

Independent, principled state policy fostering limited and responsible government, free enterprise, and a robust civil society.

November 2020

# America's Legal Tradition of Allowing Risk-Taking, Even in a Pandemic

Mike Davis

1889 Recently published policy recommendations for a more appropriate Covid-19 response.<sup>1</sup> That paper makes the case for voluntary mask and social distancing rules from the perspective of the mechanistic benefits of N95 respirators, as well as the mental, physical, and financial toll continued lockdowns and social-distancing requirements are taking on all Americans. This paper follows up on those proposals, demonstrating how they fit into the long American legal tradition of allowing individuals to weigh risk and reward for themselves, and voluntarily take on the risks they deem worthwhile. It will also examine where some of Oklahoma's largest cities have departed from that tradition, serving as examples of poor policy adopted across the country. Instead of allowing variation in behavior based on informed individual choices, they have naively attempted to banish all risk, imposing the impossible risk tolerance of the most vulnerable, fearful, and risk-averse on everyone, to the detriment of us all.

## America's Tradition of Assumed Risk

Life is full of risk. Every day could be a person's last. And every day, billions of people worldwide do things that increase the odds of their own death. Very few people live even the occasional day where they fail to undertake some action less safe than the safest course. Even living homebound carries risk. Too little exercise, too little social interaction, even too little exposure to germs, can create health problems. Without risk, human flourishing is impossible. Every economic transaction involves risk.

The legal academy has long accepted this view, and made room in the law for risk. In particular, there is something called "Assumption of Risk" - that is, an individual acts in ways he knows to be risky, but chooses to act anyway. In general, when someone knowingly takes a risk, they also are held responsible for the consequences. This is why warning signs are so often used. If you walk through your neighbor's back yard and his dog bites you, you might be able to sue him. If he has a sign up telling you to be aware of his dog, you are unlikely to prevail, unless the sign failed to adequately warn you of the dangers (for instance, if his dog had been trained to be especially vicious).

---

**Life is full of risk. Every day could be a person's last. And every day, billions of people worldwide do things that increase the odds of their own death.**

---

The point is to allow people to live their lives without having to eliminate every single risk. Otherwise we may forget to live our lives for all the risk management we are forced to undertake. This is an apt description for how many people have lived since early March.

## Legal Standards

Assumption of risk arises from the common law of torts (damages resulting in compensation) and is a response to the way life really works. People have agency (independent ability to make responsible decisions), and have to live with the consequences - known and unknown - of their choices. That is to say, the law recognizes and reflects the realities of life. Refusal to do so would be an affront to the human dignity of making consequential choices for oneself. Risk assumption is a recognition of this dignity to choose for oneself. It is also a recognition that everyone is made better off when there is some margin and allowance for danger in society. If everyone were held strictly liable for every single harm to which they contributed, we would still be in the Stone Age. Every innovation involves some measure of risk, from Benjamin Franklin touching a key charged by lightning to Madame Curie discovering radium.

Assumption of risk has two elements: knowledge of the

*Mike Davis is Research Fellow at the 1889 Institute.*

risk, and voluntary action. In a given situation, an actor must have knowledge of the risk, and voluntarily act in spite of that knowledge, in order to be judged to *assume the risk*. Knowledge requires that the person actually understands the risk he is undertaking. It is not the same as a “reasonable person standard,” which asks whether an “ordinary person” *would* understand the risk. Actual knowledge requires proof that the actor did, in fact, know the risk they were taking - a trained professional can assume a risk even when an “ordinary person” would not understand enough about the risk to assume it. If a homeowner cutting down tree branches with a chainsaw slips and injures his foot with the saw, he assumed that risk of injury. Anyone could see that something designed to chew through wood could pose a danger to human feet. On the other hand, if a defect in the chainsaw caused it to explode, the homeowner would be able to recover compensation for damages from the chainsaw maker. This is because the homeowner did not know the dangers posed by the defect.

The other element is voluntary action. This means that the risk taker was not under duress when they decided to take the risk. Someone forced at gunpoint to chainsaw down tree branches does not assume the risk of injury, though in that scenario the gunman, not the chainsaw manufacturer, would bear ultimate responsibility.

So how does COVID-19 fit into this *assumption of risk* framework? It is unthinkable that anyone old enough to go outside unsupervised would be unaware that there is a risk of catching COVID-19. The sheer amount of news coverage, signage on businesses, and word of mouth ensures that everyone with a pulse knows there is some risk of being infected with COVID-19. That many overestimate both the risk of contracting the disease and the risk of serious complications if they do, is immaterial. The public at large knows there is risk of catching COVID-19.

---

## Lifting mask requirements and social distancing mandates is not the same as banning social distancing and masks.

---

The voluntary aspect of risk assumption is also satisfied in a world without mask and social distancing mandates. Lifting mask requirements and social distancing mandates is not the same as banning social distancing and masks. Instead of being held to the standard of the most fearful and risk-averse, everyone is free to choose their own level of risk in a mandate-free world. With the option of having necessities delivered and working from home, people can choose to remain alone in their own home for months on end. But even without such services, ventilated N95 respirators, which protect the wearer from breathing in the virus, are readily available. Stores and governments are currently handing them out for free. Even if people were once again required to pay the reasonable costs of these masks, it would in no way rise to the level of coercive influence. Each person would be able to assume an appropriate level of risk based on their health profile and personal risk aversion.

An assumption of risk, in line with historical legal precedents, points to relaxing emergency orders, particularly lifting mask

mandates, social distancing mandates, and capacity restrictions. This result is not only wise, it is also just.

## Local Governments’ Improper Responses

Except for early in the COVID epidemic, the State of Oklahoma has largely played an information and recommendation role. It maintains and publishes daily data about the number of cases in each county, offers guidelines and best practices, and hosts a directory of testing locations. This is all well within the proper role of a government, and comports with an assumption of risk standard. So where has Oklahoma gone wrong?

---

## An assessment of Oklahoma’s six largest cities reveals that only one is exercising enough restraint to allow individuals to properly weigh costs and benefits.

---

The Oklahoma City school district serves as an example of bad policy. In an extreme example of social distancing, they essentially closed in March in the name of isolating kids and teachers from each other. In-person instruction has yet to resume, and when it does, no more than half of the students will be allowed to attend on a given day. This requires families with parents who both work to find and pay for daycare alternatives even with the resumption of in-person instruction, all due to a misguided emphasis on a specific form of social distancing. Yet, young people are largely unaffected by the disease, and with N95 respirators, vulnerable teachers would be, also. If anyone is too concerned to work or matriculate in a normal manner, even while taking precautions, their right not to attend should be respected, but their concerns should not determine policy for everyone, particularly given the extremely low risks posed.

An assessment of Oklahoma’s six largest cities reveals that only one is exercising enough restraint to allow individuals to properly weigh costs and benefits. The others overreach to varying degrees. Broken Arrow has no mask mandate or social distancing ordinances in place, wisely leaving its citizens free to determine their own best practices. Oklahoma City, Tulsa, Edmond, Norman, and Lawton each have mask mandates in place. In an effort to force social distancing, Tulsa and Oklahoma City have capped maximum occupancy of indoor public places to a percentage of the pre-COVID occupancy allowed by the fire marshal. Norman also caps capacity below normal levels when The University of Oklahoma has home football games. Consequently, businesses struggle to recover from the initial lockdowns (some never will) as they are hamstrung by one-size fits all ordinances based on the most fearful residents of each city.<sup>2</sup>

Churches are specifically mentioned in the Edmond and Oklahoma City ordinances - with both cities requiring social distancing in the form of staggered seating. This is effectively another limit on capacity, which may violate the Oklahoma Religious Freedom Act.<sup>3</sup>

The ordinances in Oklahoma City and Edmond could be read to apply even outdoors, if a sidewalk has two-way traffic, since

“social distancing” cannot be maintained as individuals pass one another almost shoulder-to-shoulder. Norman explicitly applies its mandate outdoors when social distancing cannot be maintained. The Norman City Council also claims the power to reach into private residences and mandate masks in private homes, if more than 25 people are present.

Penalties for violation of these statutes range from a verbal or written warning for first offenses, to fines up to \$500, mandatory court appearances, and misdemeanor violations for repeat offenders. Some even reference other statutes that carry jail time for violation. While these penalties may be in line with such petty crimes as jaywalking, the bans they attach to benign behaviors have no place in American law. Most Americans strive to follow the law, even if they can afford the penalty attached to it, simply because it is the law. Continuing to erode an already-decimated economy - that is to say, destroying the livelihood of thousands of Oklahomans - is not only inadvisable, it is immoral. Cities should follow the state government’s lead and allow citizens to assess and respond to risk for themselves.

## Conclusion

Clearly, many of Oklahoma’s local governments have overstepped, as others have across the nation. In addition to being ineffective (because the masks being mandated are ineffective), imposing mask mandates on a population of free, thinking people forces them to a standard of behavior that would only be adopted by the most risk-averse among us. This does not

---

**In addition to being ineffective, imposing mask mandates on a population of free, thinking people forces them to a standard of behavior that would only be adopted by the most risk-averse among us.**

---

comport with the American legal tradition, with common sense, or with what could in any way be considered best for the state as a whole.

Mandatory social distancing imposes significant social, spiritual, emotional, and economic costs on society. Rather than dictating social distancing for the low-risk majority, the vulnerable and risk averse should be counseled to stay home or wear N95 respirators, while those willing to take the risk carry on normally.

Social distancing mandates should be lifted across the state. In their stead, governments should educate the public regarding N95 respirators and who is most at risk from serious complications related to COVID-19. This would allow free individuals to assess and choose the response appropriate to their circumstances, including constant mask wearing or self-isolation.

## End Notes

---



- 1 Steve Trost and Byron Schломach, Make COVID-Related Restrictions Voluntary, 1889 Institute Policy Prescription, November 2020, <https://1889institute.org/make-social-distancing-restrictions-voluntary>
- 2 Broken Arrow Covid-19 information available at: <https://www.brokenarrowok.gov/our-city/resources/coronavirus-information>.  
Edmond ordinances available at: <http://edmondok.com/1568/COVID-19-Coronavirus-Information>.  
Lawton ordinances available at: <https://www.lawtonok.gov/news/covid-19-information-preparedness>.  
Norman ordinances available at: <https://www.normanok.gov/norman-coronavirus-updates>.  
Oklahoma City ordinances available at: <https://www.okc.gov/residents/prepare-okc/know-what-to-do/covid-19-coronavirus-in-okc/covid-19-emergency-restrictions-in-oklahoma-city>.  
Tulsa ordinances available at: <https://www.cityoftulsa.org/covid-19>.
- 3 51 OK Stat §51-253 (2020). <https://www.oscn.net/applications/oscn/deliverdocument.asp?id=104672>.