

Masking Up: A COVID-19 Face-off between Anti-Mask Laws and Mandatory Mask Orders for Black Americans

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Mandatory PPE orders during COVID-19 have forced Black Americans to weigh the dangers of disease against the dangers of selective enforcement and racial profiling. In states with civil rights-era anti-mask laws, both wearing and eschewing masks could lead to police interaction. This Essay argues that anti-mask laws were only superficially intended to protect Black Americans, have continued to harm minorities during COVID-19, and should be repealed, as some states have already begun to do. It motivates this policy by empirically showing the ineffectiveness of anti-mask laws and the statistically significant relationships between PPE usage patterns and race. A revisionist legal history reveals anti-mask laws' racist underpinnings, further motivating their repeal.

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INTRODUCTION

“[A] concern to oppose the Klan, to set it aside as particularly evil, can co-exist with a distancing of the more difficultly defined evils of institutional racism and white supremacy.”¹

It is 1919 and the Spanish influenza has battered America for a year. A group of citizens, calling itself the Anti-Mask League, petitions for San Francisco to repeal its mandatory mask order.² Enacted and then removed when infections started dwindling, the mask order was enforced afresh by the city during its second wave of infections.³ The Anti-Mask League calls into question the validity of scientific evidence on masks’ efficacy and sounds an alarm over civil liberties being quashed.⁴ Under political pressure from the Anti-Mask

1. Robert Kahn, *The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers*, 28 J.L. & POL’Y 71, 84 (2019).

2. See *San Francisco, California and the 1918-1919 Influenza Epidemic*, UNIV. MICH. CTR. HIST. MED.: INFLUENZA ENCYCLOPEDIA (last visited Apr. 19, 2020), <https://www.influenzaarchive.org/cities/city-sanfrancisco.html#> [https://perma.cc/WL4P-JNDY].

3. See Katie Canales, *Photos Show How San Francisco Emerged from a Lockdown too Soon During the 1918 Spanish Flu Pandemic, Leading to an Even Deadlier 2nd Wave that Rampaged through the City*, BUS. INSIDER (Apr. 21, 2020), <https://www.businessinsider.com/what-san-francisco-can-learn-spanish-flu-pandemic-coronavirus-1918> [https://perma.cc/3QFG-TNSJ].

4. See SAMUEL K. COHN, JR., *EPIDEMICS: HATE AND COMPASSION FROM THE PLAGUE OF ATHENS TO AIDS 440* (Oxford Univ. Press, 2018).

League's powerful connections,⁵ the City of San Francisco lifts the requirement.⁶ All throughout, Black Americans are dying of the Spanish influenza at disproportionate rates.⁷ San Franciscans have fresh in their memories, from the plague scare of 1900, the attempt to quarantine those of Chinese ancestry—an act of xenophobia so blatant it was struck down as lacking even a plausible public health benefit.⁸

The social history of the COVID-19 crisis is startling in its similarity to this earlier disaster. In the United States, COVID-19 has claimed a disproportionate number of Black lives, owing to systemic racism in housing, health care, and all other aspects of society.⁹ Just as in the Spanish influenza and other past pandemics, the powerful are scapegoating minorities.¹⁰ Nearly identical dynamics have returned over masks, with some refusing to comply with personal protective equipment (PPE) requirements in the name of civil liberties and partisanship.¹¹

In the intervening years, however, several states have passed anti-mask laws that are twisting and worsening the experience for minorities—particularly Black Americans. Anti-mask laws ban the wearing of masks in public.¹² Popularly understood to prevent Klan activity, these laws are often vague, with a history of selective enforcement.¹³ They also clash with the exhortations to wear personal protective equipment to prevent the spread of COVID-19, which

5. See Canales, *supra* note 3.

6. See *id.*

7. See Helene Økland and Svenn-Erik Mamelund, *Race and 1918 Influenza Pandemic in the United States: A Review of the Literature*, 16 INT'L J. ENVTL. RES. & PUB. HEALTH 2487 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6678782/> [<https://perma.cc/263E-S3ET>].

8. See *Wong Wai v. Williamson*, 103 F. 384 (N.D. Cal. 1900).

9. See, e.g., ReNika Moore, *If COVID-19 Doesn't Discriminate, Then Why Are Black People Dying at Higher Rates?*, ACLU (Apr. 8, 2020), <https://www.aclu.org/news/racial-justice/if-covid-19-doesnt-discriminate-then-why-are-black-people-dying-at-higher-rates> [<https://perma.cc/S7H3-WQV5>].

10. See, e.g., Lawrence R. Poos, *Lessons from Past Pandemics: Disinformation, Scapegoating, and Social Distancing*, BROOKINGS INST. (Mar. 16, 2020), <https://www.brookings.edu/blog/techtank/2020/03/16/lessons-from-past-pandemics-disinformation-scapegoating-and-social-distancing/> [<https://perma.cc/ZYN4-2ZNT>].

11. See, e.g., Sarah Hansen, *Mask Wars: As Mandates Grow—And Coronavirus Cases Surge—Some Conservatives Push Back*, FORBES (Jun. 19, 2020), <https://www.forbes.com/sites/sarahhansen/2020/06/19/mask-wars-as-mandates-grow-and-coronavirus-cases-surge-some-conservatives-push-back/#70e834b01aa9> [<https://perma.cc/NNP6-MHSD>].

12. These are defined in much greater detail in Section I.C and Appendix A.

13. See, e.g., Khan *supra* note 1, at 74 (referring to this as a popular notion and discussing evidence against it); *U.S. Current Trend: Anti-Mask Laws, COVID-19, and the First Amendment*, INT'L NOT-FOR-PROFIT L. CTR. (April 2020), <https://www.icnl.org/post/analysis/anti-mask-laws-covid-19-and-the-first-amendment> [<https://perma.cc/FY62-5MBX>] (stating that the face-covering laws were “enacted to target the Ku Klux Klan’s use of masks and hoods to conceal their identity”); Zack Budryk, *Civil Rights-Era Laws Against Masks Clash with Federal Coronavirus Recommendations*, THE HILL (Apr. 21, 2020), <https://thehill.com/homenews/state-watch/493897-civil-rights-era-laws-against-masks-clash-with-federal-coronavirus-recommendations> [<https://perma.cc/G5TA-ZVP2>] (referring to the bans as “a way to crack down on the Ku Klux Klan”). *federal-coronavirus-recommendations* (referring to the bans as “a way to crack down on the Klan”).

by summer of 2020 was encouraged by all states and required by many.¹⁴ States that required mask usage in public passed mandatory mask orders, mostly via executive order but, in some cases, by public health order.¹⁵ Cases began surfacing of police officers selectively targeting Black males for violating both mandatory mask orders *and* anti-mask laws. Meanwhile, White Americans went mask-free in defense of their civil liberties or shopped for groceries in KKK regalia,¹⁶ generally without fearing police action.¹⁷ Moreover, the Centers for Disease Control (CDC)'s encouragement to fashion homemade masks from bandanas or T-shirts glibly ignored the risk of racial profiling from covering one's face.¹⁸ Eventually, urged by Black politicians and citizens, some states suspended their anti-mask laws.¹⁹

This Essay argues that state anti-mask laws have never actually protected Black Americans, were only superficially intended to protect Black Americans, and have continued to make Black American lives harder during the COVID-19 pandemic. It attempts to document the frightening and confusing experience of Black Americans, who have been placed in a catch-22 with potentially fatal ramifications both of masking up and not. In the style of "thick description,"²⁰ it considers the historical-legal context now contributing to this lived experience, the motivations and realities of Black people living through this crisis, and the ways in which others, especially other Black people, understand these behaviors. This Essay analyzes evidence for a revisionist legal history of anti-mask laws –

14. See *Which States Are Reopening? A State-By-State Guide*, NPR, <https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus> [<https://perma.cc/6G6J-DFYX>] (last accessed July 9, 2020).

15. *Id.*

16. See, e.g., Rhea Mahbubani, *Colorado Police are Looking for a Man Seen at a Grocery Store Wearing a KKK Hood with a Swastika*, BUS. INSIDER (May 15, 2020), <https://www.businessinsider.com/man-colorado-grocery-store-wearing-kkk-hood-swastika-2020-5> [<https://perma.cc/E4R4-KZA3>].

17. See *id.*; see also Hollie Silverman & Sarah Moon, *Man Who Wore What Appeared to Be a KKK White Hood to the Grocery Store Won't Be Charged with a Crime*, CNN (May 12, 2020), <https://www.cnn.com/2020/05/12/us/san-diego-kkk-hood-no-charges/index.html> [<https://perma.cc/8Y3N-LSE4>].

18. See *Considerations for Wearing Cloth Face Coverings*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [<https://perma.cc/QUH4-3LNR>] (last accessed July 9, 2020).

19. See, e.g., Zack Budryk, *Georgia urged to suspend Jim Crow-era mask law*, THE HILL (Apr. 13, 2020), <https://thehill.com/homenews/state-watch/492516-georgia-urged-to-suspend-jim-crow-era-mask-law> [<https://perma.cc/93S4-M8ZB>]; Travis Fain, *NC legislature votes to suspend state's anti-mask rule indefinitely*, WRAL (Jul. 10, 2020), https://www.cbs46.com/news/georgia-governor-suspends-state-anti-mask-law-after-cbs46-raises-questions/article_932076be-7baa-11ea-be1b-47eeab47805b.html [<https://perma.cc/QC65-LYY4>]; Attorney General James Applauds Repeal of Law Criminalizing Group Mask Use in Public, NY ATTORNEY GENERAL (May 8, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-applauds-repeal-law-criminalizing-group-mask-use-public> [<https://perma.cc/VN9T-397W>].

20. See Clifford Geertz, *Thick Description: Towards an Interpretive Theory of Culture*, in TURNING POINTS IN QUALITATIVE RESEARCH: TYING KNOTS IN A HANDKERCHIEF 143, 144-6 (Norman Denzin & Yvonna Lincoln eds., 2003).

namely, that the real motivation for state anti-mask laws was to make Klan-affiliated southern governors appear moderate as they advocated against school segregation. It presents original empirical data showing the relationships between race, the decision to wear a mask, the type of mask to wear, and associated fears from masking up. Finally, it calls for the suspension or repeal of anti-mask laws and explores policy alternatives.

I.

FACING THE PROBLEM: A TIMELINE OF MANDATORY MASK ORDERS DURING COVID-19

In March 2020, the CDC's website still read that masks would provide little to no benefit to the average citizen.²¹ As evidence accumulated to the contrary, officials' advice swiftly shifted. The CDC began officially recommending face masks as of April 3, particularly in public settings like grocery stores or public transit that did not readily allow for social distancing.²² States rushed to corroborate this advice with their own mandatory PPE orders. The first state to adopt mandatory face mask laws for all in public was New Jersey, in early April, followed within a week by Connecticut, Hawaii, Maryland, New York, and Pennsylvania. By June, 13 states had passed mandatory PPE orders for people in public settings²³ and 38 had passed mandatory PPE orders for employees while at work, while many other localities had gone beyond their state's restrictions.²⁴

As public health officials became wise to masks' importance, another dilemma loomed. Outfitting more citizens in masks would prevent disease transmission, but, if not properly managed, could hasten another of the coronavirus's catastrophes: the collapse of the health care system. Even while official messaging still compared COVID-19 to the flu, Americans began to recognize the danger of a spike in cases that could outstrip medical equipment and hospital space. Still, the early days of the pandemic swirled with misinformation and calls to stockpile products, among them personal protective equipment. As a result of individuals stocking up on masks, March and April saw a mask shortage for health care workers.²⁵

As such, the CDC revised its guidance, encouraging Americans to leave medical-grade masks for health care workers. On its website, it wrote, "The cloth face coverings recommended are not surgical masks or N-95 respirators. Those are critical supplies that must continue to be reserved for healthcare workers and

21. See *Considerations for Wearing Cloth Face Coverings*, *supra* note 18.

22. See *id.*

23. See *Which States are Reopening?*, *supra* note 14.

24. See Litler Mendelson, *Facing Your Face Mask Duties – A List of Statewide Orders*, LITTLER (July 13, 2020), <https://www.littler.com/publication-press/publication/facing-your-face-mask-duties-list-statewide-orders> [<https://perma.cc/V2UB-TSH2>].

25. See Olga Khazan, *Why We're Running Out of Masks*, THE ATLANTIC (Apr. 10, 2020), <https://www.theatlantic.com/health/archive/2020/04/why-were-running>

other medical first responders.”²⁶ Elsewhere on its website, it published pictorial guides to fashioning homemade masks out of bandanas or T-shirts, complete with both sewn and no-sew options.²⁷ States, too, soon pushed for a cultural shift to homemade masks.²⁸

Meanwhile, Black Americans were already disproportionately feeling the harms of COVID-19. Systemic racism multiplied chances for contracting COVID-19 at seemingly every turn and worsened outcomes for those with the disease. Black employees were less likely to have jobs that mobilized for remote work, and instead were disproportionately called into essential jobs at grocery stores or as home health assistants.²⁹ The absence of benefits or sick leave at many of these jobs incentivized some to continue attending work, even in these dangerous conditions, to stave off eviction or starvation.³⁰ Black people were also more likely to face unstable housing situations or live in communities with poor access to health care, making it harder to effectively self-isolate or access treatment.³¹ Moreover, they faced the risk of not being taken seriously by doctors when they presented with symptoms.³² By July, the age-adjusted mortality rate for Blacks was 3.8 times higher than White counterparts, and the actual mortality rate was 2.3 times higher, meaning that Blacks were dying not just more but also at younger ages.³³

The following sections of this Article focus on one aspect of the pandemic, mask usage, and how systemic racism continues to skew safety by pitting orders requiring personal protective equipment against laws prohibiting mask usage in public, and by selectively enforcing both. Specifically, it describes the catch-22

26. See *Considerations for Wearing Cloth Face Coverings*, *supra* note 16.

27. See *How to Make Cloth Face Coverings*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-make-cloth-face-covering.html> (last accessed July 9, 2020).

28. See *Considerations for Wearing Cloth Face Coverings*, *supra* note 18.

29. See, e.g., Moore, *supra* note 9.

30. See *id.*

31. See Jennifer Abbasi, *Taking a Closer Look at COVID-19, Health Inequities, and Racism*, 324 J. AM. MED. ASSN. 427 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2767948>; Darrell M. Gray II et al, *COVID-19 and the Other Pandemic: Populations Made Vulnerable by Systemic Inequity*, 17 NAT. REV. GASTROENTEROL. HEPATOL. 520 (2020), <https://www.nature.com/articles/s41575-020-0330-8#citeas>.

32. See, e.g., Michael Menconi, *COVID-19 Ventilator Allocation Protocols are Poised to Disadvantage African Americans*, 6 VOICES IN BIOETHICS 1 (2020); Paula Johnson, *A 30-Year-Old Teacher's Covid-19 Death Tells Us Volumes*, CNN (May 31, 2020), <https://www.cnn.com/2020/05/31/opinions/higher-education-coronavirus-opportunity-for-a-more-just-world-johnson/index.html>; Sheila Butler, *My Sister Died Needlessly of COVID-19 — and Bias*, SALON (Oct. 12, 2020), <https://www.salon.com/2020/10/12/my-sister-died-needlessly-of-covid-19-and-bias/> [<https://perma.cc/BD2T-BCTG>].

33. See *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RESEARCH LAB (last updated Oct. 15, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/X757-3KAX>]; Akilah Johnson & Talia Buford, *Early Data Shows African Americans Have Contracted and Died of Coronavirus at an Alarming Rate*, PROPUBLICA (Apr. 3, 2020), <https://www.propublica.org/article/early-data-shows-african-americans-have-contracted-and-died-of-coronavirus-at-an-alarming-rate> [<https://perma.cc/E8L2-HFV8>]; Moore, *supra* note 9.

faced by many Black Americans during the pandemic: wear a mask and risk police interactions—either for violating anti-mask orders or as a result of racial profiling—or opt not to wear a mask, and risk either police interaction for violating a mandatory PPE order or health harms from COVID-19. This outcome is even more disturbing with an appreciation of state anti-mask laws’ history. Counter to beliefs that these laws were enacted to hinder the Ku Klux Klan, they were actually intended to paint the South as progressive and forestall the school segregation movement. Understanding state anti-mask laws’ racist history and spotty statutory construction motivates policy proposals to suspend or remove them altogether.

A. *State Anti-Mask Laws: A Revisionist Legal History*

“It is with reluctance that I refer to these deplorable things of the past, which ought to be forgotten. But I am constrained to be frank. . . .”³⁴ So wrote Chief Justice O’Neill in 1926, reviewing the actions of the Ku Klux Klan that had prompted Louisiana’s anti-mask laws. Yet the motivation for these laws was nowhere near past. The occasion prompting Chief Justice O’Neill’s reflection was a murder trial in which five of the jury members were themselves sworn Klansmen.³⁵

Hindsight reveals how wrong Chief Justice O’Neill was in believing that “deplorable things” were long past; the same hindsight will someday apply to people who call contemporary society “post-racial.”³⁶ Nevertheless, a persistent and reductive myth exists around the formation of anti-mask statutes. Several modern sources, including trustworthy legal and academic institutions, claim that states enacted anti-mask statutes between the 1920s and 1960s in direct response to Klan terrorism.³⁷ This story is both chronologically and experientially impoverished.

34. *State v. Dunn*, 161 La. 532, 602-03, 109 So. 56, 82 (1926) (O’Neill, C.J., dissenting) (reviewing activities of Ku Klux Klan in Louisiana which prompted enactment of anti-mask statute).

35. *See id.* Because of the Klan’s furtive organizational practices and likely financial sponsorship of the prosecutor, O’Neill argued to overturn the jurors’ qualification. Nevertheless, the verdict was sustained over Chief Justice O’Neill’s dissent because the jurors offered voir dire promising their membership would not corrupt a fair and impartial judgment. *See also* Robert Kahn, *supra* note 1, at n.18 (discussing *State v. Dunn*, including the same quote from O’Neill’s dissent).

36. *See, e.g.*, Ta-Nehisi Coates, *There Is No Post-Racial America*, THE ATLANTIC (July/August 2015), <https://www.theatlantic.com/magazine/archive/2015/07/post-racial-society-distant-dream/395255/> [<https://perma.cc/CY37-JRCS>].

37. *See, e.g.*, Budryk, *supra* note 19; *Unmasking the Klan*, SOUTHERN POVERTY L. CTR. INTELLIGENCE REP. (September 1999), <https://www.splcenter.org/fighting-hate/intelligence-report/1999/unmasking-klan> [<https://perma.cc/3TDY-8F7F>]; Herb Hallas, *New York’s Anti-Mask Law and Civil Unrest*, ADIRONDACK ALMANACK (October 2013), <https://www.adirondackalmanack.com/2013/10/new-yorks-anti-mask-law-civil-unrest.html> [<https://perma.cc/72JZ-RBMY>]; Timothy Cuffman, *The Inexorable Anti-Mask Movement*, COL. J. TRANSNAT’L L. BLOG, <http://blogs2.law.columbia.edu/jtl/the-inexorable-anti-mask-movement/> [<https://perma.cc/S92P-BAX2>] (last accessed July 9, 2020).

State responses to the worst era of the Klan's physical terrorism, during Reconstruction, were flailing. It took a federal statute, the Enforcement Act of 1870, to gain ground over this violence. The Enforcement Act introduced anti-mask language; due at first to this language and later to changes in Klan activity, racial terror lynchings slowly began to decline.³⁸ It was not until the school integration movement of the mid-to-late 1900s that most governors passed state anti-mask statutes, so as to appear moderate on racial issues and preserve a segregated South.³⁹

B. *State Anti-Mask Laws Have Never Protected Black Americans*

Throughout the Reconstruction era, new Republican governments were "helpless against"⁴⁰ the Klan.⁴¹ Southern mobs killed at least 530 individuals, of whom 400 were Black, between 1830 and 1860; the killings of Black people featured particularly torturous details.⁴² Even when officers managed to catch the perpetrators, they often failed to indict or convict them because of the jury's sympathy or fear.⁴³ Desperate, some Radical Republicans went so far as to permit the hunting and shooting of masked men.⁴⁴

Congress's Enforcement Act of 1870 responded to states' failures to control the Ku Klux Klan.⁴⁵ It enabled federal courts to review civil rights violations, meaning that the aggrieved no longer had to bring their claims to a jury of Klan sympathizers.⁴⁶ In Section 6, the Enforcement Act of 1870 made it a felony for

38. See *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE 17 (2020), <https://lynchinginamerica.eji.org/report/> [<https://perma.cc/2QED-4LPN>].

39. Note that this pattern of enacting redundant state statutes to repudiate the federal government and/or make a symbolic but inert statement is not unique to state anti-mask laws. The Equal Justice Initiative describes how, after Congress began considering anti-lynching legislation, six southern states hurriedly enacted their own, with similar language, but did not enforce their new anti-lynching laws. The Equal Justice Initiative concludes that the states passed these laws to show that the federal laws were not necessary (and thus prevent federal intrusion from actually stopping the lynchings), but had no intention of upholding these laws. See *id.*; see also Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75, 87 (2005); MANFRED BERG, *POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA* 154 (2011); CHRISTOPHER WALDREP, ED., *LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS* 135 (2006); STEWART E. TOLNAY AND E. M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* 212 (1992).

40. See IDUS NEWBY, *THE SOUTH: A HISTORY* 270-71 (1978) (stating that "the Klan was an organized conspiracy against the civil rights of a large segment of society, but so considerable were its powers of intimidation in many areas that even officials who opposed it were helpless against it").

41. See *id.*; see also *Lynching in America*, *supra* note 38, for a lengthy and meticulously researched report on race-based violence and discrimination from the mid-1800s onward.

42. See *Lynching in America*, *supra* note 38.

43. See Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819, 824 (1991) (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3611-13 (1870) (remarks of Senator Pool), reprinted in *United States v. Price*, 383 U.S. 787, 807-20 (1966) (appendix to opinion of the Court)).

44. See *id.* (again citing *United States v. Price*, 383 US at 804).

45. See *Lynching in America*, *supra* note 38 (describing the motivation for the Enforcement Acts).

46. See *id.*

two or more persons . . . [to] go in disguise upon the public highway, . . . with the intent to . . . injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States. . . .

Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870) (current version at 18 U.S.C. §241 (2020)). The Enforcement Act of 1870, along with its successors in 1871, augmented the scope of what governments could do about the Klan.⁴⁷ First, labeling mask-wearing as a federal felony had the crucial impact of placing such cases in federal courts, with a selection of jury members less likely to be influenced by the Klan. Second, the national scale rebutted any remaining skepticism about the gravity of the Klan's threat.⁴⁸ Now that governments had better traction, violence slowly began a downward trend.⁴⁹

It was not for many decades that states began passing their own anti-mask laws.⁵⁰ The first wave of state laws came in the 1920s as a response to the Klan morphing from a local to a national organization.⁵¹ The impetus for these state anti-mask laws was not necessarily resurgent violence. According to the Equal Justice Initiative's analysis of racial terror lynchings of Black Americans in 12 southern states, every state but Florida saw a decrease in annual lynchings in the 1910s, and all states saw decreases throughout the 1920s, when these state anti-mask laws were passed.⁵²

During the 1920s, the Klan focused on organizing and politically mobilizing to spread their message of hate on a wider scale.⁵³ Rather than covering their faces in ghostly costume for terroristic night rides, the Klansmen of the second wave used masks to intimidate while maintaining their role in

47. For instance, some provisions of these "Force Acts," as they came to be called, imposed martial law and enforced federal penalties against anybody interfering with Black people's free participation in society and democracy. See *Force Acts, United States [1870-1875]*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Force-Acts> (last accessed October 23, 2020).

48. See *The Enforcement Acts of 1870 and 1871*, U. S. SEN. ART & HIST., [https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm_\(last accessed October 23, 2020\)](https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm_(last%20accessed%20October%2023,%202020)) [<https://perma.cc/AX2Z-4AY2>].

49. See *Lynching in America*, *supra* note 38. But see *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1875) (invalidating sections of the Enforcement Acts). In the 1890s, immediately after these cases constrained the Enforcement Acts, most states analyzed by the Equal Justice Initiative showed a spike in racial terror lynchings. Violence then began to decline in each state, although Black suffering did not stop during this era.

50. There are a few exceptions to this. New York's anti-mask law predates even the Enforcement Acts and responded to a different crisis of tenants dressing up in costume to ambush their landlords. See, e.g., Herb Hallas, *supra* note 35 (describing this history).

51. See W.E. Burghardt Du Bois, *The Shape of Fear*, 223 N. AM. REV. 291, 302-04 (1926) (stating that the Klan of the 1920s and the Klan of Reconstruction "have nothing in common except their birthplace and their methods . . . the present Klan is a different movement from the older Klan. It has simply made the older movement's name its starting point"); see also Kahn, *supra* note 1, at 99-100; SOUTHERN POVERTY L. CTR., *supra* note 37 (describing the Klan's changing behavior over this period).

52. See *Lynching in America*, *supra* note 38. Despite these historical trends, a decrease does not mean zero.

53. See SOUTHERN POVERTY L. CTR., *supra* note 37.

society, sending the chilling message that trusted institutions were aligned with White supremacy.⁵⁴ For instance, in Arizona, Klan members would attend church services in their distinctive white hoods⁵⁵—a move of which COVID-era grocery shoppers in Klan hoods is reminiscent.⁵⁶ Second-wave Klansmen also refused to reveal their membership lists,⁵⁷ one tactic among many that W.E.B. DuBois famously criticized as “uncivilized.”⁵⁸ Indeed, it was this practice that Chief Justice O’Neill (the dissenting state judge from the opening anecdote) found so suspect, and in response to which Louisiana enacted its own law in 1924.⁵⁹ In 1928, the Supreme Court decried the Klan’s refusal to share membership lists as an attempt to “make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to the public welfare,”⁶⁰ including attempts to overtake the administrative state to advance its mission of White supremacy and “the punishment of what some of its members conceived to be crimes.”⁶¹ Hence, the handful of state anti-mask laws passed in the 1920s were designed to stanch the Ku Klux Klan’s expansion.⁶²

The next wave of state anti-mask laws came some twenty years later, adjacent to the civil rights revolution.⁶³ Professor Robert Kahn has identified the impetus for the final wave of state anti-mask laws as more propaganda than progress: “The general pattern . . . was for states to enact mask bans to make a statement that they hoped would convince the rest of the country that ‘separate but equal’ was compatible with [a] progressive South.”⁶⁴ The governor of South Carolina, for instance, catalyzed that state’s anti-mask statute in 1951 amidst his platform for “equal educational opportunity” in segregated schools in an attempt to circumvent claims of racism and cast the NAACP as extremists.⁶⁵ Months later, Georgia did the same, inspiring a Black columnist whose article appeared without a byline to wonder sarcastically, “Has Governor Talmadge sprouted wings and halo, and gone back on his solemn campaign promises to his wool hat boys?”⁶⁶ The writer concluded, of course, that the anti-mask statute was to throw integrationists off his scent.⁶⁷ Georgians were well aware of Talmadge’s explicit

54. See Kahn, *supra* note 1, at 100-04.

55. See Sue Wilson Abbey, *The Ku Klux Klan in Arizona, 1921-25*, 14 J. ARIZ. HIST. 10, 13 (1973).

56. See, e.g., Mabubani, *supra* note 16.

57. See, e.g., New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

58. See, e.g., Du Bois, *supra* note 51 at 294 (criticizing the Klan’s secrecy and cowardice).

59. See *State v. Dunn*, 109 So. 56, 82 (La. 1926).

60. See *Zimmerman*, 278 U.S. at 76.

61. *Id.* at 76-77.

62. See Kahn, *supra* note 1, at 100-04.

63. *Id.*

64. See *id.* at 102.

65. *Id.*

66. See JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936-1965, AT 136 (2014) (quoting *Georgia’s Last Stand*, THE PITT. COURIER, May 5, 1951, at 20).

67. *Id.* at 136-7.

links to the Ku Klux Klan, for whom his election furnished, in the words of Gloster Current, deputy executive director of the NAACP, “a signal to . . . don their sheets.”⁶⁸ Talmadge included appointees with concurrent Klan membership in his administration and publicly acknowledged having gained power by excluding Black voters.⁶⁹ Some of his first actions as governor were to usher in heightened poll taxes and voter registration laws.⁷⁰ Indeed, Black Americans were not swayed by the sudden swell of state anti-mask statutes.⁷¹

Unfortunately, state supreme courts were, at least retroactively. In 1990, the Georgia Supreme Court made the same mistake that Chief Justice O’Neill of Louisiana had some 70 years prior. In a 1990 case, it described how the statute was enacted “in response to a demonstrated need to safeguard the people from terrorization by masked vigilantes.”⁷² As facts above demonstrate, this is at best a sweepingly reductive account, but it is nevertheless common in legal circles today. The author of this Essay has not found evidence that such mythmaking was a calculated attempt to delude Americans on our own history. Rather, it may reflect the passage of knowledge within social groups and the systemic exclusion of outsider narratives in American society. Nevertheless, it contributes to a false and insulting narrative. Anti-mask laws have never protected Black Americans – the federal laws because officials lacked the ability to enforce them, and the state laws because they were racist in their very purpose.⁷³

68. STEPHEN G. N. TUCK, *BEYOND ATLANTA: THE STRUGGLE FOR RACIAL EQUALITY IN GEORGIA, 1940-1980* at 78 (2003) (quoting Gloster Current, Deputy Executive Director of the NAACP, on Talmadge’s election).

69. *See id.* at 77-79 (stating that Talmadge’s administration became “inextricably” linked to the KKK and detailing Talmadge’s relationship with a Grand Dragon of the KKK, whom he appointed a lieutenant colonel and his own personal aide-de-camp); *see also* WALTER J. FRASER, JR. *SAVANNAH IN THE NEW SOUTH: FROM THE CIVIL WAR TO THE TWENTY-FIRST CENTURY* (2018) (describing Talmadge’s actions and the resultant disenfranchisement for Black Georgians).

70. *See* FRASER, *supra* note 69 (page numbers unavailable online) (2019) (describing Talmadge’s actions and the resultant disenfranchisement for Black Georgians).

71. *See, e.g.,* WARD, *supra* note 66 (quoting Black columnist); TUCK, *supra* note 68 (quoting Gloster Current); FRASER, *supra* note 69. The author regrets that so many accounts of Black sentiments on the topic must come from white historians, who do not always provide these commentators’ names.

71. *See* *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990).

72. *See id.*

73. *See* Gregory L. Padgett, Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103, 105 (1984) (arguing that states do not protect minorities or robustly enforce civil rights concerns); *see also* Charles Jones, *An Argument for Federal Protection against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689, 690 (1986) (urging expanded interpretation and enforcement of federal civil rights legislation to prosecute racial violence). Though First Amendment concerns with anti-mask statutes are not the point of this article, interested readers can avail themselves of an enormous body of literature and case law.

C. Characteristics of Anti-Mask Statutes

Today, 18 states and the District of Columbia have anti-mask laws. Despite the fact that many use vague or ambiguous terms,⁷⁴ most anti-mask laws share some characteristics. For instance, most statutes include a requirement that the violation must take place in public, though they codify this requirement differently.⁷⁵ Some simply state masks must not be worn “in public” or “on public lands.”⁷⁶ Some require a number of people, such as two or more.⁷⁷ Some specify who these people must (not) be, such as by incorporating age requirements⁷⁸ or sex offender status.⁷⁹ In contrast with mandatory mask orders, state anti-mask statutes have been construed to pre-empt more rigorous municipal statutes, given the “legislature’s desire to occupy the field.”⁸⁰ Many of the executive orders passed in response to the COVID-19 emergency have permitted municipalities to pass stricter requirements.⁸¹

The following sections describe three defining features of anti-mask laws: the construction of their mens rea element, voidable vagueness or overbreadth concerns, and built-in exemptions. Appendix A, below, summarizes relevant provisions of anti-mask statutes from all states that have them, including the District of Columbia.

1. Construction of Mens Rea Element

Anti-mask statutes differ in their construction. Some ban the wearing of a mask while committing another crime; others simply ban the wearing of masks in public, commonly as a misdemeanor or form of loitering. Scholars have referred to the former as “criminal” and the latter as “general” statutes.⁸² “General” statutes simply ban masks outright, often without specifying a mens rea requirement with regard to the wearing of a mask.⁸³ Appendix A shows that twelve states attach a mens rea requirement—including Georgia, whose mens

74. See SOUTHERN POVERTY LAW CTR., *supra* note 37; see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (ridiculing the “neutrality trap” of pseudo-non-recognition of the statutes’ motivation and decrying as “farcical” and dishonest the legislatures’ unwillingness to name racism as the problem).

75. See, e.g., Stephen J. Simoni, Note, *‘Who Goes There?’—Proposing a Model Anti-Mask Act*, 61 FORDHAM L. REV. 241, 242 (1992) (describing differences between anti-mask laws).

76. See, e.g., ALA. CODE §13A-11-9 (West 2020).

77. See, e.g., OHIO REV. CODE ANN. § 3761.12 (West 2020) (requiring at least 2 people present for statute to come into effect).

78. See, e.g., W. VA. CODE §61-6-22 (West 2020) (limiting statute to those over 16).

79. See, e.g., LA. REV. STAT. ANN. § 14:313 (West 2020) (giving a different mens rea requirement for registered sex offenders).

80. See *Re Martin*, 221 Cal. App. 2d 14, 17 (Cal. Ct. App. 1963) (describing state legislature’s desire to “occupy the field”)

81. See Littler Mendelson, *supra* note 24 (summarizing state and municipal mandatory PPE orders).

82. See Simoni, *supra* note 75, at 241 (noting trend of describing laws banning masks without concurrent criminal activity as “general”).

83. See *id.*

rea requirement was added by the Supreme Court in 1990.⁸⁴ Only seven states have a purely general statute devoid of any mens rea language. Alabama's statute, enacted in 1951, offers a straightforward example of this: "A person commits the crime of loitering if he . . . *Being masked*, loiters, remains or congregates in a public place."⁸⁵ Others stipulate the kind of mask that will violate the statute, namely, a mask that obscures identity, without mentioning the mens rea with regard to its obfuscation of identity. South Carolina's is an exemplar: "No person over sixteen years of age shall appear or enter upon any . . . public way or highway of this State or upon the public property of the State or of any municipality or county in this State while wearing a mask or other device which *conceals his identity*."⁸⁶

Statutes that do articulate a mens rea requirement may do so with respect to the wearing of the mask, the mask's concealment of the wearer's identity, and/or the action undertaken (or attempted) while wearing the mask. Oklahoma's 1923 statute provides a mens rea requirement with regard to the wearing of the mask: "It shall be unlawful for any person in this state to wear a mask, hood or covering, which conceals the identity of the wearer during the commission of a crime or for the *purpose of coercion, intimidation or harassment*."⁸⁷ Coercion, intimidation, and harassment are here set apart from the commission of a crime. Nevertheless, one who conceals their identity for the purpose of coercion, intimidation, or harassment is subject to a year of imprisonment and/or a \$50 fine.⁸⁸ Meanwhile, Louisiana's statute provides a level of mens rea regarding concealment: "No person shall use or wear in any public place of any character whatsoever . . . a hood or mask, or . . . any facial disguise of any kind or description, *calculated to conceal or hide the identity of the person or to prevent his being readily recognized*."⁸⁹ A statute like this would increase the mens rea requirement of the other actions in the statute.⁹⁰ North Dakota's anti-mask statute, the most recent of the group, is unique in stipulating different mens rea requirements for different components of the offense:⁹¹

84. *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990).

85. ALA. CODE §13A-11-9 (West 2020).

86. S.C. CODE ANN. § 16-7-110 (West 2020). *See also* GA. CODE ANN. § 16-11-38 (West 2020), N.C. GEN. STAT § 14-12.8 (West 2020), W. VA. CODE §61-6-22 (West 2020) (emphasis added).

87. *See, e.g.*, OKLA. STAT. tit. 21, § 1301 (West 2020).

88. *Id.*

89. LA. REV. STAT. ANN. § 14:313 (West 2020).

90. *See* MODEL PENAL CODE §§2.02(3-5) (2019) (giving rules of statutory construction if a statute does not specify its mens rea standard).

91. North Dakota's anti-mask law is a response to the Dakota Access Pipeline (DAPL) protests in which activists were covering their faces, largely with gas masks. It was enacted in 2017. *See, e.g.*, Jayme Fraser, *Bill to ban masks at protests that become riots divides police, civil rights advocates*, MISSOULIAN (Mar. 22, 2017), https://missoulian.com/news/state-and-regional/govt-and-politics/bill-to-ban-masks-at-protests-that-become-riots-divides-police-civil-rights-advocates/article_bf34d218-2cb5-5e0d-95fa-9b7b8162fddc.html [<https://perma.cc/7KFR-KLQ2>].

An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face:

- a. With the intent to intimidate, threaten, abuse, or harass any other individual;
- b. For the *purpose of evading or escaping discovery*, recognition, or identification during the commission of a criminal offense; or
- c. For the *purpose of concealment*, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense.

N.D. CENT. CODE § 12.1-31-15 (2017) (emphasis added). This statute is deliberate in how much would need to be proven for each kind of offense.

Finally, some statutes articulate the mens rea requirement with respect to the act committed while wearing the mask. Connecticut's offers a succinct example:

Any person who, with the *intent to subject . . . any other person to the deprivation of any rights, privileges or immunities*, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability, violates the provisions of section 46a-58 while wearing a mask, hood or other device designed to conceal the identity of such person shall be guilty of a class D felony.

CONN. GEN. STAT § 53-37a (1949) (emphasis added). The language in Connecticut's anti-mask statute connects illegal mask wearing with any criminal offense designed to deprive somebody of rights based on a protected classification. Similar language appears in Delaware's statute, which was enacted earlier than Connecticut's,⁹² and Washington, DC's, which was not enacted until 1983.⁹³ North Dakota uses a similar construction but different language in its anti-mask statute, including language about the "intent to harass any other person" while wearing a mask.⁹⁴ The International Center for Not-for-Profit Law has noted that this construction, decoupled from language on protected classes, can be used to criminalize masked protestors who argue with the police. This is unsurprising, given that it was enacted in direct response to the Dakota Access Pipeline protests, where activists, masked for anonymity, did just this.⁹⁵ In Tennessee, inferences may flow in the other direction: masked

92. See DEL. CODE ANN. TIT. 11, § 1301 (West 2020).

93. See D.C. CODE § 22-3312.03 (West 2020).

94. See N.D. CENT. CODE § 12.1-31-15 (West 2020).

95. See *U.S. Current Trend: Anti-Mask Laws, COVID-19, and the First Amendment*, *supra* note

entry onto another's property may serve as prima facie evidence of intent to commit a felony, so long as there is a rational connection between the two.⁹⁶

2. *Voidable Vagueness and Anti-Mask Laws*

Aside from First Amendment concerns, the main constitutional challenges to state anti-mask statutes have been voidable vagueness or overbreadth and indefinite standards for guilt.⁹⁷

The Florida Supreme Court, in 1980, found Florida's anti-mask law unconstitutionally overbroad and applicable to innocent activities without statutory language to constrain interpretation.⁹⁸ The opinion studiously avoided any discussion of equal protection or freedom of speech or association.⁹⁹ The court found the statute "susceptible of application to entirely innocent activities . . . so as to create prohibitions that completely lack any rational basis."¹⁰⁰ Though the statute provided numerous exemptions, such as masquerade parties and gas masks during emergency drills,¹⁰¹ these were "not sufficient to cure this fatal overbreadth."¹⁰² The law was subsequently amended to include a mens rea requirement including criminal activity, the "intent to deprive people of equal protection of the law, to interfere with a person's rights secured by law, or to threaten or harass another person."¹⁰³ It retains the carveouts that were powerless to save it from overbreadth.¹⁰⁴ Similarly, the Georgia Supreme Court, in 1990, narrowed its anti-mask statute to apply only to mask-wearing "that is intended to conceal the wearer's identity and that the wearer knows, or reasonably should know, gives rise to a reasonable apprehension of intimidation, threats or impending violence."¹⁰⁵ A few years later, it limited the mens rea for the anti-mask statute to "actual knowledge that the conduct resulted in apprehension by the victim or reckless disregard as to

96. See *State v Bryant*, 585 S.W.2d 586, 588 (Tenn. 1979). See also *State v. Gates*, 542 P.2d 822 (Ariz. Ct. App. 1975), *supp op* 546 P.2d 5226 (Ariz. Ct. App. 1975), vacated on other grounds 576 P.2d 1357 (Ariz. 1978) (clarifying that one of the statutes in question was a punishment augmentation statute elevating a misdemeanor to a felony when committed while wearing a mask).

97. See Thomas R. Trenkner, *Validity and Construction of State Statute or Ordinance Prohibiting Picketing, Parading, Demonstrating, or Appearing in Public while Masked or Disguised*, 2 A.L.R.4th 1241, 1242 (2019).

98. See *Robinson v. State*, 393 So.2d 1076, 1077 (Fla. 1980).

99. See *id.*

100. See *id.*

101. See *id.* See also FLA. STAT. § 876.11-15 (West 2020).

102. *Robinson*, 393 So.2d at 1077.

103. See Debra Cassens Weiss, *Do Anti-Mask Laws Make Us All Criminals? Lawyer Who Challenged This Law Sees Issues*, ABA J. (April 23, 2020), <https://www.abajournal.com/news/article/do-anti-mask-laws-make-us-all-criminals-lawyer-who-challenged-this-law-sees-issues> [<https://perma.cc/P2E9-G3RJ>].

104. See *id.*

105. *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990).

that fact.”¹⁰⁶ The Virginia Court of Appeals, likewise, has clarified that the phrase “so as to conceal the identity of the wearer” contains an element of intent, and has rejected a broad application of the anti-mask statute that would encompass ski masks in cold weather or veils in secular or religious contexts.¹⁰⁷

3. Exemptions to Anti-Mask Laws

Finally, most statutes clarify some built-in exemptions: workarounds to motivate anti-Klan enforcement without criminalizing other kinds of mask wearing. For instance, Ohio specifies that the masks in question must not be “white caps,” the most specific anti-Klan language of any statute.¹⁰⁸ Other states’ anti-mask statutes appear alongside statutes banning cross-burning, another of the Klan’s archetypal activities.¹⁰⁹ Most importantly, more than half of the anti-mask statutes encode exemptions, such holidays or other circumstances, that justify the use of masks. These include such events as masquerades, Halloween, Christmas, Mardi Gras, and Gasparilla, a Tampa-based pirate festival.¹¹⁰ Louisiana and Minnesota carry exceptions for religious face coverings.¹¹¹ Conspicuously missing are exemptions for protests or the public health. Virginia’s comes closest, with language about medical necessity, physician recommendation, and public emergencies.¹¹² Minnesota’s also mentions medical treatment as a valid justification for wearing a mask.¹¹³ Still, neither goes into detail about the public health or a pandemic.

II.

LIVED EXPERIENCES DURING COVID-19

The push for a cultural shift to mask-wearing was led by the CDC and guided by a need to conserve medical equipment. However, the homemade mask craze neglected risks of racial profiling, particularly for Black men. These dynamics led to two equally worrisome dilemmas. First, police selectively enforced both mandatory mask orders *and* anti-mask laws against Black Americans, as compared to their enforcement of either against White Americans. Second, in choosing whether to mask up, Black Americans faced death with any choice: from COVID-19 if they chose not to wear a mask, from insufficient

106. James P. Fleissner, *Criminal Law and Procedure: A Two-Year Survey*, 48 MERCER L. REV. 219, 260 (1996); *see also* Daniels v. State, 448 S.E.2d 185 (Ga. 1994).

107. *See* Hernandez v. Commonwealth, 406 S.E.2d 398, 399-400 (Va. Ct. App. 1991); *see also* Ghafari v. S.F. Mun. Ct., 87 Cal. App. 3d 255, 261-260 (Cal. Ct. App. 1978) (striking anti-mask law because it “inhibits the exercise of free speech”).

108. *See* OHIO REV. CODE ANN. § 3761.12 (West 2020).

109. *See, e.g.*, FLA. STAT. ANN. § 876.11-15 (West 2020).

110. *See, e.g., id.*

111. MINN. STAT. ANN. § 609.735 (West 2020); LA. STAT. ANN. § 14:313 (2019).

112. VA. CODE ANN. § 18.2-422 (West 2020).

113. MINN. STAT. ANN. § 609.735 (West 2020).

medical equipment if they opted for a medical mask, or from racial profiling if they wore a homemade mask.

The following sections use news reports, social media, and empirical data to argue that the clash between anti-mask laws and mandatory mask orders added to confusion during the COVID-19 crisis, creating even more risk to Black lives.

A. Selective Enforcement of Mask Laws against Black Americans

During COVID-19, mask requirements furnished yet another basis for police interaction and selective enforcement against people of color. It has been well documented, both in data and in lived experience, that police selectively enforce laws against Americans of color. The history of selective policing based on skin color began even before our country did.¹¹⁴ In the late 1600s, Pennsylvania charged its constables to “take up” any Black person, with no distinction as to onetime slaves, seen “gadding abroad” without permission, who would then be “imprisoned overnight without food and given thirty-nine lashes, more physical punishment than White servants generally received for a major theft.”¹¹⁵ States like South Carolina and Virginia emboldened slave patrols to conduct warrantless searches and seize Blacks suspected of any crime “whatsoever.”¹¹⁶

Contemporary enforcement activity remains heightened for Americans of color. One measure of police bias in enforcement decisions is the search rate: if officers based their decisions to search cars for contraband on the same level of evidence for Black and White drivers, they would find contraband at the same rate.¹¹⁷ Thus, any disparity in officers’ decisions to search cars for drugs, and subsequent finding of contraband, displays the officers’ willingness to conduct the search on the basis of less evidence.¹¹⁸ Police interactions with Blacks are not just more numerous but also more deadly. *Proceedings of the National Academy of Sciences* has found that Black Americans, especially Black men, are much more likely than White Americans to be killed by the police.¹¹⁹ In fact, despite comprising only 13 percent of the American population, Blacks suffer 24 percent of fatal police violence.¹²⁰

During COVID-19, mask requirements and other similar policies have furnished yet another basis for selective enforcement, sometimes escalating these

114. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334 (1998).

115. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 276-77 (1978).

116. *Id.*

117. See *Findings*, STANFORD OPEN POLICING PROJECT (2020), <https://openpolicing.stanford.edu/findings/> [https://perma.cc/56KR-TUCW].

118. See *id.*

119. See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 34 PROC. NAT’L ACAD. SCI. 16793, 16794 (2019).

120. See *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> [https://perma.cc/9T9B-9MWQ] (last visited October 21, 2020).

interactions with excessive force, fines, or the threat of incarceration. On the first full day of Pennsylvania's mandatory PPE order, Walmart employees called the police on a man of color inside a Walmart who had not covered his face. He fled the store when troopers arrived and was ultimately charged with disorderly conduct.¹²¹ In Philadelphia, cops hoisted a Black man out of a bus for not covering his face.¹²² In Florida, a mask-clad Black physician unloading supplies to help test homeless people for coronavirus was handcuffed and detailed for illegal dumping.¹²³ In Illinois, at a different Walmart, two Black men wearing surgical masks were followed "like prey" by police officers who escorted them out of the store for wearing masks, allegedly for violating a local ordinance *against* wearing masks in businesses.¹²⁴ City officials later confirmed the city has no such ordinance.¹²⁵

Selective enforcement of both anti-mask laws and mandatory mask orders against Black males are stark in comparison to police treatment of Whites refusing, even protesting, masks. Throughout early April, the same period when these selective enforcement incidents took place, a rash of anti-quarantine rallies erupted nationwide. At these events, predominantly White protesters decried their state's restrictions, often carrying guns¹²⁶ and eschewing PPE,¹²⁷ even in states requiring masks in public.¹²⁸ Indeed, for some, the refusal to wear a mask became emblematic of conservative courage.¹²⁹ Yet police response to these

121. Josh Popichak, *Walmart Shopper Who Failed to Wear Mask Charged With Disorderly Conduct: Police*, SAUCON SOURCE (Apr. 25, 2020), <https://sauconsource.com/2020/04/25/walmart-shopper-who-failed-wear-mask-charged-with-disorderly-conduct/> [<https://perma.cc/29RR-PJYC>].

122. Chas Danner, *Philly Police Drag Man From Bus for Not Wearing a Face Mask*, N.Y. INTELLIGENCER (Apr. 10, 2020), <https://nymag.com/intelligencer/2020/04/philly-police-drag-man-from-bus-for-not-wearing-a-face-mask.html> [<https://perma.cc/CN24-KK2H>].

123. Johnny Diaz, *Police Handcuff Black Doctor Who Tests Homeless for Coronavirus*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/armen-henderson-arrested-homeless-coronavirus-testing.html> [<https://perma.cc/B2DC-3GXP>]; Devoun Cetoute, *Miami police investigating detainment of doctor who gives homeless virus tests, chief says*, MIAMI HERALD (Apr. 11, 2020), <https://www.miamiherald.com/news/article241943371.html> [<https://perma.cc/9B7N-LRHZ>].

124. Jeanie Stephens, (*Updated*) *Video: Wood River officer made men leave Walmart because they wore masks*, THE TELEGRAPH (Apr. 7, 2020), <https://www.thetelegraph.com/news/article/Video-Wood-River-officer-has-men-leave-Walmart-15154393.php> [<https://perma.cc/7LDW-DQMD>].

125. Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html> [<https://perma.cc/3BMB-BZEF>].

126. *See, e.g.*, Firmin DeBrabander, *The Great Irony of America's Armed Anti-Lockdown Protesters*, THE ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/guns-protesters/611560/> [<https://perma.cc/G25S-KBB7>].

127. *See id.*

128. *See, e.g.*, Bart Jansen, *Anti-quarantine rally in Pennsylvania draws about 2,000 people in latest protest against coronavirus restrictions*, USA TODAY (Apr. 20, 2020), <https://www.usatoday.com/story/news/politics/2020/04/20/coronavirus-pennsylvania-roiled-protest-against-shutdowns/5167292002/> [<https://perma.cc/S3K7-FK7X>] (describing one such rally in Pennsylvania, a PPE-required state).

129. *See, e.g.*, Hansen, *supra* note 11.

military-styled protests was peaceful.¹³⁰ As the summer wore on and Black Lives Matter protestors were tear-gassed and shoved by police,¹³¹ several commentators were jarred by the much milder treatment of the predominantly White, armed anti-quarantine protestors.¹³² Indeed, police behavior throughout the pandemic evinced much greater willingness to enforce mandatory PPE orders against Blacks than Whites.

B. *“I Want to Stay Alive but I Also Want to Stay Alive”: The Peril of Homemade Masks and Racial Profiling*

Since at least April, the CDC and several states have encouraged Americans to make their own cloth masks. For many Black men, though, the thought of covering their faces with ordinary-looking cloth is anything but innocuous.¹³³ Refrains of “thug” or “gangster” too commonly issue from police officers (or self-appointed vigilantes with guns) who, having brutalized a Black person, claim their suspicion was aroused by their victim’s style of dress. 17-year-old Trayvon Martin was killed in 2013 by an agitated neighborhood watch volunteer who, in the minutes before he took Trayvon’s life, muttered to dispatch operators about the “suspicious guy” in “a dark hoodie, a gray hoodie.”¹³⁴ Professor Cyntoria Johnson has described the association many people have built up between bandanas or rags and gang activity.¹³⁵ Similarly, Professor Angela Onwuachi-Willig has analyzed how hoodies and other styles of dress that perform blackness can signal to those with stereotyping tendencies that they do not belong in White spaces.¹³⁶ Many Black men, especially, have voiced on social media their dual concerns over their bodily safety: either from disease, by virtue of not wearing a mask, or from the police, by virtue of wearing one.¹³⁷ As

130. See Li Zhou & Kainaz Amaria, *These photos capture the stark contrast in police response to the George Floyd protests and the anti-lockdown protests*, VOX (May 27, 2020), <https://www.vox.com/2020/5/27/21271811/george-floyd-protests-minneapolis-lockdown-protests> [https://perma.cc/2XML-TR37] (comparing violent police response to peaceful #BlackLivesMatter protestors in June and passive police response to armed anti-lockdown protestors in April).

131. See, e.g., DeBrabander, *supra* note 126.

132. See *id.*

133. See Fernando Alfonso III, *Why some people of color say they won’t wear homemade masks*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/07/us/face-masks-ethnicity-coronavirus-cdc-trnd/index.html> [https://perma.cc/X4C5-C8FR].

134. See Linton Weeks, *Tragedy Gives the Hoodie a Whole New Meaning*, NPR (Mar. 24, 2012), <https://www.npr.org/2012/03/24/149245834/tragedy-gives-the-hoodie-a-whole-new-meaning> [https://perma.cc/56JG-39RF].

135. See Alfonso III, *supra* note 133.

136. See *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1183.

137. Usha Lee McFarling, *‘Which Death Do They Choose?’: Many Black men fear wearing a mask more than the coronavirus*, STAT (Jun. 3, 2020), <https://www.statnews.com/2020/06/03/which-deamany-black-men-fear-wearing-mask-more-than-coronavirus/> [https://perma.cc/6A5N-94YN].

educator Aaron Thomas tweeted, “I want to stay alive but I also want to stay alive.”¹³⁸

In Georgia, legislators acted upon the clash between anti-mask laws and PPE measures, seeking to diminish the harms of racial profiling of those in PPE. While recovering from the coronavirus, Georgia State Senator Nikema Williams penned a letter to the governor of Georgia calling for the state anti-mask law to be suspended throughout the state of emergency.¹³⁹ In it, she reflected upon anti-mask laws’ heightened impact upon Black communities and how these statutes could feed stereotyping and racial profiling.¹⁴⁰ Elsewhere, she commented on the experience of her husband, a Black man, of being racially profiled while grocery shopping in a homemade mask.¹⁴¹ Her letter also emphasized the importance of not providing countervailing mandates and confusing people as to whether they should follow the CDC’s advice on mask usage.¹⁴² Williams’ campaign was successful in Georgia and launched similar commentary nationwide.¹⁴³

C. Empirical Evidence on Mask Usage: Anti-Mask Laws, Mandatory PPE Orders, and Race

The following section describes our results, which include statistically significant findings on the relationship between race and mask usage, and statistically insignificant findings on the relationship between living in an anti-mask state and mask usage. A following section, “Takeaways,” analyzes these results, suggesting that widespread ignorance of anti-mask laws, combined with demonstrated harms to minorities from their selective enforcement and clash with mandatory PPE orders, militates against their remaining on the books.

D. Methods

The author, along with a team of researchers from the COVID-Dynamic Study, surveyed 1178 people from all 50 states to gauge mask uptake by race in

138. Aaron Thomas (@Aaron_TheThomas), Twitter (Apr. 4, 2020, 1:34 PM), https://twitter.com/Aaron_TheThomas/status/1246493711032356866.

139. See Nicole Carr (@NicoleCarrWSB), Twitter (Apr. 10, 2020, 4:09 PM), <https://twitter.com/NicoleCarrWSB/status/1248704672921239552/photo/1> (sharing a photo of Senator Williams’ letter to Bryan Kemp).

140. *Id.*

141. See Maria Boynton, *Black While Masked “Dangerous,”* V-103 (Apr. 11, 2020), <https://v103.radio.com/blogs/maria-boynton/naacp-joins-call-to-suspend-georgia-anti-mask-law> <https://perma.cc/FF89-AT9U>; see also Zack Budryk, *Georgia urged to suspend Jim Crow-era mask law*, THE HILL (Apr. 13, 2020), <https://thehill.com/homenews/state-watch/492516-georgia-urged-to-suspend-jim-crow-era-mask-law> [<https://perma.cc/FG8X-WLRV>].

142. See Boynton, *supra* note 140; see also Budryk, *supra* note 140.

143. See *Attorney Helped Save Black Men’s Lives By Calling for Suspension of Anti-Mask Law During COVID-19 Pandemic*, GREATER DIVERSITY NETWORK (Apr. 22, 2020), <http://greaterdiversity.com/attorney-helped-save-black-mens-lives-calling-suspension-anti-mask-law-covid-19-pandemic/> [<https://perma.cc/R2EQ-7RF3>]; See Taylor, *supra* note 125; *infra* Part III.A.

states with anti-mask laws.¹⁴⁴ Our surveys went out in two waves, late May and early June, just after the #BlackLivesMatter protests. The core of questions for the mask module remained the same in each wave, with additional insertions or deletions as indicated below. We solicited subjects through open recruitment via an Internet survey platform. All analyses took place after preregistering the research plan on Open Science Framework and were run using SPSS.¹⁴⁵

Anti-mask states were those states with an anti-mask statute, as listed in Appendix A below. Mandatory mask states were those states which, by the time of the wave, had in place an executive order or public health order that had the force of law, with language indicating that mask usage in at least some public settings was mandatory.¹⁴⁶ Although many more states eventually adopted mandatory PPE orders, there were no changes or additions between the two waves analyzed in this study.

E. Results

1. Descriptive Statistics

In our first wave of questions, which went out in late May 2020, the majority of subjects (632 subjects, 53.7%) lived in states with anti-mask laws, while 284 (24.1%) lived in states with mandatory PPE orders.¹⁴⁷ 26.4% of

144. This survey is part of the COVID-Dynamic project. See *COVID-Dynamic*, <https://covidynamic.caltech.edu/> [<https://perma.cc/J8MH-KCP7>].

145. Chujun Lin, et al., *COVID-DYNAMIC: Characterizing the Dynamics of Emotional and Social Attitudes During the COVID-19 Pandemic*, OPEN SCIENCE FRAMEWORK (Jul. 28, 2020).

146. These categories were mutually exclusive and the analyses were run separately. Mandatory PPE states included Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. This analysis did not include Kentucky, as it was unclear as of June 6th, both from the language of the governor's request (not executive order or public health order) and the enforcement of it he described, whether mask usage was actually mandatory.

147. These categories were not necessarily mutually exclusive, and the analyses were run separately. S.D. for anti-mask laws = .499; S.D. for mandatory PPE orders = .428. Mandatory PPE states included Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. The author did not include Kentucky, as it was unclear as of June 6th whether it was actually mandatory, both from the language of the governor's request and the enforcement he described.

In our first wave, .6% identified as Native/Pacific Islander, 10.4% identified as Asian, 0.1 percent identified as Native Hawaiian/Pacific Islander, 7.6% identified as Black, 74.1% identified as white, 5.0% identified as multiracial, 1.5% identified as other, and 0.7% chose not to disclose. Identification as Hispanic/Latino was measured in a separate item. The item asked, "Please specify your ethnic category," with options "Hispanic or Latino," "not Hispanic or Latino," and "prefer not to disclose." There is evidence that many who identify as Hispanic/Latino view identity as part of both their race and their ethnicity. See Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is being Hispanic a matter of race, ethnicity or both?*, PEW RESEARCH CTR. (Jun. 15, 2015), <https://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/> [<https://perma.cc/3HL8-5CBP>].

However, this study built on subsequently to a broader study that had already designed demographic questions with Hispanic/Latino as an ethnic category. Given the nuances of Hispanic/Latino racial identity and the ways in which these may not always clearly overlap with the

subjects overall, and 27% in states with standing anti-mask laws, reported having worn masks at least occasionally prior to the pandemic for work or personal reasons.¹⁴⁸ In the first wave, 87.3% of participants reported having worn masks in the prior 4 weeks due to COVID-19. Of those who wore masks for COVID-19, 57.4% said their mask use was because of some sort of requirement, 84% out of concern for personal or public health, and 2.8% for another reason. Of the 12.7% who reported not wearing a mask in the prior 4 weeks, 44.7% said they did not think masks were useful, 14.7% said they could not access them, and 45.3% gave another reason.¹⁴⁹ 35% percent of all self-reported mask-wearers indicated that they mostly wear medical-grade PPE, with the remaining 65% opting most of the time for homemade masks.

2. *Residence in Anti-Mask State and Mask Usage*

Residence in an anti-mask state did not have a significant relationship with mask usage. First, participants were significantly more likely to say they did not know about an anti-mask law on the books than that they were aware of such a law, regardless of whether they lived in an anti-mask state.¹⁵⁰ Moreover, in the first wave, 87.3% percent of subjects overall, and 89.1% of subjects in states with standing anti-mask laws, said they had worn masks in the past four weeks as a result of the pandemic; respondents were significantly more likely to have worn masks in the past four weeks regardless of whether their state banned masks or not.¹⁵¹ This remained the case into the second wave.¹⁵²

3. *Race and Mask Usage*

Race, however, had a statistically significant relationship with mask usage. In the first wave, there was a significant relationship between a participant's race

distinctions at play in racial profiling, the author did not include separate analyses for ethnicity in this paper, nor was it feasible to collapse the separate demographic items into a single category to include Hispanic/Latinx respondents in the analyses concerning race. However, the author can share this data upon request.

In addition, races with responses below 20 were combined into "Other" to avoid violating the assumptions of the chi square and Fisher's exact test (American Indian/Alaska Native = 11, Native Hawaiian/Pacific Islander = 3, prefer not to disclose = 17). Because each participant could only choose one response, Native Hawaiian/Pacific Islanders were included as Other rather than Asian to preserve nuance and the choices of the original survey. The same reasoning explains why Biracial was not reclassified as Other. The author acknowledges this as a design flaw.

148. $X^2(1, N=1178) = 1.173$, exact $p = .279$. Fisher's exact test was reported whenever a cell had a count of fewer than 5.

149. Participants were allowed to choose multiple answers; thus, the cumulative value is greater than 100 for mask-wearers and for non-mask-wearers.

150. $X^2(1, N = 1165) = 6.6356$, $p = .012$. Only 8% of subjects in states with anti-mask laws reported awareness of these laws; 91.2% said they were not aware of any such law existing prior to the pandemic; and 5% of subjects in states without anti-mask laws reported a false belief that their home state had such a law.

151. $X^2(1, N= 1178) = 4.046$, $p = .04$.

152. $X^2(1, N=1165) = 5.155$, $p = .023$.

and whether they had worn a mask since the last survey.¹⁵³ By the second wave, participants were equally likely to have worn masks since the last survey, regardless of their race—that is, the value was not statistically significant.¹⁵⁴ Pairwise comparisons revealed that Asian respondents were driving the statistical significance of the first wave's results—although, in both waves, the percentages of both Black and Asian respondents who reported wearing masks were higher than White respondents for this category, even if this level did not always rise to statistical significance.¹⁵⁵ 91% of all Black respondents in wave two said they had worn masks in the past two weeks, up from 86.5% on the analogous question in the previous wave. There was also a highly statistically significant relationship between race and style of mask used for both waves.¹⁵⁶ While Black and Asian people were about equally likely to wear either cloth masks or medical-grade PPE, White people were about twice as likely to wear cloth masks as surgical masks.¹⁵⁷ Subsequent pairwise comparisons revealed that, for both waves, diverging mask style choices between White participants and both Black and Asian participants powered the significance.¹⁵⁸

4. *Race and Opinion of State Management of the Pandemic*

There was also a significant relationship between race and opinion of how the state and law enforcement were handling mask requirements.¹⁵⁹ Other-identifying participants had the lowest view of official management of mask requirements, with just 22.7% reporting that the state and law enforcement were doing a good job, followed by multiracial (28.3%), Asian (31.7%), Black

153. $X^2(4, N=1178)=8.89$, exact $p = .05$. Fisher's exact test was reported whenever a cell had a count of fewer than 5.

154. $X^2(4, N=1165)=7.612$, exact $p = .125$.

155. Wave 1: Black/White $X^2(1, N=827) = .02$, $p = .87$; Asian/White $X^2(1, N=866) = 6.70$, $p = .009$; Black/Asian $X^2(1, N=193) = 3.84$, $p < .004$. Wave 2: Black/White $X^2(1, N=828) = 2.04$, $p = .158$; Asian/White $X^2(1, N=866) = 4.27$, $p = .03$; Black/Asian $X^2(1, N=190) = .086$, $p = .768$. Biracial and Other were not considered in pairwise comparisons.

156. Wave 1: $X^2(4, N=1028) = 17.78$, $p < .001$. Wave 2: $X^2(4, N=1019) = 25.627$, $p < .001$. Again, note the lower N measuring only those who self-reported regularly wearing masks.

157. In Wave 6, 37 Black subjects and 56 Asian subjects opted for surgical masks, while 40 and 60, respectively, chose other types of face coverings. White respondents were about half as likely to wear surgical masks (242) as cloth masks (508). In Wave 7, 37 Black and 54 Asian subjects opted for surgical masks rather than homemade (39 and 60, respectively); white subjects wore surgical masks (216) at about half the rate of other masks (536).

158. Wave 1: Black/White $X^2(1, N=827) = 7.785$, $p = .005$; Asian/White $X^2(1, N=866) = 7.785$, $p < .001$; Black/Asian $X^2(1, N=193) = .0009$, $p = .957$. Wave 2: Black/White $X^2(1, N=828) = 12.96$, $p < .001$; Asian/White $X^2(1, N=866) = 16.04$, $p < .001$; Black/Asian $X^2(1, N=190) = .003$, $p = .858$. Biracial and Other were not considered in the pairwise comparisons.

159. $X^2(8, N=1165) = 19.714$, $p = .011$. Pairwise comparisons were statistically significant for Asian/White well/unsure $X^2(1, N=607) = 7.119$, $p = .0007$; Asian/Other poorly/unsure $X^2(1, N=105) = 3.93$, $p = .004$; Black/Biracial well/poorly $X^2(1, N=102) = 4.112$, $p = .004$; Black/Other well/poorly $X^2(1, N=90) = 33.856$, $p = .004$; Black/Other poorly/unsure $X^2(1, N=68) = 5.871$, $p = .001$; White/Biracial well/poorly $X^2(1, N=565) = 4.03$, $p = .044$; Asian/Black well/poorly $X^2(1, N=154) = 3.61$, $p = .0056$; Asian/White well/poorly $X^2(1, N=813) = 3.76$, $p = .0052$; White/Biracial well/poorly $X^2(1, N=761) = 3.706$, $p = .0054$.

(43.4%), and White (43.8%) participants. Black and Asian participants were most likely to be unsure of their answer, with a quarter of each group (25%) answering that they did not know or were not sure.

5. *Race and Mask-Related Fears*

Finally, participants offered comments on whether they believed there was any harm to them as a result of wearing a mask. A chi-square analysis did not reveal a significant relationship between race and fears of harm from masks, likely because of the large number of empty cells, but it did reveal some telling trends.¹⁶⁰ Black respondents who responded to this question listed police interaction or racial profiling as the greatest harm that could come to them from wearing a mask (43.3%), over discomfort (23.3%), health concerns such as aggravated asthma or increased facial touching (20%), being attacked by conservatives for complying with mask requirements (10%), or others concealing their identity to facilitate crimes (.03%). No Black participants expressed concern over dignitary harms from having to wear a mask, social tension arising from inability to gauge emotion, conflicts with anti-mask laws, or other miscellaneous concerns, although participants from other racial groups did list these concerns.

Finally, just over 5% of participants responded to questions about their behaviors during the protests in early June.¹⁶¹ Of those, 88.9% said they were wearing masks while protesting.¹⁶² 27% said they felt fearful at least some of the time during the protests.¹⁶³

F. *Takeaways*

Though our sample was not perfectly representative, the data revealed key insights. First, most respondents in this survey did not know about preexisting anti-mask laws, even if they lived in anti-mask states. This undermines any policy reason to keep them on the books, given that police are selectively enforcing state anti-mask laws against minorities but most people are not aware of them so as to alter their behavior to comply.

160. $X^2(32, N = 415) = 47.686$, exact $p = .096$. The categories were personal discomfort, health, dignity/freedom, racial profiling/being mistaken for a criminal, failure to catch a genuine criminal because they are wearing a mask/disguise, fear of being mistaken as having coronavirus, difficulties arising from inability to gauge emotion, being harmed by conservatives who think the pandemic is a hoax, and other/miscellaneous.

161. 63 out of 1165 subjects responded to these questions. This is consistent with other studies that have found 6% of adults participated in the protests. See German Lopez, *The Effect of Black Lives Matter Protests on the Coronavirus Explained*, VOX (Jun. 26, 2020), <https://www.vox.com/2020/6/26/21300636/coronavirus-pandemic-black-lives-matter-protests> [<https://perma.cc/LYJ4-8XGQ>].

162. Standard deviation = .435. Broken down by race, numbers were too small to achieve statistical significance. $X^2(8, N=63) = 2.145$, exact $p = .819$.

163. S.D. = .655. Numbers were again too small to achieve statistical significance. $X^2(8, N=63) = 9.754$, exact $p = .159$.

Second, race had a profound and statistically significant impact on mask behavior. This impact appeared both in the tendency to wear masks and the proclivity towards either surgical or handmade masks. Moreover, comments from Black participants revealed that they feared harm from police interaction as a result of wearing masks.

Third, perhaps surprisingly, Black respondents were among the least likely to have a decisive opinion on how the state and law enforcement officers were handling situations relating to masks. This may reflect a feature of our methods or a genuine feature of respondents' experiences. For instance, we may owe these results to an imperfectly representative sample or a way in which the question was asked (such as by including both the government and law enforcement officers in the same item). Alternately, these results may demonstrate the confusion and desperation felt by those most impacted by COVID-19 in the face of state officials' mixed messages.

Fourth, no Black participants listed fears about conflicts with anti-mask laws, although four White participants did. Although this likely reflects the small number of participants who were aware of anti-mask laws from the beginning, it may also reflect the fact that many fears Black respondents might have from such a conflict of law would be encapsulated in an interaction with the police. Indeed, over 40% of Black subjects who answered this question did list this as a concern.

Taken together, these results undermine any policy reason to preserve state anti-mask laws on the books. Most people are unaware of them and so cannot alter their behavior to comply; thus, they are not protecting minorities. Moreover, police are selectively enforcing state anti-mask laws against minorities in ways that risk their bodily and dignitary harm.

III.

ANALYSIS AND SOLUTIONS

Preceding evidence – historical, empirical, and social media – confirms that anti-mask laws were never intended to help Black Americans and continue to add to their burden during COVID-19. The rise of better-known and less ambiguous hate crime laws since 1968, coupled with the low numbers reporting awareness of the laws, diminishes any anti-terrorism benefits the laws could claim.¹⁶⁴ The following sections examine options for suspending anti-mask laws, altering their text, and making use of racial inequity task forces.

A. Suspensions and Repeal

As news of this crisis broke, some states and cities opted to suspend their anti-mask laws. Senator Nikema Williams of Georgia launched this movement while recovering from the coronavirus. She urged the governor of Georgia to

164. See *Hate Crime Laws*, U.S. DEP'T JUSTICE (Mar. 7, 2019), <https://www.justice.gov/crt/hate-crime-laws> [<https://perma.cc/3MAP-XTXB>].

suspend the state's anti-mask law for the duration of the state of emergency.¹⁶⁵ In a letter, she highlighted the importance of not confusing people as to whether to follow the CDC's advice on mask wearing, as well as not exacerbating the Black community's already-overrepresented portion of those harmed by the pandemic.¹⁶⁶ Elsewhere, she revealed she was reflecting on her husband's experiences of feeling racially profiled while grocery shopping in a mask.¹⁶⁷ Soon after, Gerald Griggs, an attorney and vice principal of the NAACP's Atlanta branch, echoed Williams' call to indefinitely suspend the anti-mask law.¹⁶⁸ Atlanta mayor Keisha Lance Bottoms temporarily suspended the anti-mask law in Atlanta, instructing police to not enforce the law for a period of 60 days.¹⁶⁹ Shortly thereafter, the governor of Georgia signed an executive order suspending the law indefinitely.¹⁷⁰

Similar stories have unfolded elsewhere. North Carolina legislators first suspended the state's anti-mask law until August 1, and then indefinitely.¹⁷¹ New York repealed its anti-mask law.¹⁷² In Virginia, Governor Northam clarified that "no citations will be written for wearing protective masks."¹⁷³ In Alabama, the state attorney general has specified that anti-mask laws will be subject to "common-sense enforcement."¹⁷⁴ Michigan took a different approach: in the very executive order that made masks mandatory for the state, it stipulated that "the protections against discrimination in the Elliott-Larsen Civil Rights Act . . . and any other protections against discrimination in Michigan law, apply in full force to persons who wear a mask under this order."¹⁷⁵ Still more states that have yet to suspend their anti-mask laws have suspended other laws through similar

165. See Carr, *supra* note 138.

166. See *id.*

167. See Boynton, *supra* note 140; see also Budryk, *supra* note 140.

168. See *Attorney Helped Save Black Men's Lives By Calling for Suspension of Anti-Mask Law During COVID-19 Pandemic*, GREATER DIVERSITY NETWORK (Apr. 22, 2020), <http://greaterdiversity.com/attorney-helped-save-black-mens-lives-calling-suspension-anti-mask-law-covid-19-pandemic/> [https://perma.cc/3MX6-7935].

169. See Taylor, *supra* note 125.

170. See Chris Anderson, *Uncovering Florida's mask law*, HERALD-TRIBUNE (Apr. 21, 2020), <https://www.heraldtribune.com/opinion/20200421/anderson-uncovering-floridarsquos-mask-law> [https://perma.cc/Z5AY-SF4J].

171. See Travis Fain, *Lawmakers punt on North Carolina's 'anti-mask' law*, WCNC (Jun. 26, 2020), <https://www.wcnc.com/article/news/politics/north-carolina-face-masks-illegal-august-1/275-55e7fd25-16cc-4ee7-8665-ba4902b0534f> [https://perma.cc/YT3N-X4PR]; Fain, *supra* note 19.

172. See *Attorney General James Applauds Repeal of Law Criminalizing Group Mask Use in Public*, *supra* note 19.

173. See *Wear Face Masks, Stay at Home, Says Northam*, VPM-NPR (Apr. 6, 2020), <https://vpm.org/news/articles/12225/wear-face-masks-stay-at-home-says-northam> [https://perma.cc/7VZJ-RTBW].

174. See Budryk, *supra* note 19.

175. Mich. Exec. Ord. No. 2020-59, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html [https://perma.cc/T5G9-A7SU].

actions. For instance, both California¹⁷⁶ and Connecticut¹⁷⁷ have suspended their plastic bag tax laws by executive order. States should take note of the multiple strategies to minimize the effect of anti-mask laws amidst a pandemic.

B. Exemptions and Incorporating Mens Rea Requirements

Suspending anti-mask laws has become a go-to strategy among states and has been backed by Black politicians, as discussed above;¹⁷⁸ the author of this Essay also endorses it as the most sensible policy. Nevertheless, states may be wary of removing their anti-mask laws for fear of people abusing their newfound license, as in the cases of White men grocery shopping in KKK hoods.¹⁷⁹ In this event, they may consider clarifying the text of the statute via its exemptions or mens rea element.

As discussed above, most anti-mask laws admit of exemptions for Halloween, Mardi Gras celebrations, or other “legitimate” usage, so another exemption for the public health would be in line with tradition.¹⁸⁰ At least one anti-mask statute, that of Virginia, already permits exemptions for medical reasons or during an emergency if the governor declares it.¹⁸¹ Nevertheless, neither Virginia’s anti-mask law nor that of any other state explicitly provides exemptions for the public health.¹⁸² As such, states seeking to preserve anti-mask laws but minimize harm to minorities might amend their statutes to excuse, for instance, face coverings worn for public health reasons.

Alternately, clarifying anti-mask statutes’ mens rea component would, ideally, instruct law enforcement to not harass people using masks for a “legitimate” purpose, as coronavirus protection must surely be. Above, this Article discusses the constitutional challenges brought against anti-mask statutes for indefinite standards of guilt.¹⁸³ The state supreme courts of Georgia, Florida, and Virginia have all narrowed their statutes to only apply in certain conditions or levels of mens rea.¹⁸⁴ Nevertheless, Appendix A, below, shows that eight out

176. See *Which States are Reopening?*, *supra* note 14; see also Heather Murphy, *California Lifts Ban on Plastic Bags Amid Virus Concerns*, N.Y. TIMES (Apr. 24, 2020) <https://www.nytimes.com/2020/04/24/us/california-plastic-bag-ban-coronavirus.html> [<https://perma.cc/6H46-ZVZC>].

177. See *Which States are Reopening?*, *supra* note 14; see also Marc E. Fitch, *Lamont delays plastic bag tax until June 30*, YANKEE INST. FOR PUB. POL’Y. (May 13, 2020), <https://yankeeinstitute.org/2020/05/13/connecticut-plastic-bag-tax-returns-on-friday/> [<https://perma.cc/2ZQX-ZW85>].

178. See *supra* notes 163-166 and accompanying text.

179. See Mabubani, *supra* note 16.

180. See *supra* notes 102-09 and accompanying text; see also Budryk, *supra* note 12.

181. See *U.S. Current Trend: Anti-Mask Laws, COVID-19, and the First Amendment*, *supra* note 13.

182. See *id.*

183. See *supra* notes 88-109 and accompanying text.

184. See *Robinson v. State*, 393 So.2d 1076, 1077 (Fla. 1980); *Daniels v State*, 448 S.E.2d 185 (Ga. 1994) (interpreting state anti-mask laws to include a mens rea requirement).

of 18 states still do not specify a mens rea requirement in their anti-mask statute.¹⁸⁵ At least in theory, clarifying mens rea would instruct law enforcement officers on the kind of mask-wearing that would warrant intervention, which surely would not include public health mask usage. This might curb some of the selective enforcement and confusion resulting from the clash in mandates.

States who wish to modify their anti-mask statutes may consider the language of these rulings, such as requiring actual knowledge that the conduct resulted in apprehension by the victim or reckless disregard as to that fact.¹⁸⁶ They may also turn to the original language of the Enforcement Act of 1870, which criminalized “two or more persons [. . .] in disguise on the highway or on the premises of another with the intent to prevent or hinder his/her free exercise or enjoyment of any rights so secured,”¹⁸⁷ or a state whose anti-mask statute already mirrors this language, such as Connecticut.¹⁸⁸ Steven J. Simoni has proposed a model anti-mask statute which incorporates two sections, the penalty for each of which is specified separately. The first section criminalizes mask-wearing in public with the intent to conceal identity.¹⁸⁹ It exempts a number of activities which require anonymity to engage in, such as certain kinds of protest, conducting business during a labor dispute, identifying suspects in a criminal proceeding, or obscuring oneself from paparazzi.¹⁹⁰ The second section enhances penalties for any primary criminal offense committed while concealing one’s physical identity.¹⁹¹

Incorporating mens rea requirements may be a fix for the long term, but not immediately during the pandemic. For instance, Georgia’s anti-mask statute was narrowed to include a mens rea requirement decades ago, but this did not obviate the need for its suspension during COVID-19. If states choose this approach, they should consult with Black legislators and organizers to ensure it has the intended effect.

C. Making Use of Task Forces

At least six states—Utah, Pennsylvania, Ohio, Michigan, Louisiana, and Vermont—have already established some manner of task force dedicated to racial disparities in the wake of COVID-19.¹⁹² Several have been established by executive order.¹⁹³ On a national level, senator and vice presidential candidate Kamala Harris proposed the COVID-19 Racial and Ethnic Disparities Task Force Act of 2020, calling for a task force to “gather data about

185. See *supra* notes 72-109 and accompanying text.

186. Daniels, 448 S.E.2d at 189. See also Fleissner, *supra* note 107, at 260.

187. 18 U.S.C. §241 (2020).

188. See CONN. GEN. STAT §53-37a (1949).

189. See Simoni, *supra* note 76, at 266-73.

190. See *id.*

191. See *id.*

192. See *Which States are Reopening?*, *supra* note 14.

193. See *id.*

disproportionately affected communities and provide recommendations to combat the racial and ethnic disparities in the COVID–19 response throughout the United States and in response to future public health crises.”¹⁹⁴

Inclusive task forces offer many potential benefits in crafting responses to the health disparities created by the pandemic, mask safety among them. For one, they can improve data collection. The ACLU, in its letter to the California government, argued that a centralized state task force could standardize the racial or ethnic groups being measured rather than allowing counties to make their own decisions over what to measure, often with wildly differing results.¹⁹⁵ This would capture nuances in the breakdown of disease disparities and help to form sophisticated and effective policy.¹⁹⁶ Another benefit is that, if task forces are truly responsive to their communities, they can invest in community education and help to curb problems through a more agile means than legislation. Though Louisiana’s task force was largely comprised of health professionals, such that it is unclear to an outsider how involved this task force is with its community, it was laudably charged with community education around virus prevention and social determinants of health, as well as with conducting long-term research.¹⁹⁷ Task forces can serve as a point of contact between the community and the government, especially for people who might not otherwise find a willing ear among their representatives. Pennsylvania’s task force was explicitly instructed to reach out to leaders in marginalized communities and centrally pool information from citizens and the state.¹⁹⁸ As the ACLU observes, sincere community engagement from a government organization can improve the scope of representation, transparency, and therefore trust.¹⁹⁹

In designing these task forces, legislators have been deliberate about membership selection and duration of service. Michigan’s, for instance, is comprised of 23 representatives from diverse backgrounds, charged until 90 days after the governor terminates the state of emergency.²⁰⁰ Louisiana’s is comprised

194. COVID-19 Racial and Ethnic Disparities Task Force Act of 2020, S. 3721, 116th Cong. (2020).

195. See American Civil Liberties Union, *Letter to California Board of Supervisors* (Aug. 12, 2020), https://www.aclunc.org/sites/default/files/2020.08.12_Statewide_COVID-19_Racial_Disparity_Task_Force_Letter_final.pdf [https://perma.cc/D5LW-KG5H].

196. See *id.*

197. See Melinda Deslatte, *Edwards creating task force on virus’s racial disparities*, ASSOCIATED PRESS NEWS (April 10, 2020), <https://apnews.com/article/8a2abf7de3d8d0db03256922907535e3> [https://perma.cc/P96P-FB6Q].

198. Pennsylvania Office of the Lieutenant Governor, *Pennsylvania COVID-19 Response Task Force: Health Disparity Policy Recommendation Report* (2020), <https://www.governor.pa.gov/wp-content/uploads/2020/08/20200813-COVID-19-Health-Disparity-Report.pdf>

199. See American Civil Liberties Union, *supra* note 195.

200. See Governor Whitmer Signs Executive Order Creating the Michigan Coronavirus Task Force on Racial Disparities, MICHIGAN.GOV (Apr. 20, 2020), <https://www.michigan.gov/whitmer/0,9309,7-387-90499-526478--,00.html> [https://perma.cc/7XVD-6LKJ].

largely of members of various academic health centers.²⁰¹ The Federal Task Force Act proposes to combine officials from several health-related agencies, along with “five health professionals with expertise in addressing racial and ethnic disparities, with at least one representative from a rural area [. . .]; five policy experts specializing in addressing racial and ethnic disparities in education and racial or ethnic economic inequality [. . .]; six representatives from community-based organizations specializing in providing culturally competent care or services and addressing racial and ethnic disparities, with at least one representative from an urban Indian organization and one representative from a national organization that represents Tribal governments [. . .]; six state, local, territorial, or Tribal public health officials representing departments of public health, who shall represent jurisdictions from different regions of the United States with relatively high concentrations of historically marginalized populations [. . .].”²⁰²

Nevertheless, task forces are no panacea for health disparities of the pandemic, mask-related or otherwise. With the establishment of Vermont’s task force, the governor admitted, “Let’s be honest, a task force is not the cure-all for what ails us. It’s going to take some soul-searching and change, individually, to make a difference.”²⁰³ Task forces can only address health disparities insofar as their structure does not recreate the inequities that drive these outcomes.²⁰⁴ One way to ensure inclusiveness is to make a task force accessible to its community so that it can collect information from more than just the standard channels of transmission. Another is to appoint diverse members who can speak to a variety of experiences. Still a third is to ensure that legislators take task force recommendations seriously.

To that end, state task forces must abide by best practices such as those offered by the ACLU: prioritizing diversity in the group, releasing all members’ contact information for ease of connecting with stakeholders, relying on a centralized platform, and appointing one member to reconcile disparate data.²⁰⁵

CONCLUSION

With the pandemic expected to rage on for several more months, and schools and workplaces preemptively closing for the fall, we can plan on masks continuing to be a part of daily life. Even as the disaster subsides, masks may, as they have in other parts of the world, become part of United States culture and fashion.

201. See Melinda Deslatte, *supra* note 197.

202. See COVID-19 Racial and Ethnic Disparities Task Force Act of 2020, *supra* note 194.

203. See Wilson Ring, *Vermont task force to look at racial disparities in COVID-19*, AP NEWS (2020), <https://apnews.com/article/d9ed5e45b0accb6e22c635afd8893bdf> [<https://perma.cc/79NA-S573>].

204. See ACLU, *supra* note 195.

205. See *id.*

As a society, we must keep all citizens safe from biological and social diseases alike. COVID-19 has illustrated that we cannot achieve biological safety without social safety, as given witness by the disproportionate health impact on communities of color and the multiple police killings of Black Americans during spring of 2020.

Masks have the potential to inflame tensions, but they also have the potential to save lives. In seeking to promote a safe masking culture, states would do well to acknowledge the medical as medical and political as political, including by admitting their flaws in early mask guidance.²⁰⁶ They must also include nuance in their mask guidance, not just to eliminate racial tone-deafness but also to clarify in what settings masks must be worn, and remove tones of moral judgment when issuing evidence-based public health guidance.²⁰⁷ While some may be tempted to issue exemptions to mandatory PPE orders for people of color, they must approach this with thoughtfulness to avoid vitriolic backlash against those they intend to protect, as one predominantly White Oregon county learned.²⁰⁸ Finally, in anti-mask states, a recognition of the laws' racist intentions, coupled with the asymmetry of awareness of these laws between police and citizens, can disabuse legislators of any reticence to repeal them.

APPENDIX A. ANTI-MASK LAWS BY STATE.

State and year enacted	Mens rea	Penalty	Language
Alabama: ALA. CODE §13A-11-9 (1949).	No	\$500 or a year in jail	A person commits the crime of loitering if he... Being masked, loiters, remains or congregates in a public place... A person does not commit a crime under subdivision (a)(4) of this section if he is going to or from or staying at a masquerade party, or is participating in a public parade or presentation of an educational, religious, or historical character or in an event as defined in subdivision (1) of Section 13A-11-140 .
New York, N.Y. PENAL § 240.35(4) (1845).	No	Up to 15 days in jail	A person is guilty of loitering when he... Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place;

206. See Robert Kahn, *Masks, Culture Wars, and Public Health Expertise: Confessions of a Mask 'Expert'*, U. ST. THOMAS L. J. 1, 15-26 (forthcoming 2020) (calling on states to be candid about their failings and racial “tone-deafness” surrounding COVID-19 masking to help negate the partisan “culture wars” over their usage, and impugning the idea that public health officials are certified to make decisions on decisions like protesting, which are not purely medical but also political).

207. See *id.* at 22-26.

208. See Scottie Andrew, *An Oregon County Drops Its Mask Exemption for People of Color After Racist Response*, CNN (Jun. 25, 2020), <https://www.cnn.com/2020/06/24/us/oregon-county-people-of-color-mask-trnd/index.html> [<https://perma.cc/TRF7-URQ2>] (saying that the policy “created a ripple of fear throughout our communities of color . . . making them a target for further discrimination and harassment”).

			except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities;
South Carolina, S.C. CODE ANN. § 16-7-110 (1951).	No	Fine of not more than \$500 or imprisonment for not more than a year	No person over sixteen years of age shall appear or enter upon any lane, walk, alley, street, road, public way or highway of this State or upon the public property of the State or of any municipality or county in this State while wearing a mask or other device which conceals his identity. Nor shall any such person demand entrance or admission to or enter upon the premises or into the enclosure or house of any other person while wearing a mask or device which conceals his identity. Nor shall any such person, while wearing a mask or device which conceals his identity, participate in any meeting or demonstration upon the private property of another unless he shall have first obtained the written permission of the owner and the occupant of such property. It shall be unlawful for any person to place or to cause to be placed in a public place in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part or to place or cause to be placed on the property of another in the State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is the whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do. The provisions of Sections 16-7-110 and 16-7-120 shall not affect the following: (1) Any person wearing traditional holiday costume; (2) Any person engaged in a trade or employment in which a mask is worn for the purpose of ensuring the physical safety of the wearer or because of the nature of the occupation, trade or profession; (3) Any person using a mask in a theatrical production or masquerade ball; or (4) Any person wearing a gas mask prescribed in a civil defense drill or exercise or in an emergency.
Georgia, GA. CODE ANN. § 16-11-38 (1951).	None in statute; Supreme Court read it into statute in 1990. <i>See State v Miller</i> , 398 S.E.2d 547, 552 (Ga. 1990).	Up to 12 months in jail and up to \$1000 fine	(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so. (b) This Code section shall not apply to: (1) A person wearing a traditional holiday costume on the occasion of the holiday; (2) A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or

			<p>profession, or sporting activity;</p> <p>(3) A person using a mask in a theatrical production including use in Mardi gras celebrations and masquerade balls; or</p> <p>(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.</p>
North Carolina, N.C. GEN. STAT § 14-12.8 (1953)	No	Up to 120 days in jail and discretionary fine	No person or persons shall in this State, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, or appear upon or within the public property of any municipality or county of the State, or of the State of North Carolina.
West Virginia, W. VA. CODE §61-6-22 (1988).	No	(c) Any person who violates any provision of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$500 or imprisoned in the county jail not more than one year, or both fined and imprisoned.	<p>(a) Except as otherwise provided in this section, no person, whether in a motor vehicle or otherwise, while wearing any mask, hood or device whereby any portion of the face is so covered as to conceal the identity of the wearer, may:</p> <p>(1) Come into or appear upon any walk, alley, street, road, highway or other thoroughfare dedicated to public use;</p> <p>(2) Come into or appear in any trading area, concourse, waiting room, lobby or foyer open to, used by or frequented by the general public;</p> <p>(3) Come into or appear upon or within any of the grounds or buildings owned, leased, maintained or operated by the state or any political subdivision thereof;</p> <p>(4) Ask, request, or demand entrance or admission to the premises, enclosure, dwelling or place of business of any other person within this state; or</p> <p>(5) Attend or participate in any meeting upon private property of another unless written permission for such meeting has first been obtained from the owner or occupant thereof.</p> <p>(b) The provisions of this section do not apply to any person:</p> <p>(1) Under sixteen years of age;</p> <p>(2) Wearing a traditional holiday costume;</p> <p>(3) Engaged in a trade or employment where a mask, hood or device is worn for the purpose of ensuring the physical safety of the wearer;</p> <p>(4) Using a mask, hood or device in theatrical productions, including use in mardi gras celebrations or similar masquerade balls;</p> <p>(5) Wearing a mask, hood or device prescribed for civil defense drills, exercises or emergencies; or</p> <p>(6) Wearing a mask, hood or device for the sole purpose of protection from the elements or while participating in a winter sport.</p>
Louisiana, LA. REV. STAT. ANN. § 14:313 (1924)	No in general; for convicted sex offenders, "intent to	Imprisonment for not less than six months nor more than three years	No person shall use or wear in any public place of any character whatsoever, or in any open place in view thereof, a hood or mask, or anything in the nature of either, or any facial disguise of any kind or description, calculated to conceal or hide the identity of the person or to prevent his being readily recognized... To activities

	conceal his identity on...any recognized holiday for which hoods, masks, or disguises are generally used”		<p>of children on Halloween, to persons participating in any public parade or exhibition of an educational, religious, or historical character given by any school, church, or public governing authority, or to persons in any private residence, club, or lodge room.</p> <p>(2) To persons participating in masquerade balls or entertainments, to persons participating in carnival parades or exhibitions during the period of Mardi Gras festivities, to persons participating in the parades or exhibitions of minstrel troupes, circuses, or other dramatic or amusement shows, or to promiscuous masking on Mardi Gras which are duly authorized by the governing authorities of the municipality in which they are held or by the sheriff of the parish if held outside of an incorporated municipality.</p> <p>(3) To persons wearing head covering or veils pursuant to religious beliefs or customs.</p>
Minnesota, MINN. STAT. § 609.735 (1963)	No		A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor.
Virginia, VA. CODE ANN. § 18.2-422 (1950).	Yes— “intent to conceal his identity”	One to five years in prison	It shall be unlawful for any person over 16 years of age to, with the intent to conceal his identity, wear any mask, hood or other device whereby a substantial portion of the face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing. However, the provisions of this section shall not apply to persons (i) wearing traditional holiday costumes; (ii) engaged in professions, trades, employment or other activities and wearing protective masks which are deemed necessary for the physical safety of the wearer or other persons; (iii) engaged in any bona fide theatrical production or masquerade ball; or (iv) wearing a mask, hood or other device for bona fide medical reasons upon (a) the advice of a licensed physician or osteopath and carrying on his person an affidavit from the physician or osteopath specifying the medical necessity for wearing the device and the date on which the wearing of the device will no longer be necessary and providing a brief description of the device, or (b) the declaration of a disaster or state of emergency by the Governor in response to a public health emergency where the emergency declaration expressly waives this section, defines the mask appropriate for the emergency, and provides for the duration of the waiver. The violation of any provisions of this section is a Class 6 felony.

California, CAL. PENAL CODE § 185 (1873).	Yes – to evade or escape discovery or escape from charges	Up to 6 months in jail and/or a fine of up to \$1,000	It shall be unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of: One—Evading or escaping discovery, recognition, or identification in the commission of any public offense. Two—Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor.
Michigan, MICH. COMP. LAWS § 750.396 (1931)	Yes – intent to facilitate the commission of a crime	Imprisonment not more than 93 days, fine not more than \$500, or both	A person who intentionally conceals his or her identity by wearing a mask or other device covering his or her face for the purpose of facilitating the commission of a crime is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.
North Dakota, N.D. CENT. CODE § 12.1-31-15 (2017).	Yes	Up to a year in jail	An individual may not wear a mask, hood, or other device that covers, hides, or conceals any portion of that individual's face: a. With the intent to intimidate, threaten, abuse, or harass any other individual; b. For the purpose of evading or escaping discovery, recognition, or identification during the commission of a criminal offense; or c. For the purpose of concealment, flight, or escape when the individual has been charged with, arrested for, or convicted of a criminal offense. 2. A violation of this section is a class A misdemeanor.
Ohio, OHIO REV. CODE ANN. § 3761.12 (1953).	Yes	Up to 180 days in jail and/or \$1,000 fine	No person shall unite with two or more others to commit a misdemeanor while wearing white caps, masks, or other disguise.
Oklahoma, OKLA. STAT. tit. 21, § 1301 (1923).	Yes – for the purpose of coercion, intimidation, or harassment	A fine of not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by imprisonment in the county jail for a period of not exceeding one (1) year, or by both such fine and imprisonment	It shall be unlawful for any person in this state to wear a mask, hood or covering, which conceals the identity of the wearer during the commission of a crime or for the purpose of coercion, intimidation or harassment; provided, the provisions of Section 1301 et seq. of this title shall not apply to the pranks of children on Halloween, to those going to, or from, or participating in masquerade parties, to those participating in any public parade or exhibition of an educational, religious or historical character, to those participating in any meeting of any organization within any building or enclosure wholly within and under the control of said organization, and to those participating in the parades or exhibitions of minstrel troupes, circuses or other amusements or dramatic shows.
Florida, FLA. STAT. § 876.11-15 (1951).	Yes – intent to “deprive of...equal protection of the	Up to 60 days in jail	No person or persons over 16 years of age shall, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be or appear upon any lane, walk, alley, street, road, highway, or other public way in this state.

	<p>law...injure ...intimidat e...or avoiding [criminal] identifi- cation”</p>		<p>No person or persons shall in this state, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be, or appear upon or within the public property of any municipality or county of the state.</p> <p>No person or persons over 16 years of age shall, while wearing a mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, demand entrance or admission or enter or come upon or into the premises, enclosure, or house of any other person in any municipality or county of this state.</p> <p>No person or persons over 16 years of age, shall, while wearing a mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, hold any manner of meeting, make any demonstration upon the private property of another unless such person or persons shall have first obtained from the owner or occupier of the property his or her written permission to so do.</p> <p>The provisions of ss. 876.12-876.15 apply only if the person was wearing the mask, hood, or other device:</p> <p>(1) With the intent to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws or for the purpose of preventing the constituted authorities of this state or any subdivision thereof from, or hindering them in, giving or securing to all persons within this state the equal protection of the laws;</p> <p>(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of the person’s exercise of any right secured by federal, state, or local law or to intimidate such person or any other person or any class of persons from exercising any right secured by federal, state, or local law;</p> <p>(3) With the intent to intimidate, threaten, abuse, or harass any other person; or</p> <p>(4) While she or he was engaged in conduct that could reasonably lead to the institution of a civil or criminal proceeding against her or him, with the intent of avoiding identification in such a proceeding.</p> <p>876.16 Sections 876.11-876.15; exemptions.—The following persons are exempted from the provisions of ss. 876.11-876.15:</p> <p>(1) Any person or persons wearing traditional holiday costumes;</p> <p>(2) Any person or persons engaged in trades and employment where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession;</p> <p>(3) Any person or persons using masks in theatrical productions, including use in Gasparilla celebrations and masquerade balls;</p>
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			(4) Persons wearing gas masks prescribed in emergency management drills and exercises.
Washington, DC, (Mar. 10, 1983, D.C. CODE § 22-3312.03 (1983).	Yes – intent to “deprive... of equal protection ...injure, intimidate ...or...avoid [d criminal] identification”	Up to 180 days in jail	<p>(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:</p> <p>(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;</p> <p>(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or</p> <p>(3) Hold any manner of meeting or demonstration.</p> <p>(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:</p> <p>(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;</p> <p>(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;</p> <p>(3) With the intent to intimidate, threaten, abuse, or harass any other person;</p> <p>(4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant’s actions, with reckless disregard for that probability; or</p> <p>(5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.</p>
Connecticut, CONN. GEN. STAT §53-37a (1949).	Yes – intent to subject...any other person to the deprivation of any rights, privileges, or immunities ...	One to five years in prison and up to \$5,000 in fines	Any person who, with the intent to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness or physical disability, violates the provisions of section 46a-58 while wearing a mask, hood or other device designed to conceal the identity of such person shall be guilty of a class D felony.
Delaware, DEL. CODE ANN. TIT. 11, § 1301 (1953).	Yes – “for the purpose of...deprivation of	Up to 30 days in jail and fine of up to \$575	A person is guilty of disorderly conduct when...(1) Congregating with other persons in a public place while wearing masks, hoods or other garments rendering their faces unrecognizable, for the purpose of and in a manner

	any rights, privileges or immunities secured by the Constitution” and “[knows that it is] “likely to cause substantial harm” or “knowingly disobeys an officer”		likely to imminently subject any person to the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States of America. (2) The person engages with at least 1 other person in a course of disorderly conduct as defined in paragraph (1) of this section which is likely to cause substantial harm or serious inconvenience, annoyance or alarm, and refuses or knowingly fails to obey an order to disperse made by a peace officer to the participants.
New Mexico, N.M. Stat. Ann § 30-22-3 (1963).	Yes – “intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.”	No more than six months in jail and/or \$500 fine	Concealing identity consists of concealing one's true name or identity, or disguising oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.