signal *and* the entire length of a “Don’t Walk” signal before they can cross the street.

Similarly, laws requiring pedestrians to use crosswalks allows drivers to use more of the street than pedestrians. While drivers can use the entire street and can freely change lanes, pedestrians are limited to sidewalks and crosswalks (which may be as far apart as a half-mile).⁶⁵ This is a far cry from the open streets of pre-jaywalking America.⁶⁶

b. Less Walking Means More Inactivity and More Pollution

It could be argued that the public as a whole is harmed by jaywalking because, if jaywalkers are especially likely to be injured in traffic crashes, the public as a whole pays for these injuries through higher insurance premiums.⁶⁷ But, to the extent that jaywalking laws discourage walking, such laws actually *impair* human health, thus requiring additional healthcare and raising insurance premiums. This is the case for two reasons.

First, according to the U.S. Surgeon General, “[e]ncouraging Americans to add walking to their daily routine has enormous long term health benefits.”⁶⁸ Walking and similar activities can not only reduce weight, but may also reduce the risk of heart disease, stroke, diabetes, depression, and cancer.⁶⁹ For example, regular walkers are 30% less likely to contract diabetes than a control group of nonwalkers.⁷⁰ Thus, any law that discourages walking will also reduce Americans’ ability to prevent such diseases.

Second, if people walk more and drive less, they will generate less pollution. If vehicle-miles traveled declined by 30%, transportation-related carbon-dioxide emissions would, in turn, decrease by 7% to

65. See Kain, *supra* note 50 (citing example).

66. See *infra* Section II.D.

67. Cf. Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 405 (1991) (making similar argument regarding smoking).

68. *Active Living*, SURGEON GEN., <http://www.surgeongeneral.gov/priorities/active-living/index.html> (last visited Mar. 14, 2017).

69. *Vital Signs: Walking Among Adults—United States, 2005 and 2010*, CTDS. FOR DISEASE CONTROL & PREVENTION (Aug. 10, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6131a4.htm> (stating that regular physical activity has these benefits and listing walking as one such activity).

70. See Ting Xia et al., *Cobenefits of Replacing Car Trips with Alternative Transportation: A Review of Evidence and Methodological Issues*, HINDAWI PUB. CORP., <http://www.hindawi.com/journals/jeph/2013/797312> (last visited Mar. 14, 2017) (introducing a study that “found that the risk of type II diabetes was 31% less for participants who engaged in regular moderate intensity physical activity, with 30% less risk among a regular walking population compared with almost no walking”).

10%,⁷¹ thus possibly reducing the magnitude of climate change.⁷² The environmental costs of driving are not limited to greenhouse gases. During the 2008 Beijing Olympics, city officials restricted automobile use; as a result, particulate matter, carbon-monoxide, and nitrous-oxide emissions were reduced 28%, 10.3%, and 12.3%, respectively.⁷³ Similar restrictions caused a 30% ozone decrease during the 1996 Atlanta Olympics, producing a reduction in asthma cases.⁷⁴

Reduced pollution, in turn, reduces healthcare costs. For example, in Australia the total health-related costs of motor vehicles exceed \$2 billion.⁷⁵ It follows that, to the extent jaywalking laws encourage Americans to drive rather than walk,⁷⁶ these laws increase pollution and thus increase the health costs arising from pollution.

c. Not Just Health

Moreover, every would-be pedestrian who chooses to drive instead of walk adds to traffic congestion, which imposes costs upon both the public and individual drivers. The public, as taxpayers, pays for congestion because traffic congestion creates political pressure for the maintenance, expansion, and widening of roads.⁷⁷ The public, as individual drivers, also pays for congestion by having to allow for extra time for every commute due to heavier traffic.⁷⁸

3. *The Social-Equity Perspective*

As noted above, police enforcement of jaywalking laws has sometimes disproportionately targeted minorities and the poor.⁷⁹ But, even where this is not the case, these laws disproportionately harm the poor for two reasons.

71. See REID EWING ET AL., *GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE* 9 (2007), <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf> (“[I]t is realistic to assume a 30 percent cut in VMT with compact development . . . [such development could] reduce total transportation-related CO2 emissions from current trends by 7 to 10 percent”); see also Brian Stone, Jr. et al., *Is Compact Growth Good for Air Quality?*, 73 J. AM. PLANNING ASS’N 404, 411–14 (stating that a 6% decrease in vehicle miles traveled in the American Midwest would likely lead to 5.1% decrease in carbon-dioxide emissions).

72. Cf. *Massachusetts v. EPA*, 549 U.S. 497, 507–10 (2007) (describing the relationship between carbon dioxide and climate change).

73. See Stone, Jr. et al., *supra* note 71, at 411–13 (development patterns causing a 6% increase in vehicle travel likely to reduce various pollutants by 5–6%); Xia et al., *supra* note 70.

74. See Xia et al., *supra* note 70.

75. *Id.*

76. I note, however, that I have found no studies on the actual impact of jaywalking laws upon walking.

77. Cf. News Release, *Federal Highway Administrator Mendez Celebrates Opening of DFW Connector*, U.S. DEP’T TRANSP., FHWA 37-13 (D.O.T.), 2013 WL 4477919 (describing a federal official’s claim that new highway will reduce congestion).

78. Cf. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 910 (2015) (“[O]ne recent assessment concluded that the total economy-wide costs of traffic congestion to the United States was [sic] more than \$120 billion in 2013.”).

79. See *supra* text accompanying notes 54–57.

First, poverty-level households are less likely to own automobiles than the average household. Of all U.S. residents living below the poverty level, 20.4% are in households with no access to a vehicle, including one-third of poor black residents.⁸⁰ These percentages are higher in urban areas: for example, in the city of New Orleans, 46.7% of poor residents live in carless households, including a majority of the black poor.⁸¹ As a result, poor workers are more likely to commute on foot: about 8% of American workers in households earning under \$10,000 a year walk to work, as opposed to 2% of commuters in households earning over \$200,000 a year.⁸² If poor people walk more, it follows that any law discouraging or punishing walking disproportionately harms the poor.

Even poor workers who do own cars are indirectly punished by laws that encourage driving because the cost of vehicle ownership and maintenance affects the poor more than the rich. According to the federal Bureau of Transportation Statistics, the working poor (that is, persons living in households earning under \$8,000 a year) who own vehicles spend 21% of their income on commuting—more than poor transit users (who spend 13%).⁸³ Although low-income drivers can avoid some of these expenses by purchasing inexpensive used cars, many vehicle costs (such as the cost of fuel and maintenance) are harder for the poor to avoid. In fact, the costs of vehicle purchases comprise less than 40% of household automobile-related expenses.⁸⁴

Second, even if all Americans walked equally often, jaywalking fines would harm poor pedestrians more because fines are unrelated to ability to pay. This is especially true where fines can lead to other harmful consequences. For example,⁸⁵ Ferguson, Missouri, (a suburb of St. Louis notorious for its race riots in 2015)⁸⁶ has a history of imposing debt

80. See Alan Berube et. al., *Socioeconomic Differences in Household Automobile Ownership Rates: Implications for Evacuation Policy*, SOCRATES 40 (June 2006), <http://socrates.berkeley.edu/~raphael/BerubeDeakenRaphael.pdf>.

81. *Id.* at 36–40 (citing statistics for New Orleans and numerous other cities).

82. See Emily Badger, *The Demographic Paradox of Who Bikes and Who Walks to Work*, WASH. POST (May 9, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/09/the-demographic-paradox-of-who-bikes-and-walks-to-work>. Generally, walking to work declines as income rises, with one exception: households earning over \$150,000 walk slightly more than slightly less wealthy households. *Id.*

83. *BTS Issue Brief 1*, BUREAU TRANSP. STAT. (Mar. 2003), http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/special_reports_and_issue_briefs/issue_briefs/number_01/pdf/entire.pdf (last visited Mar. 28, 2017).

84. See U.S. BUREAU LABOR STAT., *Consumer Expenditures in 2012, Report 1046*, (March 2014), http://www.bls.gov/opub/reports/cex/consumer_expenditures2012.pdf (describing how average household spends just under \$9,000 on transportation, but only \$3,210 on purchases of cars; an average household spends \$2,756 on motor fuel and \$2,490 on other vehicle expenses).

85. Ferguson is not unique. Throughout the United States, criminal sentences can lead to a variety of fines, and failure to pay these fines can lead to prison time. See generally *In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU (Oct. 2010) [hereinafter *In For A Penny*], https://www.aclu.org/files/assets/InForAPenny_web.pdf (citing examples from numerous states and pointing out that when Americans imprisoned for unpaid fines, imprisonment often costs state and local governments more than fines).

86. Symposium, *Development in the Law: Policing*, 128 HARV. L. REV. 1707, 1707 (2015) [hereinafter HARV.] (describing Ferguson riots); Scott Malone, *Riot-Torn Ferguson, Missouri to Remain in*

on individuals through criminal proceedings.⁸⁷ So, if a resident was fined and failed to show up for a court proceeding (or was even late for a court date),⁸⁸ she was charged an additional \$120–130 fine, together with a \$50 fee for a new arrest warrant and \$0.56 per mile for the distance that police officers drove to serve the warrant.⁸⁹ A person unable to pay such fines could be imprisoned until the next court session (which occurs only three days a month) and then charged \$30–60 per night by the jail.⁹⁰ So, in Ferguson, a ticket for jaywalking could lead to a cascade of events culminating in weeks of imprisonment.

C. *But What About Safety?*

It could be argued that jaywalking laws protect walkers from themselves because the safest place to cross the street is at an intersection with traffic lights. This argument fails—traffic lights only protect a walker from through traffic, not from vehicles making left and right turns. For example, suppose walker *A* is at an intersection and the traffic lights give *A* the right-of-way: that is, the light across from *A* says “walk” and the light above *A* is red. Assuming that no one is violating the law, the lights protect *A* from a motorist driving through the intersection and colliding with *A* head-on.

The lights do not, however, protect *A* from a motorist turning left or right from a nearby intersection. That motorist may be allowed by the law to turn right on a red light or may be turning either left or right on a green light. So, at a four-way intersection, *A* not only has to pay attention to the light, but also has to pay attention to motorists turning from two other directions.⁹¹ By contrast, if *A* crosses midblock, where there is no light, *A* need not worry about turning motorists but instead only has to worry about traffic coming directly at her. In this situation, jaywalking may sometimes be safer than following the law.

State of Emergency: Officials, REUTERS (Aug. 12, 2015, 2:52 PM), <http://www.reuters.com/article/us-usa-ferguson-idUSKCN0QH1QK20150812>.

87. See HARV., *supra* note 86, at 1723–24. I note that the city has recently reformed its policies by announcing an amnesty for arrests preceding the end of 2014. See Henry Gass, *Ferguson Court Reform Points to Deeper Concern for St. Louis*, CHRISTIAN SCI. MONITOR (Aug. 26, 2015), <http://www.csmonitor.com/USA/Justice/2015/0826/Ferguson-court-reform-points-to-deeper-concern-for-St.-Louis-video>.

88. See HARV., *supra* note 86, at 1724 (noting that courtroom doors typically close “just five minutes after the session is set to start for the day”).

89. *Id.*

90. *Id.* (adding that Ferguson’s overuse of fines may have contributed to the tension that led to riots). I note that Missouri has recently prevented municipalities from enacting Ferguson-like policies. See Editorial, *Reforms Follow Protests In Ferguson*, N.Y. TIMES (Sept. 7, 2015), http://www.nytimes.com/2015/09/07/opinion/reforms-follow-protests-in-ferguson.html?_r=0 (describing state-imposed limits on fine revenue for Missouri municipalities). Other states, however, may still allow such policies. See also *In For A Penny*, *supra* note 85, at 8–9 (suggesting the overuse of fines nationwide).

91. Cf. Tom Vanderbilt, Opinion, *When Pedestrians Get Mixed Signals*, N.Y. TIMES (Feb. 2, 2014), <http://nytimes.com/2014/02/02/opinion/sunday/when-pedestrians-get-mixed-signals.html> (“[T]he times we came closest to being hit by cars were when we had the ‘Walk’ signal and a driver attempted to make a turn.”).

It could be argued that instead of crossing at signalized intersections, walkers should use marked crosswalks. But, some experts suggest that in the absence of traffic lights, crosswalks are so widely ignored by drivers that they give pedestrians a false sense of security rather than actually preventing accidents.⁹² The Federal Highway Administration discourages crosswalks on high-speed roads, writing:

[n]ew marked crosswalks alone, without other measures designed to reduce traffic speeds, shorten crossing distances, enhance driver awareness of the crossing, and/or provide active warning of pedestrian presence, should not be installed across uncontrolled roadways where the speed limit exceeds 40 mph and *either*:

A. The roadway has four or more lanes of travel without a raised median or pedestrian refuge island and [averages] 12,000 vehicles per day or greater; or

B. The roadway has four or more lanes of travel with a raised median or pedestrian refuge island and [averages] of 15,000 vehicles per day or greater.⁹³

Thus, the relationship between jaywalking laws and safety is questionable: neither traffic lights nor marked crosswalks completely protect pedestrians from errant drivers. In fact, jaywalking laws may *reduce* pedestrian safety in two ways. First, to the extent that jaywalking laws reduce walking, they reduce pedestrian safety because of the “safety in numbers” phenomenon.⁹⁴ A recent study of automobile/walker collisions in Minneapolis found that “intersections characterized by greater daily levels of pedestrian activity show lower per-pedestrian crash rates than less-active intersections.”⁹⁵ This may be because motorists drive more cautiously on streets with a high number of walkers.⁹⁶

Second, to the extent that drivers expect walkers to obey anti-jaywalking laws, these laws may lead drivers to discount the likelihood of encountering a pedestrian and prompt them to be less vigilant in watching for pedestrians. If this is the case, the law may cause a vicious cycle: fewer walkers mean even less driver vigilance, less driver vigilance means more crashes, and more crashes mean even fewer walkers still.

It could be argued that, even if many crashes do occur at traffic lights, jaywalking is, on balance, dangerous because the majority of pe-

92. *Crosswalks*, WASH. ST. DEP'T TRANSP., <http://www.wsdot.wa.gov/operations/traffic/crosswalks.htm> (last visited Mar. 14, 2017) (making the argument and pointing out that unmarked intersections have fewer pedestrian/vehicle collisions).

93. See U.S. DEP'T TRANSP.: FED. HIGHWAY ADMIN., *MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES* § 3B.18, ¶ 9 (2009), <http://mutcd.fhwa.dot.gov/html/2009r1r2/part3/part3b.htm> (emphasis added).

94. Brendan Murphy et al., *Estimating the “Safety in Numbers” Effect with Estimated Pedestrian Activity 2* (Univ. of Minn. Dig. Conservancy, Working Paper No. 000136, 2015), <http://conservancy.umn.edu/bitstream/handle/11299/179818/SafetyInNumbers.pdf?sequence=1&isAllowed=y>.

95. *Id.* at 9.

96. *Id.* at 14; see also Peter L. Jacobsen, *Safety In Numbers: More Walkers and Bicyclists, Safer Walking and Bicycling*, INJURY PREVENTION 205, 209 (Sept. 2003), injuryprevention.bmj.com/content/injuryprev/9/3/205.full.pdf (reaching similar conclusions, but comparing cities rather than intersections within a single city).

destrian/car collisions occur outside of crosswalks.⁹⁷ But, this argument is not completely persuasive: many of these collisions occur not in places where a walker is jaywalking but on streets where she is far from a crosswalk, and, thus, a walker cannot easily conform to anti-jaywalking laws.⁹⁸

D. *The Solution: Just Say No to Jaywalking Laws*

If jaywalking laws are anti-environmental and inequitable, the most logical solution is simply to eliminate them. For example, jaywalking is not a legal offense in the United Kingdom.⁹⁹ Nevertheless, pedestrians actually face a *lower* risk of death from car crashes in the U.K. than in the United States. In 2013, motor vehicles killed 398 British pedestrians,¹⁰⁰ or (given the U.K.'s population of just over 63 million people)¹⁰¹ roughly 0.6 per 100,000 residents. By contrast, in that year the U.S. had 1.5 pedestrian fatalities per 100,000 people¹⁰²—a fairly typical rate for the United States.¹⁰³ This gap understates the difference between the U.S. and the U.K.; British citizens take more than twice as many trips on foot as Americans, which means they have more opportunities to become victims of vehicle/pedestrian collisions.¹⁰⁴ Thus, British pedestrians are far safer than American pedestrians,¹⁰⁵ despite the absence of jaywalking laws.

97. See NHTSA, TRAFFIC SAFETY FACTS 2013 DATA: PEDESTRIANS 2 (2015) [hereinafter SAFETY FACTS], <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812124> (noting that only 20% of pedestrian deaths at intersections); but see Tom Vanderbilt, *In Defense of Jaywalking*, SLATE (Nov. 2, 2009, 4:01 PM), http://www.slate.com/articles/life/transport/2009/11/in_defense_of_jaywalking.html (“In New York City the *Post*, quoting numbers from the DoT, said 50 jaywalkers were killed annually; this is a high number to be sure, but just one-fourth the total pedestrian death toll.”).

98. Vanderbilt, *supra* note 97 (“[L]ess than 20 percent of fatalities occurred where a pedestrian was crossing outside an easily available crosswalk.”); cf. Brent T. White et al., *Urban Decay, Austerity and the Rule of Law*, 64 EMORY L.J. 1, 23 (2014) (noting that jaywalking may be safer “in the absence of adequate traffic control or protected crosswalks”). I note that in some states, a pedestrian far enough from a crosswalk might not even be guilty of jaywalking. See *supra* note 40 (citing examples).

99. *What Every Brit Should Know About Jaywalking*, BBC NEWS (Jan. 12, 2007, 09:54 GMT), <http://news.bbc.co.uk/2/hi/6251431.stm>.

100. DEP'T TRANSP., FACTS ON PEDESTRIAN CASUALTIES: JUNE 2015, (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438072/pedestrian-casualties-2013-data.pdf.

101. See U.K. Population (Live), WORLDOMETERS, <http://www.worldometers.info/world-population/uk-population> (last visited Mar. 14, 2017).

102. See SAFETY FACTS, *supra* note 97, at 9.

103. *Id.* at 1 (noting every year between 2004 and 2013, there were between 4,100 and 4,900 pedestrian deaths in the U.S.).

104. See Michael Lewyn, *Sprawl in Europe and America*, 46 SAN DIEGO L. REV. 85, 91 (2009) (17% of British trips are on foot or through some other method that is not an automobile, mass transit, or bicycle, as opposed to 7% of Americans). On the other hand, the higher number of British pedestrians may itself be a cause of Britain's lower death rates. See Jacobsen, *supra* note 96 and accompanying text (discussing “safety in numbers” theory); Murphy et al., *supra* note 94 and accompanying text (discussing “safety in numbers” theory).

105. On the other hand, this is hardly an “other things being equal” comparison. Cf. *Federal Highway Administration University Course on Bicycle and Pedestrian Transportation*, FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt23.cfm> (last visited Mar. 14, 2017) (describing numerous practices that make European nations, including Britain, more pedestrian friendly than the United States). I am not arguing, however, that the absence of jaywalking

Similarly, in Massachusetts the fine for jaywalking is only \$1.¹⁰⁶ The pedestrian fatality rate is 1 per 100,000 people¹⁰⁷—one-third below the U.S. average. While most American cities have higher pedestrian-fatality rates than the national average, Boston's pedestrian-fatality rate is only 1.08 per 100,000 people—about the same as the Massachusetts average and well below the national average.¹⁰⁸

Because many states have enacted anti-jaywalking laws,¹⁰⁹ it may be difficult for local governments to completely legalize jaywalking. State jaywalking laws, however, do not always establish penalties for jaywalking—so, in states where jaywalking penalties are a matter of local option,¹¹⁰ a local government can, by municipal ordinance, prohibit police from issuing tickets or may even limit jaywalking fines to \$1 or some other nominal amount.

As noted above, one reason anti-jaywalking laws fail to protect walkers is that even a walker who avoids head-on collisions by obeying a “Don’t Walk” sign can be injured by a car turning left or right.¹¹¹ So, a less radical move may be to reduce the scope of this problem by turning more intersections into “pedestrian scrambles.”¹¹² A scramble (also known as a “Barnes Dance” in honor of a traffic engineer who popularized the idea) is an intersection that allows pedestrians from all directions to cross at the same time and prohibits cars from turning during that period.¹¹³ Scrambles are not popular with motorists, however, who dislike having to spend more time waiting for pedestrians to cross.¹¹⁴ Even in cities with scrambles, only a few intersections have them—¹¹⁵ so unless scrambles are radically expanded, their existence hardly justifies jaywalking laws.

laws causes Britain's better safety record, merely that Britain's lack of jaywalking laws is not harmful enough to *prevent* Britain from being safer.

106. See Eric Randall, *Why Wouldn't You Jaywalk in Boston?*, BOS. MAG. (July 23, 2014, 12:19 PM), <http://www.bostonmagazine.com/news/blog/2014/07/23/wouldnt-jaywalk-boston/> (citing MASS. GEN. LAWS ch. 90, § 18A (2014)).

107. SAFETY FACTS, *supra* note 97, at 8.

108. *Id.* at 9.

109. See *supra* notes 40–41 (citing examples).

110. See *Jaywalking in Arizona*, *supra* note 49 (citing examples). I note that states could also reduce traffic deaths by prosecuting motorists who harm pedestrians—but since the discussion above focuses on *pedestrians'* criminal liability, that issue is beyond the scope of this article. Cf. Gretta Cohn, *The Perfect Crime*, FREAKONOMICS (May 1, 2014, 8:57 AM), <http://freakonomics.com/2014/05/01/the-perfect-crime-a-new-freakonomics-radio-podcast/> (observing that drivers are rarely prosecuted for harming pedestrians).

111. See Vanderbilt, *supra* note 91.

112. See Eric Jaffe, *A Brief History of the Barnes Dance*, ATLANTIC: CITYLAB (Dec. 18, 2012), <http://www.citylab.com/commute/2012/12/brief-history-barnes-dance/4189/>.

113. *Id.*

114. *Id.* In fact, Denver recently eliminated the Barnes Dance from its streets because of concerns about slowing down both cars and transit vehicles. See Stephanie Simon, *No More Dancing in Denver's Streets*, WALL ST. J. (Apr. 20, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704547804576261030416490722>.

115. See Jaffe, *supra* note 112 (citing examples).

III. THE WAR ON CHILD PEDESTRIANS

In the 1960s, about half of American children walked to school;¹¹⁶ in 2009, only 13% did so.¹¹⁷ A variety of causes underlie this trend. American society as a whole became more automobile-dependent.¹¹⁸ In addition, American parenting became far more intensive in a variety of ways.¹¹⁹ For example, today's parents often use technology to monitor their children¹²⁰ and are more willing than their parents to confront teachers about children's academic problems.¹²¹ Modern parents are also less willing to let older children babysit their children¹²² or to leave them alone outside the house.¹²³ The latter trend has spread into the criminal law, as police and prosecutors have come to expect constant parental supervision¹²⁴—a rule of thumb that discourages children from walking to school or anywhere else. In turn, when children are driven everywhere, a variety of harmful “mores” results: more traffic congestion, more pollution from automobiles, and more health problems for increasingly inactive children.¹²⁵

A. The Problem

As child pedestrians have become more unusual, police officers, prosecutors, and child-protection agencies have begun to see such behavior as abnormal and even illegal. For example:

- * In Jonesboro, Arkansas, a mother was convicted of child endangerment for making her ten-year old son walk to school after he had been repeatedly ejected from school buses for misbehavior.¹²⁶

116. Edward H. Ziegler, *American Cities and Sustainable Development in the Age of Global Terrorism: Some Thoughts on Fortress America and the Potential for Defensive Dispersal II*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 95, 111 n.73 (2005).

117. *The Decline of Walking and Bicycling*, SRTS GUIDE, http://guide.saferoutesinfo.org/introduction/the_decline_of_walking_and_bicycling.cfm (last visited Mar. 14, 2017).

118. See Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 160–64 (1998) (auto travel almost doubled between 1965 and 1990 while public transit use declined); BRIAN MCKENZIE, *MODES LESS TRAVELED—BICYCLING AND WALKING TO WORK IN THE UNITED STATES: 2008–2012*, at 3 (2014), <https://www.census.gov/prod/2014pubs/acs-25.pdf> (percentage of Americans walking to work decreased by half between 1980 and present).

119. Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1231–41 (2011).

120. *Id.* at 1237–40.

121. *Id.* at 1235.

122. See David Pimentel, *Criminal Child Neglect and the “Free Range Kid”: Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 953 (2012) (noting that preteen children once were allowed to babysit, but that this is far less common today).

123. See *id.* at 947 n.1.

124. See Bernstein & Triger, *supra* note 119, at 1254–65 (citing examples); *infra* Section III.A (citing examples).

125. See *infra* Section III.B.

126. See David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 258 (2015) [hereinafter *Fearing the Bogeyman*].

- * Debra Harrell of North Augusta, South Carolina, spent seventeen days in jail because she let her nine-year old daughter play at a park while she was working.¹²⁷
- * Nicole Gainey of Port St. Lucie, Florida, was arrested and charged with child neglect because her seven-year-old was playing unsupervised at a nearby playground.¹²⁸
- * Ashley Richardson of Winter Haven, Florida, was jailed when she left her four children, ages six to eight, to play at a park.¹²⁹
- * In Ohio, a father allowed his six-year-old daughter to walk three blocks to a post office; they had walked together many times before.¹³⁰ Police took the child into their custody, initially refusing to return her to her father.¹³¹ The state child protective services (“CPS”) agency advised police to return the child, but served the father with a complaint alleging child neglect, and sought to take the child from her parents.¹³² Another Ohio father was arrested for child endangerment and lost his job after the child walked to a store without the father’s knowledge or consent.¹³³
- * In Silver Spring, Maryland, Danielle and Alexander Meitiv allowed their ten- and six-year old children to walk one mile home from a playground, after the children had previously paired up for shorter walks.¹³⁴ The children were held by police and CPS for five hours.¹³⁵ CPS employees later threatened to remove the children if the parents did not sign a CPS-drafted “safety plan,”¹³⁶ and attempted to frighten the children by telling them that “bad guys” were “waiting to grab you.”¹³⁷
- * Even in indoor spaces, children are not safe from government control. In Bozeman, Montana, a university professor was charged with child endangerment after dropping her three children and several friends (ages twelve, eight, seven, and three) off

127. *Id.* at 260.

128. *Id.*

129. *Id.*

130. *Id.* at 262.

131. *Id.*

132. *Id.*; see also Scott Shackford, *Ohio CPS Wants To Snatch Kid Away from Family that Has Taught Her Self-Sufficiency*, REASON.COM: HIT & RUN BLOG, (Apr. 3, 2013), <http://reason.com/blog/2013/04/03/ohio-cps-wants-to-snatch-kid-away-from-f>.

133. Ryan Grenoble, *Dad Charged with Child Endangerment After Son Skips Church to Go Play*, HUFFINGTON POST (July 2, 2014, 4:10 PM), http://www.huffingtonpost.com/2014/06/30/dad-arrested-son-skips-church_n_5544661.html.

134. See *Fearing the Bogeyman*, *supra* note 126, at 263; Peter Gray, *Meet Danielle Meitiv, Fighting for Her Kids’ Rights*, PSYCHOL. TODAY (Apr. 11, 2015), <https://www.psychologytoday.com/blog/freedom-learn/201504/meet-danielle-mektiv-fighting-her-kids-rights>.

135. See Donna St. George, *‘Free Range’ Parents Cleared in Second Neglect Case After Kids Walked Alone*, WASH. POST (June 22, 2015), https://www.washingtonpost.com/local/education/free-range-parents-cleared-in-second-neglect-case-after-children-walked-alone/2015/06/22/82283c24-188c-11e5-bd7f-4611a60dd8e5_story.html.

136. See *Fearing the Bogeyman*, *supra* note 126, at 263.

137. *Id.* at 264.

at a local mall.¹³⁸ The mother accepted a plea bargain involving community service.¹³⁹

In some of these cases, the state ultimately dropped charges against parents.¹⁴⁰ Nevertheless, the mere possibility of arrest or CPS harassment may exert a chilling effect upon parents, discouraging them from allowing children to walk anywhere.¹⁴¹

B. *The Real Safety Issue*

Government attempts to stop children from walking implicate some of the same concerns as jaywalking laws. To the extent that these practices encourage parents to drive their children, they also impair public health by reducing children's opportunities for exercise and increasing pollution and traffic congestion through increased vehicle use.¹⁴² Like jaywalking laws, government prosecutions for child neglect obviously impair citizens' liberties. And, like anti-jaywalking laws, such prosecutions raise social equity concerns: low-income parents are less likely to be able to afford cars and thus less likely to drive their children to school, and even the parent who owns a car might not be able to afford to pay someone to supervise their child at times when the parent is at work or otherwise unavailable.¹⁴³

Just as government restricts jaywalking to protect pedestrians from themselves, government seeks to prevent children from walking because (in the words of one journalist) "the world is a more dangerous place than it was generations ago when children were allowed to roam freely."¹⁴⁴ For example, some police officers and bureaucrats have sought to prosecute parents for allowing their children to walk because of a hy-

138. See Pimentel, *supra* note 122, at 968; Bridget Kevane, *Guilty as Charged*, BRAIN, CHILD, (Jan. 14, 2014), <http://www.brainchildmag.com/tag/bridget-kevane/#>.

139. Pimentel, *supra* note 122, at 968. This case, however, involved an aggravating circumstance: the twelve-year-olds briefly stepped into a dressing room at the mall, leaving the younger children unsupervised for five minutes. *Id.* As a result, store employees then called the police. *Id.* But see *State v. Hughes*, No. 17-09-02, 2009 WL 2488102, at *7 (Ohio Ct. App. Aug. 17, 2009) (overturning a child-neglect conviction where a five-year-old was left alone in car for thirty minutes).

140. See St. George, *supra* note 135; Donna St. George & Brigid Schulte, 'Free-Range' Flap in Maryland Fans Flames of National Debate on Parenting, WASH. POST (Apr. 18, 2015), https://www.washingtonpost.com/local/education/free-range-flap-in-maryland-fans-flames-of-national-debate-on-parenting/2015/04/18/ebc10248-e47e-11e4-81ea-0649268f729e_story.html (discussing how the charges were dropped against Nicole Gainey).

141. *Fearing the Bogeyman*, *supra* note 126, at 265 ("[Parents'] risk management decisions must incorporate the risk that the state will intervene.").

142. See *supra* text accompanying notes 58–76 (discussing these issues in context of jaywalking discussion).

143. See Amanda Kolson Hurley, *The Murky Law on Free-Range Kids*, ATLANTIC: CITYLAB (Apr. 17, 2015), <http://www.citylab.com/crime/2015/04/the-murky-law-on-free-range-kids/390795/> ("Low-income parents who can't afford child care, or who struggle to arrange it around unpredictable work schedules, may leave their children unsupervised out of necessity rather than on principle.").

144. Tierney Sneed, *What's Behind the Arrests of Mothers for Leaving Their Children Unattended?*, U.S. NEWS (July 31, 2014, 3:05 PM), <http://www.usnews.com/news/articles/2014/07/31/whats-behind-the-arrests-of-mothers-for-leaving-their-children-unattended> (describing, but not endorsing, the comment).

pothetical risk of children being abducted by strangers or otherwise victimized by criminals.¹⁴⁵ As discussed below, this argument lacks merit for two reasons. First, this risk is small and declining. Second, this risk, to the extent it exists, is outweighed by the harms (both to the public and to nonwalking children themselves) that may arise when children are forbidden to walk.

1. *Minimal Risk*

After increasing in the 1960s and 1970s, violent crime has significantly decreased in recent decades. The national murder rate decreased from its all time high of 10.2 homicides per 100,000 Americans in 1980 to 4.7 per 100,000 in 2012—a rate lower than in 1960.¹⁴⁶ In particular, crimes against children are especially rare. Violent crime against children decreased by 77% between 1994 and 2010.¹⁴⁷ Murders arising out of abductions by strangers are especially infrequent; a parent who wanted his child abducted would have to leave the child outside, unattended, for 500,000 years before it would be likely to happen.¹⁴⁸ More generally, children are safer than ever in a wide variety of respects: child mortality rates from all causes have fallen by nearly half since the early 1990s, and reports of missing children are down nearly 40%.¹⁴⁹

2. *Countervailing Risks: Or, Why it is Dangerous for Children NOT to Walk Outside*

a. Risks of Harm to the Public

As noted above, vehicle use creates a wide variety of pollutants, leading to significant healthcare costs of various types.¹⁵⁰ Just as jaywalking laws may increase these costs by increasing driving, public health is also impaired when parents drive their children to destinations that earlier generations of children might have walked to.

145. *Id.*; see also *Fearing the Bogeyman*, *supra* note 126, at 258 (justifying a police officer's decision to arrest a parent by asking "is that safe for the child?"); *id.* at 264 (discussing CPS workers raising the threat of kidnapping in trying to build a case against parents who allowed their children to walk outside).

146. See *Estimated Crime in United States—Total*, U.S. DEP'T JUST. <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (use search engine to choose "Violent crime rates" and "United States- Total") (last visited Mar. 14, 2017).

147. See Jessica Culverhouse, *Parks: A Place for PLAY*, PARKS & RECREATION (Oct. 1, 2014), <http://www.nrpa.org/parks-recreation-magazine/2014/october/parks-a-place-for-play/>. It could be argued that parental refusal to allow children outside is responsible for this decrease and, thus, should be mandated by law. But this claim is a "heads I win tails you lose" argument: that is, if crimes against children decrease, partisans of the *status quo* will claim victory, while if crimes were increasing, they would argue that the dangers of the modern world require children to be kept inside.

148. Pimentel, *supra* note 122, at 960.

149. See Christopher Ingraham, *There's Never Been a Safer Time to Be a Kid in America*, WASH. POST: WONKBLOG (Apr. 14, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/14/theres-never-been-a-safer-time-to-be-a-kid-in-america/>.

150. See *supra* text accompanying notes 71–75.

On a more intangible level, government intrusion into parents' right to allow children to walk raises constitutional questions. In 1925, the Supreme Court wrote that government may not "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children"¹⁵¹ because children are not "the mere creature[s] of the State."¹⁵² More recently, the Supreme Court emphasized that Due Process includes the "fundamental right of parents to make decisions concerning the care, custody and control of their children."¹⁵³

Although these principles do not prohibit states from enacting child-neglect laws,¹⁵⁴ the Court's statements suggest that courts and bureaucrats should give parents ample discretion to decide how to rear their children, rather than forcing all parents to do what the average judge, juror, or police officer would think best.¹⁵⁵ When an Arkansas parent was arrested because her child walked to school, a police officer stated that "if you wouldn't want your child doing it, you probably don't need some other child doing it."¹⁵⁶ The officer's suggestion that all children must conform to his conception of "your child" seems inconsistent with the Court's emphasis on parental discretion.

b. Risks of Harm to Children

Children suffer from not being able to walk alone for several reasons. First, if children are not allowed to walk unless their parents are present, they will obviously walk less. One recent study of Toronto children showed that children who were allowed to go places by themselves were 20% more physically active than other children.¹⁵⁷ Other things being equal, less exercise means worse health.¹⁵⁸ So, American children's failure to walk may have contributed to health problems related to lack of exercise—in the last thirty years, obesity rates have nearly tripled

151. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925).

152. *Id.* at 535.

153. *Troxel v. Grandville*, 530 U.S. 57, 66 (2000).

154. See *In re Neglected Child*, 296 A.2d 250, 253–54 (Vt. 1972) (stating that *Pierce* does not bar states from enforcing child-neglect laws because of the importance of state interest in preventing such neglect).

155. See *Troxel*, 530 U.S. at 66; *Pierce*, 268 U.S. at 535. It could even be argued that government decisions to the contrary are unconstitutional. See Ilya Somin, *How the Constitution Protects "Free Range" Parents*, WASH. POST (Apr. 16, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/16/how-the-constitution-protects-free-range-parents/>. Although states clearly have a right to regulate child neglect, statutes must have "reasonable standards" to avoid violating the Due Process Clause. See *Neglected Child*, 296 A.2d at 254. So, if a prosecutor decided that "child neglect" included allowing a 10-year-old to walk to school, and if a court thought the prosecutor's decision was unreasonable, prosecuting the 10-year-old's parents would violate Due Process. I, however, have found no case law on point.

156. *Fearing the Bogeyman*, *supra* note 126, at 258.

157. See *Unsupervised Outings Help Children Be More Active*, RYERSON U. (Jan. 22, 2015), http://www.ryerson.ca/news/news/Research_News/20150122-unsupervised-outings-help-children-be-more-active.html.

158. See *supra* text accompanying notes 68–70.

among teenagers and quadrupled among younger children.¹⁵⁹ Between the late 1970s and the late 1990s, the total days of healthcare devoted to school-aged children with obesity-related illnesses doubled, and the proportion of hospital costs dedicated to these patients nearly quadrupled.¹⁶⁰

Second, parents who drive their children expose them to the risk of injury and death from car crashes. An American child is fifty times more likely to die from a car crash than from an abduction by a stranger.¹⁶¹ On the other hand, it could be argued that, even if children do not face much of a risk from crime, child pedestrians face an enormous risk from traffic. But, this argument is a self-fulfilling prophecy: the more that parents drive their children, the more auto traffic they create, thus increasing the very risk that they might use to justify driving.

Third, it is not clear that unsupervised children are at greater risk of criminal victimization than heavily supervised children because children may be at risk even when with parents. Most American violent crimes are committed against adults; only 4.6% of victims of violent crime involve children.¹⁶² And, as a matter of common sense, this should not be surprising. Many violent crimes—especially those between strangers—often involve robberies,¹⁶³ and because adults carry more money than children, they are more inviting targets for such crimes. Should a child be with a parent who is being victimized, the child might be injured, killed, or at least emotionally traumatized.¹⁶⁴ In other words, if even the tiniest risk of criminal victimization justifies forcing a child to be in the company of adults at all times, one might also argue that similar risks could also justify forcing the child to be away from adults at all times—obviously an absurd result.

Fourth, to the extent that limiting children's ability to walk is part of a broader program of more intensive parenting,¹⁶⁵ children may be given less practice in functioning independently. Where children are given too few opportunities to be self-sufficient, they may eventually suffer from

159. See Catherine Malina & John M. Balbus, *Environmental Interventions to Help Address the Obesity and Asthma Epidemics in Children*, 17 DUKE ENVTL. L. & POL'Y F. 193, 194 (2007) (discussing how obesity rates "have nearly tripled among children ages two to five and twelve to nineteen [sic] years" and "more than quadrupled among children ages six to eleven years").

160. *Id.*

161. See Pimentel, *supra* note 122, at 987; see also SAFETY FACTS, *supra* note 97 (noting 214 deaths of occupants three years old or younger, 199 deaths of occupants four-to-seven-years-old, and 225 of occupants eight-to-twelve-years-old).

162. *Victimization Data Categorized by Age and Type of Crime*, OFF. VICTIMS CRIME (Nov. 2014), <http://www.ovc.gov/pubs/NIBRS/victimizationdata.html>.

163. See Erika Harrell, *VIOLENT CRIMES COMMITTED BY STRANGERS, 1993–2010*, U.S. DEP'T JUST. (Dec. 2012), <http://www.bjs.gov/content/pub/pdf/vvcs9310.pdf> (noting that the majority of robberies are committed by persons unknown to the victim, while only 25% of rapes and 42% of assaults involved strangers; 19.3% of "stranger homicides" arose out of robberies).

164. Cf. *Ex parte* Giles, 632 So. 2d 577, 578 (Ala. 1993) (describing the murder of parents and children by robbers); *Gonzalez v. State*, 136 So. 3d 1125, 1153 (Fla. 2014) (allowing the prosecutor to mention that children were present while parents murdered).

165. See *Fearing the Bogeyman*, *supra* note 126, at 238–39 (suggesting a broader American trend of parental overprotection).

reduced ability to function on their own—for example, they may be less able to manage time without parental interference or be less creative.¹⁶⁶

Today, a child is 2,322 times more likely to be taken from a family by CPS than be abducted by a nonstate kidnapper.¹⁶⁷ In 2008, 267,000 children were removed from their homes as a result of a CPS investigation, and no parental misconduct was found in one-third of these cases.¹⁶⁸ Children removed from families may suffer emotional damage from being torn from their parents and being placed in foster care with strangers.¹⁶⁹ Moreover, the foster care system itself is dangerous because children in foster care are more likely to be abused or to die from abuse than other children.¹⁷⁰ Even where CPS and criminal investigations do not lead to the ultimate penalty of family breakup, the investigation itself may be traumatic for parent and child alike.¹⁷¹

In sum, keeping children locked up in their parents' homes and cars creates safety risks by contributing to health problems arising from inactivity, deaths and injuries from car crashes, and perhaps even criminal victimizations. And, where children are removed from their parents for failure to conform to this policy, they incur the risks of emotional trauma and abuse in foster care.

C. Solving the Problem

If police, prosecutors, and CPS bureaucrats have gone too far in keeping children off the streets, how can the law be reformed? David Pimentel, the leading legal commentator on this issue, has suggested reforms affecting both the child-abuse bureaucracy and the criminal-justice system. After discussing his proposals, this Article shall suggest a more aggressive alternative.

1. CPS and Federal Child-Abuse Law

The most significant statute governing CPS activities is the federal Child Abuse Prevention and Treatment Act ("CAPTA").¹⁷² CAPTA provides funding to states to fight child abuse and neglect.¹⁷³ Currently,

166. See Zvi Triger, *The Darker Side of Overparenting*, 2013 UTAH L. REV. ONLAW 284, 286 (where parents constantly monitor children, they "fail to develop important competencies, such as time management and negotiating conflicts. They also tend to show less creativity, spontaneity, enjoyment, and initiative in their leisure pastime . . ."); Judith L. Ritter, *Growin' Up: An Assessment of Adult Self-Image in Clinical Law Students*, 44 AKRON L. REV. 137, 150 n.90 (2011) (children of "helicopter parents" have weaker problem-solving skills).

167. See *Fearing the Bogeyman*, *supra* note 126, at 266 n.172.

168. *Id.* at 266.

169. *Id.* at 274.

170. *Id.*

171. *Id.* at 275.

172. See *id.* at 243 (noting that CAPTA is perhaps "the most significant of these legislative actions" related to child welfare).

173. *Id.*

the statute defines “child abuse and neglect” as acts or omissions that cause harm to a child or present “an imminent risk of serious harm.”¹⁷⁴

Pimentel suggests that this standard is “sufficiently vague to threaten the autonomy and deference that parents might otherwise enjoy.”¹⁷⁵ A CPS employee could hear about children walking to school, imagine the possibility of “imminent” harm, and spring into action. Moreover, the “imminent harm” standard fails to distinguish¹⁷⁶ statistically more likely risks—such as car crashes or obesity¹⁷⁷—from “one in a million” risks, such as child abduction.¹⁷⁸ Thus, Congress and state governments should refocus their definitions of child neglect on truly unreasonable risks—that is, the risks “that outweigh the costs and alternative risks of taking precautions against them.”¹⁷⁹ Because “unreasonableness” is itself a vague concept,¹⁸⁰ Pimentel proposes that CPS intervention should be allowed only where “the expected harm is *grossly* disproportionate to the costs and risks of the next best alternative” and where parents have “abused [their] discretion.”¹⁸¹ If CPS is forced to meet this higher standard, “free range parents” (that is, parents who are willing to grant their children above-average levels of independence)¹⁸² and their children will have more autonomy.¹⁸³

Certainly, such a standard would make courts less willing to grant CPS petitions placing overly independent children in foster care. And, to the extent that CPS employees actually pay attention to the law before making decisions, a “grossly disproportionate” standard will protect child pedestrians and their parents.

On the other hand, Congress has already sought to rein in CPS once with limited success. The 1989 version of CAPTA defined child abuse and neglect to include “negligent treatment . . . [which caused a] child’s health or welfare [to be] harmed or threatened thereby.”¹⁸⁴ As a result, unsubstantiated reports of child abuse and neglect multiplied, and there was a dramatic increase in children being removed from their homes and placed in foster care.¹⁸⁵ To combat these excesses, Congress enacted the current language, which (as Pimentel points out) has “had a minimal effect in reducing the number and frequency of unwarranted interventions.”¹⁸⁶ It might be the case that CPS employees will pay more attention

174. CAPTA Reauthorization Act of 2010, Pub. L. 111-320, § 142(a)(2), 124 Stat. 3459, 3482 (2010); see also Pimentel, *supra* note 122, at 269 n.195 (citing similar state laws).

175. *Fearing the Bogeyman*, *supra* note 126, at 246.

176. *Id.* at 245–46.

177. Pimentel, *supra* note 122, at 958–59, 966 n.96.

178. *Id.* at 960.

179. *Fearing the Bogeyman*, *supra* note 126, at 284.

180. *Id.* at 284–85.

181. *Id.* at 285.

182. *Id.* at 238, 238–39 n.7 (quotation marks omitted).

183. *Id.* at 285.

184. *Id.* at 244 (citing Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, § 101, § 14(4), 102 Stat. 102, 116 (1988)).

185. *Id.* at 244.

186. *Id.* at 245–46.

to a new statute enacting Pimentel's "grossly disproportionate" test. But, on the other hand, it might also be the case that, just as bureaucrats failed to heed Congress' last amendments to CAPTA, they will ignore the hypothetical new statute as well.

Certainly, amending CAPTA to define child neglect more prudently will do no harm and will probably do some good where CPS employees read the law before acting, or where parents are litigious enough to force CPS to read the law after acting. On the other hand, where CPS employees act first and consult the law later, less litigious parents (or parents who cannot afford to be litigious) may be intimidated into submitting to CPS ideas about proper parenting, even if the law is on the parents' side.¹⁸⁷

2. *Prosecutors and Juries*

Criminal child-neglect laws are even less clear than CAPTA. For example, the Michigan statute criminalizes any activity that places "a child at an unreasonable risk . . . by failure . . . to intervene to eliminate that risk when that person is able to do so."¹⁸⁸ Because anything that a parent does exposes a child to some risk, juries have significant discretion to decide when a risk is "unreasonable." A prosecutor and jury could decide that allowing a child to walk to school creates an "unreasonable risk" of the child being victimized by criminals or could just as easily decide that driving the child to school creates an "unreasonable risk" of the child being attacked by carjackers or injured in a car crash.

As an alternative, Pimentel recommends Illinois' civil child-neglect statute.¹⁸⁹ This statute lists fifteen factors governing child-neglect cases, including, for example, whether the minor's movement was restricted, whether the minor was given the parent's phone number, whether the minor had access to food, and the physical distance between the minor and her parents.¹⁹⁰ As Pimentel points out, this statute gives more guidance to prosecutors and juries than the more vaguely worded child-neglect statutes.¹⁹¹

On the other hand, a test with fifteen factors will rarely yield a clear result: some factors will always support prosecution, while others will always support the defense. For example, suppose a mother allows her ten-year-old daughter to walk alone to school in the morning and, as a result, is arrested and prosecuted for child neglect. Illinois' ninth factor (wheth-

187. Similarly, Pimentel suggests that, because the federal government funds foster care more generously than family reunification, CPS officials have an incentive to place children in foster care. *Id.* at 246. He suggests that such federal funding should be partially redirected towards supporting family reunification. *Id.* at 287. To the extent that CPS excesses involve actual removal rather than mere threats, such reallocation would certainly influence CPS to be less aggressive. *Id.*

188. MICH. COMP. LAWS § 722.622(k)(ii) (2016); see also Pimentel, *supra* note 122, at 975–76 (citing other examples).

189. Pimentel, *supra* note 122, at 992.

190. *Id.* at 992–93 (citing 705 ILL. COMP. STAT. 405/2-3(1)(d) (2016)).

191. *Id.* at 993.

er the minor's movement was restricted)¹⁹² presumably favors the mother. And, since a ten-year-old child is normally capable of knowing her phone number, factor ten (whether the minor was given an adult's phone number)¹⁹³ does as well.¹⁹⁴ On the other hand, factor fourteen (whether the minor was left under the supervision of another adult),¹⁹⁵ as well as factor two (the number of minors left at the location), may favor the prosecution.¹⁹⁶ And, if the minor has already eaten breakfast and expects to eat lunch at school, factor eleven (whether there was food left for the minor) favors the prosecution.¹⁹⁷ Other factors are so ambiguous that their impact is not clear. For example, factor four is "the duration of time in which the minor was left without supervision."¹⁹⁸ Presumably, factor four favors the defense if the walk is two minutes and favors the prosecution if the walk is two hours; however, the parent has no way of knowing whether a ten- or twenty- or thirty-minute walk is too long.

Moreover, juries are unlikely to have particularly good judgment in enforcing multifactor standards. As Pimentel notes, human perception of risk rarely matches actual risks.¹⁹⁹ One reason, which psychologists call "the availability heuristic," is that "people assess the likelihood of an occurrence according to how easily they can recall an example of it."²⁰⁰ Because stories of child abductions are so horrific, people can easily recall them and, thus, assume such events are common; as a result, a prosecutor can easily manipulate a jury into believing that a parent who allows their children any freedom at all is ignoring this risk.²⁰¹ The very rarity of this risk actually ensures that it will be burned into people's memories. If people can put a human face on the risk, they will systematically exaggerate it, while dangers affecting thousands of people (such as car crashes or diabetes) seem more anonymous and, thus, are likely to be overlooked by juries.²⁰² These biases are exacerbated by media coverage; therefore, the regular depiction of horrific crimes against children on television causes Americans to exaggerate the risk of such crimes.²⁰³ By contrast, children who suffer health problems from lack of exercise are unlikely to be dramatically portrayed on television shows.²⁰⁴

Pimentel proposes to remedy these problems by adding additional factors to the Illinois statute. For example, one additional factor might be "the parents' philosophy for teaching children responsibility and self-

192. 705 ILL. COMP. STAT. 405/2-3(1)(d)(9).

193. *Id.* § 405/2-3(1)(d)(10).

194. *See id.* § 405/2-3(1)(d) (listing factors).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See* Pimentel, *supra* note 122, at 983.

200. *Id.*

201. *Id.*

202. *Id.* at 984.

203. *Id.* at 985-86.

204. *See* Bradley S. Greenberg et al., *Portrayals of Overweight and Obese Individuals on Commercial Television*, 93 AM. J. PUB. HEALTH 1342, 1342 (2003).

reliance”²⁰⁵ and another might be cultural parenting practices in a particular family or cultural community.²⁰⁶ He also suggests a jury instruction reminding jurors that “criminal child neglect constitutes more than bad parenting or a lapse of good judgment.”²⁰⁷

These additional factors might encourage prosecutors and jurors to take parental judgment more seriously and, thus, are improvements on the *status quo*. On the other hand, an eighteen or twenty-factor test makes prosecutor and juror discretion virtually unlimited and, thus, will only marginally increase the likelihood of wise results.²⁰⁸ Even if a parent’s risk of prosecution is reduced by these changes, the risk of prosecution is still substantial enough that a litigation-averse parent will have her children driven everywhere.

3. *The Case for Bright-Line Rules*

As suggested above, both children and society as a whole may, on balance, be safer if they are able to walk outside without fear of CPS or police harassment because increased walking will reduce the public-health risks of air pollution, car crashes, and lack of exercise. It therefore seems reasonable to conclude that the question is close enough that parents should be given more discretion.

If this assumption is correct, and if (as suggested above) vague tests oriented towards reasonableness are inadequate to protect parents from prosecutors and juries, the most effective way to protect parents and children will be with a bright-line test. Such a bright-line test is now part of federal law. In 2015, Congress enacted Section 8542(a) of the Every Student Succeeds Act, which states that:

nothing in this Act shall authorize the Secretary to, or shall be construed to (1) prohibit a child from traveling to and from school on foot or by car, bus, or bike when the parents of the child have given permission; or (2) expose parents to civil or criminal charges for allowing their child to responsibly and safely travel to and from school by a means the parents believe is age appropriate.²⁰⁹

This law, by its terms, is not likely to eliminate the criminalization of walking. It only limits the federal government, and it only privileges walking to school (as opposed to walking to other destinations).

205. Pimental, *supra* note 122, at 995.

206. *Id.* at 995–96.

207. *Id.* at 996.

208. Similarly, Pimentel suggests that parties in criminal child-neglect proceedings be given the opportunity to present expert testimony on the actual likelihood of a given risk and on the possible harms from overprotective parenting, thus mitigating the juror biases discussed above. *Id.* at 996–97. This proposal has the same advantages and disadvantages as his proposed jury instructions: on the one hand, it will remind jurors of reasons to protect parents’ judgments, but, on the other hand, jurors will still be balancing a multitude of considerations and, thus, will have unbridled discretion to convict any parent, anywhere, anytime of child neglect.

209. Every Student Succeeds Act, Pub. L. No. 114–95, § 8542, 129 Stat. 1802, 2119 (2015).

State governments, however, can pass legislation with similar language. For example, a state law could state that “no state or local government entity shall (1) prohibit a child old enough to attend kindergarten from traveling on foot or by bus or bike when the parents of the child have given permission; or (2) expose parents to civil or criminal charges for allowing their child to do so when the parents believe that such travel is age appropriate.”²¹⁰

This sort of statute has precedent. Oregon law limits the crime of child neglect due to inadequate supervision to situations in which the child is younger than ten.²¹¹ Children younger than ten are certainly intelligent enough to walk to school; indeed, some of the most highly publicized incidents of government harassment of unsupervised children have involved children ages six to ten.²¹² Thus, it seems reasonable that the law should protect the rights of any child old enough to attend school (usually around five or six). On the other hand, a two-year-old child might not know how to avoid getting lost or how to avoid speeding automobiles.

Admittedly, a bright-line rule fails to protect the least mature children (and less mature parents) from themselves.²¹³ But, if no law can reach the right outcome for every single family, it seems to me that states should err on the side of trusting the discretion of parents (who presumably know more about their children and have more of an interest in protecting their children than a police officer, prosecutor, or juror). In other words, when in doubt, err on the side of liberty.²¹⁴

IV. A CONFLICT OF VALUES

Ultimately, the question of when (if ever) to prosecute either jaywalkers or the parents of a solitary child pedestrian is not just about objective risk. Because there is no obvious way of knowing the extent to which such prosecutions reduce walking, there is no way of quantifying their social harms.

To some extent, the debate involves a conflict of values. The value of negative liberty (that is, minimizing government interference in individuals' lives)²¹⁵ justifies allowing people to walk as much as they like. The value of public health (whether defined as reducing air pollution or

210. See MICHAEL LEWYN, *GOVERNMENT INTERVENTION AND SUBURBAN SPRAWL: THE CASE FOR MARKET URBANISM* 147 (2017) (suggesting the same language be adopted by state governments for legislation similar to the federal Every Student Succeeds Act).

211. OR. REV. STAT. § 163.545(1) (2016). This law does not mean that anyone leaving a nine-year-old alone is automatically guilty of child neglect; rather, it provides that the law is violated if “with criminal negligence, the [parent or guardian] leaves the child unattended . . . for such period of time as may be likely to endanger the health or welfare of such child.”

212. See *supra* text accompanying notes 126–39.

213. See Hurley, *supra* note 143 (making argument).

214. A paternalist could argue that the law should instead err on the side of safety. But, as noted above, health and safety considerations support both sides of this argument. See *supra* Section III.B.

215. Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA PHIL. (Aug. 2, 2016), <http://plato.stanford.edu/entries/liberty-positive-negative/>.

reducing health problems from lack of exercise)²¹⁶ also justifies encouraging people to walk more and drive less. And the value of social equity favors narrowing legal principles that disproportionately harm low-income walkers and their parents.²¹⁷

On the other hand, the *status quo* can be justified by the idea of paternalism—the idea that people should be protected from their own foolishness and that the State knows better than the individual.²¹⁸ Although this idea is not dominant in American society, it still does govern some areas of the law (for example, mandatory seat-belt and helmet laws,²¹⁹ prohibition of illegal drugs,²²⁰ and drinking ages for the consumption of alcohol).²²¹ A paternalist strategy makes little sense, however, where—as in the case of anti-walking public policies—that strategy itself harms public health.

V. CONCLUSION

As American society has become ever more dependent upon automobiles, legislators, police, and prosecutors (many of whom may drive to most destinations) have begun to treat walking as exotic and dangerous, rather than as a normal part of American life. As a result, they have enforced legal policies that penalize walking, which means that pedestrians must walk in fear of a variety of legal punishments, as well as of being hit by speeding automobiles. Two such policies are anti-jaywalking laws and prosecutions of parents who allow their children to walk to schools, parks, and other destinations.

To the extent that these policies affect Americans' behavior, they may actually damage human health: as the law turns pedestrians into drivers, it ensures that these drivers suffer from lack of exercise while they inflict car crashes and air pollution upon the nation as a whole. Thus, it is time for the law to give Americans the freedom to walk again. In particular, this means that jaywalking laws should be repealed and that children should be able to walk freely.

216. *Public Health Policy for Outdoor Air Quality*, WORLD HEALTH ORG., http://www.who.int/phe/health_topics/outdoorair/databases/public_health_policy/en/ (last visited Mar. 14, 2017); Steven Reinberg, *Lack of Exercise More Deadly than Obesity: Study*, WEBMD (Jan. 14, 2015), <http://www.webmd.com/fitness-exercise/news/20150114/lack-of-exercise-more-deadly-than-obesity-study-suggests#1>.

217. See Hurley, *supra* note 143.

218. *Paternalism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

219. *Primary Enforcement of Seat Belt Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/motorvehiclesafety/calculator/factsheet/seatbelt.html> (last visited Mar. 14, 2017).

220. 21 U.S.C. § 841(a) (2012).

221. *Alcohol Laws by State*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0388-alcohol-laws-state> (last visited Mar. 14, 2017).