

Campus Protests, Mask Bans and the First Amendment: The Hidden Promise of the Intent-to-Intimidate Standard

Rob Kahn*

Mask bans have become popular in wake of the 2024–25 campus protests over the Gaza war. The new campaign against campus mask wearing sweeps up a wide variety of “innocent” (non-threatening) masking into its web. These laws, at least in theory, would criminalize a patient wearing a COVID mask on the way to a doctor’s appointment, parents masking while playing with their children in a public park, or a student who masks to avoid being doxxed at a peaceful campus protest.

Some have argued that the First Amendment protects names but not faces. But this argument is outdated at a time when, thanks to facial recognition technology and viral social media, names are faces. Protecting mask wearers who would otherwise face harassment if unmasked is a better approach but not everyone who masks does so to conceal their identity. Instead, courts should hold that the First Amendment protects mask wearing unless the wearer acts with the intent to intimidate others—for example, when the wearer confronts another person at close quarters and remains masked despite that person’s expression of fear. The middle ground, intent-to-intimidate approach reflects the robust history of masking and disguise in colonial America, while respecting the right of individuals under normal circumstances to decide whether to cover their face.

* Professor of Law, St. Thomas University, Minneapolis, Minnesota. B.A., Columbia University (1985); JD, N.Y.U. School of Law (1989); Ph.D. (political science), Johns Hopkins University (2000). I would like to thank Greg Sisk and Jacqueline Baronian for their helpful comments.

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INTRODUCTION: MASK BANS AND THE FIRST AMENDMENT

Once mandated, masks have fallen out of favor.¹ Big city mayors dislike them,² college presidents rebuke them,³ while the President of the United States excoriates them on Truth Social.⁴ According to a January 2025 *New York Post* poll, over seventy-five percent of New Yorkers

¹ See Rob Kahn, *The Authoritarian Semiotics of the New Campus Mask Bans*, 99 ST. JOHN’S L. REV. 511, 511–12 (2026) [hereinafter Kahn, *Authoritarian Semiotics*].

² Edward Helmore, *New York Governor Considers Face-Mask Ban on Subway to Deter Crime* GUARDIAN (June 15, 2024), <https://www.theguardian.com/us-news/article/2024/jun/15/new-york-face-masks-ban-subway-crime> [https://perma.cc/SBB5-PQ7B] (describing opposition of Eric Adams to mask bans); see also Kahn, *Authoritarian Semiotics*, *supra* note 1, at 511–12.

³ For example, Barnard College President Laura Ann Rosenbury has been a strident critic of masks. See Laura Ann Rosenbury, *When Student Protest Goes Too Far*, CHRON. HIGHER EDUC. (Mar. 3, 2025), <https://www.chronicle.com/article/when-student-protest-goes-too-far> [https://perma.cc/QN96-U472] (critiquing mask wearers as an anonymous “they”); see also Kahn, *Authoritarian Semiotics*, *supra* note 1, at 524–25. More recently, President Rosenbury proposed a ban on intimidatory mask wearing and masks that violate school rules. Sharon Otterman, *Barnard College Pledges ‘Zero Tolerance’ for Antisemitism in Settlement*, N.Y. TIMES (July 7, 2025), <https://www.nytimes.com/2025/07/07/nyregion/barnard-college-antisemitism-lawsuit.html> [https://perma.cc/7USU-97AE].

⁴ See Anna Betts, *Trump Threatens to Pull Federal Funds for US Schools for Allowing ‘Illegal Protests’*, GUARDIAN (Mar. 4, 2025), <https://www.theguardian.com/us-news/2025/mar/04/trump-university-funding-protests> [https://perma.cc/M3QL-WBD8].

support mask bans.⁵ This support reflects efforts to cast mask- or keffiyeh-wearing college students as the modern day equivalent of the Ku Klux Klan.⁶ It also reflects a lingering dislike of masks dating from the pandemic.⁷ As New York City Mayor Eric Adams put it in 2024—it is “time [for mask wearing] to go back to the way it was pre-COVID.”⁸

This dislike of masks, however, sits uneasily with another set of values. On the one hand, some masking is “innocent.” A college student protesting the Gaza war might mask to avoid getting doxxed.⁹ An immunocompromised person, or someone suffering from a respiratory illness might mask for health reasons.¹⁰ A person cheating on a spouse might mask to be able to continue living a secret life.¹¹ Finally, parents might choose to mask while playing with their children in a public park.¹² A free society, one that lets people make decisions for themselves, should appreciate that people mask for a variety of reasons and (normally) respect this choice.¹³

At the same time, protecting mask wearing pushes back against police forces that increasingly rely on facial recognition technology to “solve” cases—sometimes in violation of their own rules.¹⁴ For example,

⁵ Carl Campanile, *Eye-Popping Amount of New Yorkers Support a Mask Ban After Troubling Anti-Jewish Incidents*, N.Y. POST (Jan. 13, 2025), <https://nypost.com/2025/01/13/us-news/eye-popping-amount-of-new-yorkers-support-a-mask-ban-after-troubling-anti-jewish-incidents/> [<https://perma.cc/H629-36KZ>].

⁶ Kahn, *Authoritarian Semiotics*, *supra* note 1, at 517–18.

⁷ *Id.* at 525–32.

⁸ Helmore, *supra* note 2.

⁹ See NYCLU 2025–2026 Legislative Memorandum: An Act to Amend the Penal Law, in Relation to the Crime of Masked Harassment and Aggravated Harassment A.3133 (Dinowitz)/S.3070 (Skoufis), at 5 [hereinafter NYCLU Memorandum], <https://www.nyclu.org/uploads/2025/03/A3133-Dinowitz-S3070-Skoufis-Mask-Ban-OPPO-1.pdf> [<https://perma.cc/G633-KJJV>] (describing doxxing at Columbia University since the start of the Gaza war).

¹⁰ See ALEC TYSON, MICHAEL LIPKA & CLAUDIA DEANE, 5 YEARS LATER: AMERICA LOOKS BACK AT THE IMPACT OF COVID-19, at 26 (2025), https://www.pewresearch.org/wp-content/uploads/sites/20/2025/02/PRC_2025.02.12_Covid-5-Year_REPORT.pdf [<https://perma.cc/KXR7-HLQW>] (describing post-COVID masking).

¹¹ Consider the adulterous couple whose identities were revealed by the kiss-me jumbotron at a July 2025 Cold Play concert. Kat Rosenfield, *The Cold Play Couple Did Something Bad. The Internet Did Something Worse.*, FREE PRESS (July 20, 2025), https://www.thefp.com/p/the-coldplay-couple-did-something?utm_campaign=email-post&r=22lbee&utm_source=substack&utm_medium=email [<https://perma.cc/EPA9-XE5Z>]. A mask would have come in handy.

¹² *Cf.* Daniels v. State, 448 S.E.2d 185, 188–89 (Ga. 1994) (reversing conviction of defendant who masked to “entertain” neighborhood children).

¹³ See Rob Kahn, *The Mask Wars and Social Control: Lessons from the 1927 Unveiling Campaign in Soviet Uzbekistan*, 53 CAL. W. INT’L L.J. 161, 164–65, 198 (2022) [hereinafter Kahn, *The Mask Wars and Social Control*].

¹⁴ See Gintaras Radauskas, *New Orleans Police Secretly Used Live Facial Recognition to Nab People Right on the Street*, CYBERNEWS (May 20, 2025), <https://cybernews.com/news/new-orleans-police-facial-recognition/> [<https://perma.cc/WM6A-T4QZ>] (describing how the New

after United Health Care executive Brian Thompson was shot (and after a surveillance photo identified Luigi Mangione as a potential suspect), Mayor Adams called on all New Yorkers to take off their masks momentarily when entering a taxi cab or restaurant.¹⁵ Mayor Adams did not explain how Sally from Queens lifting her mask would help the NYPD apprehend Thompson's killer.¹⁶

Finally, to the extent mask bans target masks not for *what they do* but for *what they represent*, mask bans trade in stereotypes about masks, keffiyehs and campus protesters. There certainly are situations where mask wearing is threatening—such as face-to-face encounters where the wearer uses the mask to stoke fear in the other party.¹⁷ Broad mask bans undoubtedly capture these instances. But they create the false impression that *all* masking is “threatening,” which unfairly stigmatizes mask wearers as a group.

Given concerns about personal freedom, state surveillance and stigmatization, this Article asks a pair of questions. First, does the First Amendment protect the right to mask? Second, *what type of masking* is protected? The second question is critical. Masking often gets presented as an “all-or-nothing” issue—either masking is permissible at all times and places, or the state should ban all public masking. This “either/or” approach helps anti-maskers. As one mask ban supporter put it, “The reality is that mask bans prevent and respond to crime and harassment.”¹⁸ Therefore, it is not difficult to conjure up instances of problematic mask wearing. Someone entering a dwelling place at night, while masked, is likely up to no good.¹⁹ Likewise, a masked Ku Klux Klan member evokes a past of night riding and racist violence.²⁰

But the mask debate need not be so limited. Mask regulations come in different shapes and sizes. A ban on masked harassment (as was

Orleans police violated its own policies on facial recognition photos by not including the photos in police reports).

¹⁵ Matthew Impelli, *Eric Adams Talks NYC Face Mask Recommendations After Luigi Mangione Arrest*, NEWSWEEK (Dec. 10, 2024), <https://www.newsweek.com/new-york-city-luigi-mangione-arrest-eric-adams-mask-rules-1998197> [<https://perma.cc/NX5Y-E4FV>].

¹⁶ Instead, Mayor Adams praised cameras as a law enforcement tool and reassured New Yorkers that they could put their masks back on once they had been photographed. *Id.*

¹⁷ See *infra* subpart III(C).

¹⁸ Hannah E. Meyers, *New Yorkers are Right to Demand a Ban on Criminal Masking*, CITY J. (Jan. 22, 2025), <https://www.city-journal.org/article/new-york-criminal-face-masking-terror-crime> [<https://perma.cc/BCZ4-2FQJ>].

¹⁹ *Walpole v. State*, 68 Tenn. 370 (1878) (upholding use mask ban against chicken burglar). So, too, is someone found with a fourteen-inch knife while masked. See Meyers, *supra* note 18.

²⁰ Rebecca C. Lewis, *Democratic Lawmakers and Civil Rights Groups Push for Mask Ban*, CITY & STATE: N.Y. (June 27, 2024), <https://www.cityandstateny.com/politics/2024/06/democratic-lawmakers-and-civil-rights-groups-push-mask-ban/397727/> [<https://perma.cc/8EE9-MXZK>].

proposed in New York in 2025)²¹ is quite different from a ban, like the one recently enacted by Nassau County, that—read broadly—prohibits all public mask wearing across the county subject to a few, narrow exceptions.²² If our goal is to protect society against the harms of mask wearing, are sweeping mask bans necessary? Or is there a middle ground—one that recognizes the harm posed by some types of masking *and* the harm of excessive, overbroad mask bans?

To state my thesis plainly, I believe such a middle ground exists. In *State v. Miller*,²³ the Georgia Supreme Court modified its state mask law to satisfy the First Amendment by limiting it to situations where the mask was worn with the intent to intimidate others.²⁴ The “intent-to-intimidate” standard separates expressive, protective, and idiosyncratic masking from masking that is genuinely threatening.

By contrast, other approaches to mask wearing and the First Amendment insufficiently protect the right to mask. In 2004, the Second Circuit held in *Church of the American Knights of the Ku Klux Klan v. Kerik*²⁵ that New York’s previous mask ban could be used to restrict masking at a planned Klan rally in lower Manhattan because the First Amendment protects names but not faces.²⁶ The *Kerik* distinction between names and faces provides a bright line rule. Meanwhile, the name vs. face divide serves the symbolic purpose of distinguishing “good” civil rights activists (like those who sought to block disclosure of the NAACP’s membership lists) from “bad” groups (like the Ku Klux Klan, whose members wear hoods to invoke terror). As such, the *Kerik* logic reinforced

²¹ Rebecca C. Lewis, *New York’s ‘Mask Ban’ Wouldn’t Actually Ban Masks*, CITY & STATE: N.Y. (Jan. 24, 2025), <https://www.cityandstateny.com/policy/2025/01/new-yorks-mask-ban-wouldnt-actually-ban-masks/402488/> [<https://perma.cc/XG2F-RWYY>].

²² Rebecca Schneid, *Nassau County Enacts Face Mask Ban, First of Its Kind Post-Pandemic*, TIME (Aug. 16, 2024), <https://time.com/7011074/nassau-county-maskban/> [<https://perma.cc/3MCG-N4WG>]. The Nassau County Mask Transparency Act is posted on the Nassau County website. NASSAU CNTY., N.Y., Clerk Item 142-24 (Aug. 14, 2024) [hereinafter Nassau County Mask Transparency Act], <https://www.nassaucountyny.gov/AgendaCenter/ViewFile/Item/3192?fileID=247452> [<https://perma.cc/B5GZ-S9AT>]. As we shall see, the scope of the Nassau County Mask Transparency Act is unclear. *See infra* note 63. At a minimum, the law bans two or more mask wearers from congregating anywhere in the county subject to exemptions based on health, safety, celebratory masking, and masks worn for religious or cultural purposes. Nassau County Mask Transparency Act, *supra*, § 3(a), (b)(1).

²³ 398 S.E.2d 547 (Ga. 1990).

²⁴ *Id.* at 550–51.

²⁵ 356 F.3d 197 (2d Cir. 2004). The law in question, N.Y. PENAL LAW § 240.35(4), was repealed during the COVID pandemic. *See* Rob Kahn, “My Face, My Choice?”—Mask Mandates, Bans, and Burqas in the COVID Age, 14 N.Y.U.J.L. & LIBERTY 651, 669–72 (2021) [hereinafter Kahn, “My Face, My Choice”] (describing the repeal of the law).

²⁶ *Kerik*, 356 F.3d at 209.

comparisons between student protesters and the Klan made by some critics of the 2024 Gaza protests.²⁷

Despite its symbolic appeal, the names vs. faces approach has problems. *Kerik*, which only applies in the Second Circuit, ignored earlier case law applying the First Amendment to mask wearing,²⁸ and has not been adopted since then.²⁹ These earlier courts, accepting that the First Amendment covers faces, have used *NAACP v. Alabama*³⁰ to protect mask wearing when the wearer anticipates harassment if unmasked—a standard some campus protesters can likely meet.³¹ And the holding of *State v. Miller*, which restricts the scope of Georgia’s mask law to situations where the wearer intends to intimidate others,³² will protect a great deal of ordinary, non-threatening mask wearing.³³

In other words, the prospects for mask bans are less certain than a quick read of *Kerik* suggests. How one reacts to this uncertainty matters. A free society should normally let people decide whether to cover their face with a mask.³⁴ Mask-ban supporter Hannah Meyers of the Manhattan Institute, reassures skeptics that “law-abiding citizens” will remain free to mask “for genuine reasons of health, religious observance, or revelry.”³⁵ But why not go further, and set masking as the default—if not in legislation, then at least in the doctrine judges use to interpret mask laws? As *Miller* suggests, the seeds for a broader protection of mask wearing already exist in our jurisprudence.³⁶

²⁷ For an overview of the symbolic comparison between anti-war protesters and the Klan, see Kahn, *Authoritarian Semiotics*, *supra* note 1, at 517–525.

²⁸ See, e.g., *American Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 839, 841 (N.D. Ind. 1999); *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978); *Ghafari v. Mun. Ct.*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978).

²⁹ See *infra* Part I.

³⁰ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (protecting membership lists on First Amendment grounds where members would otherwise face harassment).

³¹ See *infra* Part II.

³² *State v. Miller*, 398 S.E.2d 547, 551–52 (Ga. 1990).

³³ See *infra* Part III.

³⁴ Kahn, *The Mask Wars and Social Control*, *supra* note 13, at 197 (rejecting “face authoritarianism”).

³⁵ Meyers, *supra* note 18. Some mask ban proposals do not even go this far. See Makiya Seminer, *North Carolina Lawmakers Push Bill to Ban Most Public Mask Wearing*, *Citing Crime*, ASSOCIATED PRESS (May, 15, 2024), <https://apnews.com/article/north-carolina-masks-covid-protests-gaza-7da0c5dd3ee1a59f9482e709bf4b3300> [<https://perma.cc/4MAW-YVGF>] (describing proposal to remove health exemption from North Carolina’s mask law).

³⁶ I have addressed this question in prior work. See Robert Kahn, *The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers*, 28 J.L. & POL’Y 71, 104–33 (2019) [hereinafter Kahn, *The Long Road Back to Skokie*] (noting the decreasing First Amendment protection of the right to mask over time). While true, past cases like *Miller* (decided in 1990) offer hope for the future.

Moreover, the protection of mask wearing (and disguises) is deeply entrenched in American history. During the Boston Tea Party, colonists dumping tea into Boston harbor disguised their faces to appear as Indians.³⁷ Likewise, women in colonial Charleston, South Carolina sat for portraits with mask in hand—a reference to the central role of masquerade balls in the mid-eighteenth century London social scene.³⁸ (This may be why mask bans often exempt masquerade balls).³⁹ From an originalist perspective,⁴⁰ the place of masks and disguises in colonial America undercuts the urgency behind today’s mask bans.

In what follows, Part I describes the *Kerik* names vs. faces distinction and shows how it cannot justify today’s sweeping mask bans.⁴¹ Part II takes up the *NAACP v. Alabama* harassment test, which protects mask wearing where the wearer faces harassment if unmasked (unless the ban is narrowly tailored to a compelling state interest).⁴² The *NAACP* test is an improvement—but it only applies if the wearer faces potential harassment.

Part III turns to Georgia’s intent-to-intimidate requirement introduced in *State v. Miller*.⁴³ *Miller* makes it clear that non-intimidatory masking is constitutionally protected. Moreover, it provides guardrails against broad interpretation of mask laws by focusing the question of “intimidation” on the defendant—who must intend to threaten someone with their mask. This approach better protects the right to mask than other

³⁷ See *Why Did Colonists Dress as “Mohawks” at the Boston Tea Party?*, COLONIAL WILLIAMSBURG (Dec. 12, 2023) [hereinafter *Why Did Colonists Dress as “Mohawks”*], <https://www.colonialwilliamsburg.org/discover/moments-in-history/the-tea-crisis/said-it-was-done-by-a-crew-of-mohawk-indians-why-did-colonists-dress-as-mohawks-at-the-boston-tea-party/> [https://perma.cc/94XM-DDEC].

³⁸ See Jennifer Van Horn, *The Mask of Civility: Portraits of Colonial Women and the Transatlantic Masquerade*, AM. ART, Fall 2009, at 8, 9–10 (describing the portraits of mask-holding colonial women painted by John Wollaston and the “tremendous popularity” of London masquerade balls in the eighteenth century).

³⁹ For example, Virginia’s mask ban exempts its ban from persons who are “engaged in any bona fide theatrical production or masquerade ball.” VA. CODE ANN. § 18.2-422(iii) (2014); see also GA. CODE ANN. § 16-11-38(b)(3) (2021) (exempting “Mardi gras celebrations and masquerade balls”).

⁴⁰ Originalists base constitutional interpretation on history and tradition. See, e.g., Michael L. Smith & Alexander S. Hiland, *Using Bruen to Overturn New York Times v. Sullivan*, 50 PEPP. L. REV. 80, 100–04 (2023) (arguing for using historical experience to assess the First Amendment). Whatever one thinks of originalism as a method of constitutional interpretation, today’s sweeping mask bans violate the spirit of eighteenth-century American history.

⁴¹ See *infra* Part I.

⁴² See *infra* Part II.

⁴³ See *infra* Part III.

proposals—such New York’s 2025 law banning masking during the commission of a felony or Class A misdemeanor.⁴⁴

Part IV examines how masks and disguises were understood in late colonial America.⁴⁵ On the one hand, the use of disguises during the Boston Tea Party suggests that the Founders of the country understood the connection between disguise, anonymity and protest. Likewise, the colonial interest (and participation in) London’s masquerade culture shows an understanding that masks might be worn for non-threatening, social purposes.

The Conclusion returns to Georgia’s middle ground, intent-to-intimidate approach.⁴⁶ By focusing on the wearer’s intent, the Georgia approach rejects the idea that all masks are intimidatory (and should be banned). As such, it offers a truce in the mask wars, one that recognizes the harms posed by some mask wearing while protecting a wide range of non-threatening mask wearing.

I. “NAMES ARE NOT FACES”—THE KERIK ANSWER AND ITS LIMITATIONS

At first glance, the Second Circuit ruling in *Church of the American Knights of the Ku Klux Klan v. Kerik* gave mask ban supporters just what they wanted—a clear, unequivocal statement that the protection laid out in *NAACP v. Alabama* of the names of speakers does not apply to faces.⁴⁷ The language is striking:

[T]he Supreme Court has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one’s appearance in a public demonstration. Nor has any Circuit found such a right. We decline the American Knights’ request to extend the holdings of *NAACP v. Alabama* and its progeny and to hold that concealment of one’s face while demonstrating is constitutionally protected.⁴⁸

One can question *Kerik*’s weight of authority analysis.⁴⁹ When *Kerik* was decided, no federal appellate court had taken up whether *NAACP v. Alabama* applies to faces, and several other courts had, since the 1970s,

⁴⁴ N.Y. PENAL LAW § 205.35 (2025) bans masking to evade arrest. For a discussion of the weaknesses of New York’s new mask ban, see *infra* notes 167–180 and accompanying text.

⁴⁵ See *infra* Part IV.

⁴⁶ See *infra* Conclusion.

⁴⁷ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2004).

⁴⁸ *Id.* These sentences are the only time in the opinion *Kerik* directly addresses why names and faces are different.

⁴⁹ See Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 124–25.

held the opposite,⁵⁰ which makes the sweeping use of “never” and “[n]or” a little less persuasive.

Nevertheless, *Kerik* is binding in the Second Circuit. Indeed, since *Kerik* was decided, neither the Supreme Court, nor any Circuit Court, has disagreed with it. In addition, *Kerik* offers a clear, bright line rule—the First Amendment protects names, not faces. Finally, *Kerik* anchored its ruling in history in stories about the Klan and New York’s Rent Wars of the 1840s.⁵¹ In its history of the Klan, *Kerik* cited *Virginia v. Black*,⁵² which found that cross burning could be a true threat,⁵³ suggesting that masks could be equally threatening.⁵⁴

For anti-maskers concerned about the “KKK tactics” of campus protesters in 2024,⁵⁵ *Kerik* has much to offer. The simplicity of its approach lets uneasy campus administrators and local police know that masking during a protest falls outside the First Amendment. This frees campuses to enact their own mask bans,⁵⁶ opens the door to sweeping state and local mask laws banning all masking in a given place, while doing nothing to protect students who risk being doxed for participating in “inappropriate” protests.⁵⁷

However, *Kerik* has limitations. *Kerik* is only binding in the Second Circuit and, in over twenty years, no court in the nation has adopted *Kerik*’s per se rule exempting “faces” from First Amendment coverage. Nor did *Kerik* elaborate on why names and faces are different. By contrast, in *Falcone v. Dickstein*,⁵⁸ the Third Circuit, holding that refusing to mask (in violation of a mask mandate) was not expressive speech, lectured the

⁵⁰ See, e.g., *Am. Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 839, 841 (N.D. Ind. 1999); *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978); *Ghafari v. Mun. Ct.* 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978).

⁵¹ *Kerik*, 356 F.3d at 200 n.2 (describing the history of the Ku Klux Klan); *id.* at 203–05 (recounting the origins of New York’s 1845 mask ban). For a critical description of these stories, see Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 89–104.

⁵² 538 U.S. 343 (2003).

⁵³ *Kerik*, 356 F.3d at 200 n.2 (citing *Black*, 538 U.S. 343).

⁵⁴ On the other hand, *Kerik* wrapped up its history of the Klan by concluding that after 1949 the Klan had become “badly splintered.” *Id.* If so, one wonders why *Kerik* took such a hardline approach to mask wearing.

⁵⁵ For examples of the use of Klan imagery in support of current mask bans, see Kahn, *Authoritarian Semiotics*, *supra* note 1, at 516–525.

⁵⁶ See Otterman, *supra* note 3 (describing Barnard’s proposed mask ban).

⁵⁷ See NYCLU Memorandum, *supra* note 9, at 5 (describing doxxing at Columbia University).

⁵⁸ 92 F.4th 193 (3d Cir. 2024).

mask-abstaining plaintiffs at length about the types of (meritorious) behaviors that merit First Amendment protection as symbolic speech.⁵⁹

Moreover, the account the Second Circuit gave of the passage of New York State's 1845 mask law cannot bear the weight of its broad names vs. faces distinction. According to *Kerik*, the 1845 ban was a necessary response to violent renters ambushing sheriff's parties seeking to collect back rent.⁶⁰ *Kerik*'s reading of the sources overstated the threat posed by the renters.⁶¹ However, even if one takes the Second Circuit's history at face value, how does a concern about violent mask wearers—indeed, the original version of the New York mask ban punished masking while armed—justify an absolute ban on mask wearing at *all* demonstrations, including peaceful ones?⁶²

Moreover, some mask bans are much broader. The Nassau Mask Transparency Act bans a wide range of public masking.⁶³ This creates a situation where mask bans, originally enacted with a narrow focus on stopping the Klan (or rebellious renters), are used against “the wrong people.”⁶⁴ Sometimes, as with the chicken thief in *Walpole v. State*,⁶⁵ arrested under an anti-Klan mask law for wearing a mask,⁶⁶ these wayward

⁵⁹ *Id.* at 207–08 (distinguishing “appropriate” forms of protest, like flag burning, from refusing to wear one’s mask during a COVID-era school board meeting about mask mandates). I discuss *Falcone* at length in Kahn, *Authoritarian Semiotics*, *supra* note 1, at 532–36.

⁶⁰ *Falcone*, 92 F.4th at 203–05.

⁶¹ The Court also downplays the ultimate political success of the protesters who achieved an end to feudal rents in 1848. See Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 91–97.

⁶² To be sure, not every campus protest over the Gaza war was peaceful, although most were. Lois Beckett, *Nearly All Gaza Campus Protests in the US Have Been Peaceful, Study Finds*, GUARDIAN (May 10, 2024), <https://www.theguardian.com/us-news/article/2024/may/10/peaceful-pro-palestinian-campus-protests> [https://perma.cc/S35Y-65PH]. Either way, *Kerik* does not distinguish between peaceful and violent acts.

⁶³ The scope of the Nassau law is unclear. See Nassau Mask Transparency Act, *supra* note 22. Section 3(a) lists a set of requirements for the mask ban to apply (it is only necessary to satisfy one requirement). Section 3(b)(1) punishes mask wearing if the wearer “remains or congregates in a public place with other persons so masked or disguised.” It is an open question whether “remains” is an independent element, or whether the statute should be read “remains . . . in a public place with other persons so masked or disguised.” The former reading—which has the interpretive benefit of distinguishing “remains” from “congregates”—bans all public masking (subject to the exceptions in section 2). Even the narrower interpretation bans groups of two or more mask wearers.

⁶⁴ See Kahn, *Authoritarian Semiotics*, *supra* note 1, at 519–21 (describing instances of mask bans targeting the “wrong” people).

⁶⁵ 68 Tenn. 370 (1878).

⁶⁶ *Id.* at 370–71, 373 (upholding use of Tennessee’s Reconstruction-era mask ban against a chicken burglar).

prosecutions might be something society can live with.⁶⁷ Other unintended victims of overbroad mask bans pose harder cases. Should mask laws be used against a man wearing makeup on a subway platform in the late 1960s,⁶⁸ a cyclist masking because of the elements,⁶⁹ or a cancer patient wearing a mask for health reasons?⁷⁰

At the same time, *Kerik*'s names vs. faces distinction is open to an alternative, narrower reading. *Kerik* states that the First Amendment does not reach the "concealment of one's face *while demonstrating*."⁷¹ The added phrase—"while demonstrating"—is strange. It can be read to suggest that only protest-oriented masking falls outside of the First Amendment. Other masking—such as Uncle Fred masking out of shame after his home team loses its tenth game in a row—would be protected because it was not done "while demonstrating."

This is an odd interpretation of the *Kerik* rule. A supporter of mask bans could argue, perhaps plausibly, that the Court intended the "while demonstrating" language to highlight how mask wearing remains outside the scope of the First Amendment even when core free speech activities (like demonstrating) are involved.⁷² But words matter—especially in a textualist, originalist age.⁷³ There is a canon that courts should give meaning to every word in a rule.⁷⁴ If this canon applies, then the *Kerik*

⁶⁷ Likewise, the first person charged under the Nassau Mask Transparency Act was arrested for carrying a knife—a point mask ban supporters saw as cause for celebration. *See* Meyers, *supra* note 18. For a critique, see Kahn, *Authoritarian Semiotics*, *supra* note 1, at 530 n.139.

⁶⁸ *People v. Archibald*, 296 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 1968).

⁶⁹ *See* Kahn, "My Face, My Choice?", *supra* note 25, at 680 (describing arrest of cyclist under Austria's 2017 face veil ban for wearing a scarf in insufficiently cold weather). Cyclists in Virginia were concerned enough about potential police arrests of cyclists (and skiers) that they sought to modify Virginia's mask ban, VA. CODE ANN. § 18.2-422 (2025), to include an exemption for masking in cold weather. *See Wearing a Winter Mask Still a Felony in Virginia*, VA. BICYCLING FED'N (Jan. 14, 2013), <https://archive.vabike.org/wearing-a-winter-mask-still-a-felony-in-virginia/> [<https://perma.cc/EC7M-XL6Z>].

⁷⁰ Virginia's mask law allows for masking for "bona fide medical reasons" but requires that the mask wearer carry an "affidavit" from their doctor on their person. VA. CODE ANN. § 18.2-422(iv)(a) (2025). The same issue came up under Austria's face veil ban. *See* Kahn, "My Face, My Choice?", *supra* note 25, at 679–80 (describing police request that masked leukemia patient supply a doctor's note).

⁷¹ *Church of the American Knights of the Ku Klux Klan v. Kerik*, 357 F.3d 197, 209 (2004) (emphasis added).

⁷² *See, e.g.,* LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 46 (1986) (describing the role played by speech in democratic self-governance).

⁷³ For example, Mike Paulsen argues that the Constitution directs us to read it in an originalist manner. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. L. Rev. 857, 918 (2009).

⁷⁴ *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 Mich. L. Rev. 71, 81 (2018) (describing and evaluating the use of the surplusage canon).

name vs. face distinction should only restrict First Amendment protection of masks while the wearer is “demonstrating.”

This narrow reading is consistent with the historical stories the Second Circuit tells in its ruling. When the court discusses the Renters War (and the Klan), it focuses on fear, intimidation and violence.⁷⁵ But many mask laws do not merely punish violent/intimidatory mask wearing, or mask wearing for a political purpose (like refusing to pay back rent), they punish most (if not all) mask wearing.⁷⁶ The Nassau law, whatever the legislative intent, says nothing about masked demonstrations.⁷⁷ As such, it falls outside the scope of the narrow reading of the *Kerik* rule, which targets masking “while demonstrating.”

While singling out protests for reduced First Amendment protection seems odd, there are good policy reasons for adding extra protection for apolitical, garden-variety masking. Post COVID, eighteen percent of Americans mask.⁷⁸ They mask for many reasons—some mask because they do not want to get sick or infect others.⁷⁹ Others mask to entertain friends, or because it is a cold day.⁸⁰ Nor is all concealing of identity necessarily threatening to the state. Sports fans humiliated by their teams

⁷⁵ As noted above, *Kerik* tends to exaggerate the violence of the mask wearers. Often the mask wearers and the sheriff’s posse groups they were tracking would negotiate agreements on back rent—sometimes at local saloons. See Kahn, *The Long Road Back to Skokie*, supra note 36, at 92–93 (describing the contending parties sharing a drink of brandy after stopping an eviction).

⁷⁶ For example, Alabama’s mask law punishes all mask wearing in the state—with no exceptions. Ala. Code § 13A-11-9(a)(4) (2025). The Nassau Mask Transparency Act is potentially narrower. There are exemptions for health, religious, and celebratory mask wearing. Nassau Mask Transparency Act, supra note 9, § 3(a). And, if read narrowly, see supra note 61, the law only comes into play when two or more people mask, § 3(b)(1), or there is probable cause to believe that the wearer will commit a civil or criminal offense, § 3(b)(4). Even this narrower approach reaches a good deal of non-violent mask wearing. For example, the Nassau County act would reach a group of friends on their way to a water aerobics class masking because they thought it was the right thing to do.

⁷⁷ While the Nassau law arose in the wake of the campus protests at nearby Columbia University, see Schneid, supra note 22, the county legislature went far beyond this. According to the county, “masks and facial coverings that are not worn for health and safety concerns or for religious or celebratory purposes are often used as a predicate to harassing, menacing or criminal behavior.” Nassau Mask Transparency Act, supra note 22, § 2.

⁷⁸ See Tyson, Lipka & Deane, supra note 10, at 28.

⁷⁹ For example, sixty-nine percent of respondents say that it is “extremely/very” or “somewhat” important for someone with “cold-like symptoms” to wear a mask “in crowded settings.” *Id.* at 26.

⁸⁰ As we have seen, skiers and cyclists in Virginia banded together to propose an exemption to their state mask laws to include cold-weather activities. See *Wearing a Winter Mask Still a Felony in Virginia*, supra note 69.

might mask,⁸¹ as might someone cheating on a spouse.⁸² Finally, there are people who—for no particular reason—chose not to expose their face (and identity) for the world to see.

Of course, some of these activities are covered by mask ban exceptions. For example, many anti-mask laws exempt masquerade balls, others exempt health activities.⁸³ However, the extent of these exceptions is uneven—indeed, some mask bans (such as Alabama’s) have no exemptions at all.⁸⁴ Moreover, the application of exemptions adds to the power of police and prosecutors who are likely to arrest now and ask questions later.

The only advantage of the broad version of the *Kerik* rule is its clarity—all mask wearing falls outside the First Amendment. But such a draconian approach is ill-suited to our modern society—especially given the growth of surveillance capitalism, facial recognition technology, cancel culture and doxxing⁸⁵ (words unknown when the Second Circuit decided *Kerik*).⁸⁶

The narrow reading of *Kerik*, which would limit mask bans to public demonstrations, would be an improvement over the free-for-all for anti-mask laws the broad reading of *Kerik* encourages. Under the narrow version of *Kerik*, people masking for health reasons, religious reasons or simply to have fun would have First Amendment protection (as long as they were not masking “while demonstrating”). This is progress in the battle against face authoritarianism. But why not go further, dispense with

⁸¹ To take one example, a lifelong Yankees fan might hide their identity when attending a game at Shea Stadium.

⁸² See Rosenfield, *supra* note 11.

⁸³ For example, the Virginia anti-mask law provides exemptions for “traditional holiday costumes,” masks worn for safety reasons as part of a profession, and masks worn as part of a “bona fide theatrical production or masquerade ball.” VA. CODE ANN. § 18.2-422(i)-(iii) (2025). As we have seen, the Virginia mask ban also allows for health-related masks—provided the wearer carries a doctor’s note. *Id.* § 18.2-422(iv).

⁸⁴ See ALA. CODE § 13A-11-9(a)(4) (2025). Interestingly, Alabama treats mask wearing as a form of loitering. *Id.*

⁸⁵ See Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1703 (2017) (describing masks as one way to resist the state’s attempts to police bodies).

⁸⁶ That said, Judge Leonard Sand, upholding the American Knights’ anonymity claims at the district court, addressed the possibility that faces could be used to identify the participants. See *Church of the American Knights of the Ku Klux Klan v. Kerik*, 232 F. Supp. 2d 205, 213 (S.D.N.Y. 2002) (noting “that a number of anti-Klan groups make it their business to monitor the activities of the American Knights” and that “the proliferation of computers and the world wide web provides the opportunity to post photographs of and personal information about participants . . . instantaneously at zero or little cost”).

Kerik altogether, and accept that all mask wearing raises at least some First Amendment concerns?⁸⁷

II. MASK WEARING AND THE NAACP V. ALABAMA HARASSMENT TEST

If courts (appropriately) reject *Kerik*, they will likely turn to the *NAACP v. Alabama* harassment test⁸⁸ under which the mask wearer must first show that, if unmasked, they would face harassment.⁸⁹ This harassment could be physical (violence), economic (job loss), or social (shunning).⁹⁰ Once this is shown, the state must show that the mask ban is narrowly tailored to a compelling interest triggered by the mask.⁹¹

From the perspective of resisting face authoritarianism, the *NAACP* harassment test is not perfect. It requires proof of harassment if unmasked—something that excludes health masking and masking as a playful activity (for example, wearing a Halloween mask). But the harassment test improves on *Kerik* in two ways. First, it suggests that fear of harassment can justify wearing a mask. Second, it adopts the compelling-state-interest test, which in the post-*Brandenburg* free speech context imposes a high standard.⁹² More generally, the *NAACP* harassment test brings the law of mask wearing (and mask refusal) back to the First Amendment norms established in the 1960s and 1970s and epitomized by the Skokie era, which viewed the First Amendment as expansive enough to tolerate a Nazi parade in a community of Holocaust survivors.⁹³ The harassment test may be half-a-loaf, but it reflects the free speech norms that underly American democracy, freedom and rule of law.

⁸⁷ This could be a package deal, in which the bright-line rules of both *Kerik* and *Falcone* would be replaced by a case-by-case approach to mask regulation. Doing so would require compromise. Mask mandate supporters would accept less than universal masking during the next pandemic. Meanwhile, during campus protests over the next hot-button issues—whatever it is—students choosing to mask would have some First Amendment protection.

⁸⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (describing harassment test).

⁸⁹ See, e.g., *Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 838 (1999) (extending First Amendment protections to mask wearers facing harassment).

⁹⁰ *NAACP*, 357 U.S. at 462.

⁹¹ *Goshen*, 50 F. Supp. 2d at 843, 844.

⁹² See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (establishing “incitement to imminent lawless action” test for restricting speech). Notably, *Brandenburg* does not allow the state to restrict or prohibit speech based on its content. See *Interview with Nadine Strossen*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES* 378, 379, 396–97 (Michael Herz & Peter Molnar eds., 2012).

⁹³ See Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 76 (expressing the hope “that a society with truly thick skin will learn to make peace not only with offensive words, but also with masks, even when they are scary”).

As a practical matter, the harassment test has been good for mask wearers.⁹⁴ For example, in *Aryan v. Mackey*,⁹⁵ decided in 1978, the Northern District of Texas upheld a restraining order against the mask ban Texas Tech sought to impose as a condition on a proposed protest against the Shah of Iran.⁹⁶ Noting that Iranian students “fear[ed] reprisals from the Shah,” *Aryan* concluded that, although the First Amendment does not protect anonymity, “[s]erious . . . questions arise . . . when there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second.”⁹⁷ The Court, quoting liberally from *NAACP v. Alabama*, noted NAACP members whose identity was revealed were exposed to “economic reprisal[s], loss of employment, threat[s] of physical coercion, and other manifestations of public hostility.”⁹⁸

That same year, a California court reached the same conclusion in a case involving an Iranian anti-Shah protester who “plac[ed] a leaflet between his glasses and face . . . [to] conceal[] his identity.”⁹⁹ Holding that section 650 of the California Penal Code, prohibiting appearing in public with one’s face “partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal [one’s] identity,”¹⁰⁰ was overbroad,¹⁰¹ the court relied on *NAACP v. Alabama* and *Talley v. California*,¹⁰² to allow masked protests in situations where harassment is likely, in this case by a foreign government.¹⁰³

Finally, in 1999 in *American Knights of the Ku Klux Klan v. City of Goshen*,¹⁰⁴ the Northern District of Indiana applied the harassment test where Klan members whose identities were revealed faced death threats, a bomb threat, and vandalism.¹⁰⁵ Rejecting the approach that would be taken five years later in *Kerik*, the *Goshen* court conceded that there were “[o]bvious differences . . . between Goshen’s anti-mask ordinance and leafleting and name disclosure laws the Supreme Court has addressed.”¹⁰⁶

⁹⁴ See *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978) (upholding right of anti-Shah protesters to conceal their identities); *Ghafari v. Mun. Ct.*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978) (same); *Goshen*, 50 F. Supp. 2d at 839; cf. *People v. Aboaf*, 721 N.Y.S.2d 725, 728 (N.Y. Crim. Ct. 2001) (rejecting harassment claim of anarchists due to lack of evidence).

⁹⁵ 462 F. Supp. 90 (N.D. Tex. 1978).

⁹⁶ *Id.* at 91.

⁹⁷ *Id.* at 92.

⁹⁸ *Id.* (alteration in original) (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

⁹⁹ *Ghafari*, 150 Cal. Rptr. at 814.

¹⁰⁰ *Id.* (quoting CAL. PENAL CODE § 650a (1953) (repealed 1984)).

¹⁰¹ *Id.* at 815–18.

¹⁰² 362 U.S. 60, 64 (1960).

¹⁰³ *Ghafari*, 150 Cal. Rptr. at 816.

¹⁰⁴ 50 F. Supp. 2d 835, 839 (N.D. Ind. 1999).

¹⁰⁵ *Id.* at 841.

¹⁰⁶ *Id.*

But these were “distinctions without differences” given the location of the protests in a small community “where facial recognition might be expected to disclose name, address and other commonly known information.”¹⁰⁷

This last sentence is the lodestar that connects *Aryan*, *Ghafari*, and *Goshen*. When showing one’s face puts the protester at risk of subsequent retaliation, courts are open to allowing exceptions to the enforcement of mask laws based on First Amendment freedom of association principles. Yet the *NAACP* harassment test does not mean mask wearers will always emerge victorious in court. For example, in *People v. Aboaf*,¹⁰⁸ a New York county court rejected a First Amendment anonymous speech argument by bandana-wearing anarchists “based solely on a description of anarchism as a political philosophy and a list of famous anarchists of the past” who, presumably, faced discrimination.¹⁰⁹

Moreover, even if the mask wearer can show harassment, the state can still show the mask ban was narrowly tailored to a compelling interest. This is sometimes—but not always—a steep climb for the state. For example, in *Aryan*, Texas Tech failed to produce “facts” (as opposed to “supposition[s]”) linking the anti-Shah protests to violence.¹¹⁰ Likewise, in *Ghafari*, the court dismissed the possibility that the anti-Shah protesters were ready to storm the Iranian Embassy in San Francisco as a “red herring”¹¹¹—but also recognized the state’s legitimate interest in law enforcement concerns.¹¹² Sometimes, the mask wearing group—such as the Ku Klux Klan in *Goshen*—can pose compelling security concerns, but these concerns do not necessarily flow from unmasking.¹¹³ Finally, there are some settings—such as the interior of a courthouse—where security and order concerns become paramount.¹¹⁴

In this regard, two points stand in the harassment balancing test’s favor. First, the test is a more realistic approach than *Kerik*’s per se rule. Instead of rigidly distinguishing between names and faces, *Goshen* asked: When do faces in a modern technological society also reveal names? The court’s answer, that faces reveal names in a small, tight-knit community, opens the door to other possibilities, modern ones. In an age of cellphone

¹⁰⁷ *Id.*

¹⁰⁸ 721 N.Y.S.2d 725 (N.Y. Crim. Ct. 2001).

¹⁰⁹ *Id.* at 728–29. The case was raised under N.Y. PENAL LAW § 240.35(4), New York’s old mask ban.

¹¹⁰ 462 F. Supp. 90, 92 (N.D. Tex. 1978).

¹¹¹ *Ghafari v. Mun. Ct.*, 150 Cal. Rptr. 813, 816 (1978).

¹¹² *Id.* at 815.

¹¹³ *American Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 843 (N.D. Ind. 1999).

¹¹⁴ *Ryan v. Cnty. of DuPage*, 45 F.3d 1090, 1095–96 (7th Cir. 1995) (recognizing harassment principle but refusing to apply it to a courtroom mask ban).

photos and facial recognition technology, has the link between faces and names changed? If so, should the law change as well? The prevalence of doxing on both sides of the campus protests over the Gaza war suggests at least a partial answer to this question.¹¹⁵

Second, the harassment balancing test is a more factually nuanced approach to mask laws. *Aryan*, *Ghafari*, and *Goshen* require the statute (or prosecutor) to provide a compelling reason for the ban, one rooted in the specific harm posed by the mask. The reason cannot come from a state legislature, or from generalities about campus protests,¹¹⁶ or from stereotypes about the student protesters.¹¹⁷ It must come from the facts of the specific situation. Courts will look at these facts with a careful, skeptical eye.

What does the harassment balancing test mean for the new mask bans? *Aryan*, *Ghafari*, *Goshen*, and *Ryan* raise questions about the sweeping the geographic scope of some mask bans. There are some settings—the interior of a courthouse,¹¹⁸ perhaps a high crime area¹¹⁹—where mask bans might raise fewer First Amendment issues.¹²⁰ In other settings, courts will be more skeptical. Punishing masking on the New York City subways, for example, requires more than the fact that *some* riders use the subway to arrive at the places where they commit acts of vandalism.¹²¹ After all, New Yorkers ride the subway for many other reasons—to commute to a job, attend classes, celebrate a life event, or go out to eat.

¹¹⁵ See Kahn, *Authoritarian Semiotics*, *supra* note 1, at 522 (noting doxxing on Columbia's campus); NYCLU Memorandum, *supra* note 9, at 5 (same).

¹¹⁶ Both *Aryan* and *Goshen* discounted the importance of similar protests taking part in nearby areas. *Goshen*, 50 F. Supp. 2d at 843 (noting that *Goshen*'s evidence of Klan rallies in other cities did not address the impact of masking on "violence or arrest rates"); *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978) (noting that anti-Shah protests in other Texas cities were peaceful).

¹¹⁷ Kahn, *Authoritarian Semiotics*, *supra* note 1, at 517–19 (discussing comparisons between Gaza war protesters and Klan members).

¹¹⁸ *Ryan*, 45 F.3d at 1095–96.

¹¹⁹ The 2023 Philadelphia mask ban is an example of this. See Amanda Watford, *Are Ski Mask Bans a Crime-Fighting Solution? Some Cities Say Yes*, STATELINE (Jan. 10, 2024), <https://stateline.org/2024/01/10/are-ski-mask-bans-a-crime-fighting-solution-some-cities-say-yes/> [<https://perma.cc/378C-CNKS>] (describing Philadelphia's mask ban and proposed mask bans in other cities).

¹²⁰ Whether high-crime-area mask bans are a good idea is another matter. See Stephen J. Simoni, "Who Goes There?"—*Proposing a Model Anti-Mask Act*, 61 FORDHAM L. REV. 241, 266 (1992) (supporting mask bans as a response to street crime). Simoni's proposed law used a conceal-one's-identity standard—a stance Simoni never justifies in his article. *Id.* at 272; see also Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 115 (critiquing Simoni on this point). In any event, the Nassau County Mask Transparency Act, *supra* note 22, does not restrict itself to high crime areas—it covers the entire county.

¹²¹ Helmore, *supra* note 2.

Ideally, a mask ban should target conduct, not spaces. If North Dakota is worried that “antifa” activists are going to block oil pipelines, they should ban masking during demonstrations rather than enacting a law that bans masks in the entire state.¹²² Or, to return to the New York City subway, the state might theoretically punish harassing mask wearing on the subway itself.¹²³ But punishing subway maskers for using the subway to travel to the site of their masked “crime” is no different from banning mask wearing on North Dakota’s roads because “masked anarchists” will use Interstate 80 to arrive at a protest against an oil pipeline.

On the other hand, the *NAACP* harassment has a major limitation—it only applies if the wearer fears harassment. While campus protesters speaking out on unpopular issues might show this, a parent donning a circus mask to play with their children in a public park would not, nor would a cancer patient who wears a surgical mask for health reasons (assuming a surgical mask actually conceals one’s identity).¹²⁴

Such a garden-variety, non-threatened mask wearer is likely out of luck. The wearer could try to present their mask wearing as First Amendment symbolic speech.¹²⁵ But courts are reluctant to assume mask wearing conveys an expressive message that an audience would understand as such. Because the expressive message test was not satisfied in *State v. Berrill*,¹²⁶ where the defendant—dressed in a Devil costume and mask at a school board meeting—explicitly told attendees that he represented the Devil,¹²⁷ it is hard to see symbolic speech helping a person

¹²² See N.D. CENT. CODE § 12.1-31-15 (2026) (prohibiting the wearing of masks during commission of criminal offense). Despite the title, the law—enacted in 2017 in response to protests over the Keystone pipeline—does not need a criminal offense to enter into effect; all that is necessary is that the mask is worn with “the intent to intimidate, threaten, abuse, or harass any other individual.” *Id.* at § 1(a); Nick Smith, *Bill Would Ban Protesters from Using Face Masks*, BISMARCK TRIB. (Jan. 18, 2017), https://bismarcktribune.com/news/local-and-politics/bill-would-ban-protesters-from-using-face-masks/article_ca53a54e-3251-5c43-b213-91ce02d269dd.html [<https://perma.cc/DVV4-A9HG>]. Even though, as we shall see in Part III, the “intent to intimidate” language offers some hope as a compromise position in the mask wars, one can ask why North Dakota needed a state-wide ban to respond to a local concern.

¹²³ An instance of harassment on the subway took place in June 2024 but the assailant (who was wearing a mask) was charged with coercion, which shows that one does not need a mask law to punish harassing behavior. Karen Matthews, *Man Who Police Say Urged ‘Zionists’ to Get Off NYC Subway Train Faces Criminal Charge*, ASSOCIATED PRESS (June 26, 2024), <https://apnews.com/article/palestinian-protest-new-york-zionist-subway-0178ea10bf0f53b6b9e33505f0514eab> [<https://perma.cc/C3WR-5PA2>].

¹²⁴ Kahn, *Authoritarian Semiotics*, *supra* note 1, at 539 (calling for mask bans to exempt surgical mask wearing).

¹²⁵ See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (describing the expressive-speech test).

¹²⁶ 474 S.E.2d 508 (W. Va. 1996).

¹²⁷ *Id.* at 514–15; see also Kahn, *The Long Road Back to Skokie*, *supra* note 36, at 116–22. Indeed, the most common rebuttal to symbolic speech claims of Klan members is the argument

who masks not to make a point, but out of playfulness, health concerns, or personal predilection. Fortunately, mask wearers have another way to defend their rights.

III. GEORGIA’S INTENT-TO-INTIMIDATE APPROACH

If we want to tamp down the “mask wars,” we might turn to *State v. Miller*, in which the Georgia Supreme Court upheld a mask ban against free speech claims but added a judicially created intent-to-intimidate requirement.¹²⁸ At first, *Miller* reads like a victory for mask bans, and a repudiation of First Amendment absolutism.¹²⁹ On reflection, however, *Miller* offers a middle ground in the mask wars that carves out space for constitutionally protected, non-threatening mask wearing.

In what follows, I first describe how *Miller*, despite upholding Georgia’s anti-Klan mask law, wound up protecting mask wearing.¹³⁰ Next, I examine the *Miller* standard in light of New York’s efforts to enact anti-mask legislation.¹³¹ Finally, I explore how the doctrinal principles set out in *Miller* apply to current debates about mask and keffiyeh wearing during campus protests.¹³²

A. A Possible Compromise? *State v. Miller*

State v. Miller is a curious case. The defendant was charged with appearing in public in Klan regalia.¹³³ At first blush, *Miller* reads like *Kerik*, an open-and-shut upholding of a mask ban against a First Amendment challenge. The Georgia Supreme Court laid out the history of Klan violence that led to the passage of the 1953 anti-mask law at issue in

that the Klan mask adds little that the hood and white sheets do not already provide. *See State v. McGough*, 309 So. 3d 1006, 1015 (La. Ct. App. 2021).

¹²⁸ *State v. Miller*, 398 S.E.2d 547, 551–52 (Ga. 1990).

¹²⁹ This is how I thought about *State v. Miller* two decades ago when I was comparing American anti-Klan laws to German laws banning Holocaust denial. *See* Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DETROIT MERCY L. REV. 163, 174–76, 188 (2006) [hereinafter Kahn, *Cross-Burning*] (arguing that safeguarding the people of Georgia won out over freedom of association). In particular, I saw cases like *Miller* challenging the dominant conception that the United States tolerates hate speech while Europe bans it. For an example of this type of argument, see Eric Heinze, *Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 182 (Ivan Hare & James Weinstein eds., 2009). Today, I tend to see *Miller* as a compromise with a libertarian edge to it.

¹³⁰ *See infra* subpart III(A).

¹³¹ *See infra* subpart III(B).

¹³² *See infra* subpart III(C).

¹³³ *Miller*, 398 S.E.2d at 549.

the case.¹³⁴ This history justified an exception to the general First Amendment protection of speech and assembly—at least when it comes to mask wearing that intimidates.¹³⁵ The dissent of Presiding Judge Smith,¹³⁶ invoking *Collin v. Smith* (the Skokie case)¹³⁷ and relating a high school gathering where he spoke with students about whether freedom of speech should extend to Nazis, completes the picture.¹³⁸

Viewed this way, *State v. Miller* prefigures *Virginia v. Black*, the cross-burning case, and serves as a counterexample to the argument that the United States took an “absolutist” approach to freedom of speech.¹³⁹ And there is some truth here. *Miller* did not invalidate Georgia’s mask ban, and Miller, the defendant, did not appear to be intimidating anyone when he stood, by himself, in a shopping mall handing out leaflets.¹⁴⁰

A deeper reading of *Miller*, however, reveals something else. Doctrinally, *Miller* gave the defendant his due. While *Kerik* dispensed with the *NAACP* harassment test, the Georgia Supreme Court in *Miller* applied the test, even though it concluded (as in *People v. Aboaf*)¹⁴¹ that the defendant did not face an actual threat.¹⁴² Likewise, the Georgia Supreme Court reached the *O’Brien* symbolic speech test¹⁴³ because mask wearing might convey a communicative element—only to conclude that the 1953 mask ban (largely because of the history of masked violence) furthered a substantial governmental interest.¹⁴⁴ These steps already revealed an openness to the free speech claims of mask wearers.

But *Miller* went further—it added an intent-to-intimidate requirement to the statute.¹⁴⁵ This is notable given that Georgia Code section 16-11-38 did not require “intent” at all. Instead, the law, as written, punishes anyone who wears “a mask, or hood or device” that operates “so

¹³⁴ *Id.* at 550–51.

¹³⁵ *Id.* at 552.

¹³⁶ *Id.* at 554 (Smith, P.J., dissenting).

¹³⁷ See *Collin v. Smith*, 578 F.2d 1197, (7th. Cir. 1978) (upholding the right of national socialists to march in the village of Skokie, a Chicago suburb with a high proportion of Holocaust survivors); see also Kahn, *Cross-Burning*, *supra* note 129, at 169–71 (describing the Skokie affair).

¹³⁸ *Miller*, 398 S.E.2d at 557 n.13 (Smith, P.J., dissenting).

¹³⁹ See *supra* note 129.

¹⁴⁰ At the time of his arrest, Miller was alone and not acting in a threatening manner. See *Miller*, 398 S.E.2d at 555 (Smith, P.J., dissenting).

¹⁴¹ 721 N.Y.S.2d 725, 729 (N.Y. Crim. Ct. 2001).

¹⁴² *Miller*, 398 S.E.2d at 553 & n.4.

¹⁴³ *Id.* at 550 (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

¹⁴⁴ *Id.* The court may have been relying on the 1983 Georgia Constitution, which “provides even broader protection” to speech than the First Amendment. *Id.*

¹⁴⁵ *Id.* at 551–52.

as to conceal the identity of the wearer.”¹⁴⁶ In other words, all that is necessary for liability is that the mask covers the wearer’s face. The 1953 law is an instance of what mid-twentieth century mask expert Jack Swertfeger would call a “strong” anti-Klan mask law because it punished mask wearing in and of itself—rather than requiring an aggravating circumstance.¹⁴⁷

Strong anti-mask laws target the Ku Klux Klan organizationally by limiting the mobility of Klan members—the goal was to make it impossible for the Klan to travel to a community and remain there.¹⁴⁸ But strong mask laws cover a broad range of activity unrelated to threats, intimidation and harassment. Given this broad language, it was not surprising that Mr. Miller brought a claim against section 16-11-38 alleging that the statute was overbroad¹⁴⁹ or that the Georgia Supreme Court in *Miller* ultimately agreed with him and added an intent-to-intimidate requirement.¹⁵⁰

For mask ban supporters—especially those eager to turn New York city subways, or the streets and byways of Nassau County into mask-free zones—the *Miller* overbreadth discussion is disappointing. The Georgia Supreme Court began by restating Mr. Miller’s examples. Does the Georgia statute ban “wearing a ski mask in mid-winter” or “wearing sunglasses on a sunny day?”¹⁵¹ Or, for that matter, does the statute ban wearing a mask “to make a political point?”¹⁵²

In holding that section 16-11-38 does “not sweep so broadly,” the court relied on the legislative history of the 1953 act (used earlier in the ruling to justify the statute’s impingement on Mr. Miller’s right to symbolic speech).¹⁵³ The history of Klan violence elaborated on in the legislative history made the statute “easily susceptible to a narrowing construction that avoids any constitutional overbreadth problem.”¹⁵⁴ Therefore, the statute would require an intent to conceal one’s identity and would apply only “when the mask-wearer knows or reasonably should

¹⁴⁶ GA. CODE ANN. § 16-11-38(a) (2025).

¹⁴⁷ Jack Swertfeger, Jr., Comment, *Anti-Mask and Anti-Klan Laws*, 1 J. PUB. L. 182, 188 (1952).

¹⁴⁸ See *id.* Strong mask bans were common in the 1920s, when the Second Klan was at its height. See also DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 2–7 (Duke Univ. Press 1981) (1965) (distinguishing a First Klan active during Reconstruction, a Second Klan active in the 1920s, and a Third Klan active in the 1940s and 1950s).

¹⁴⁹ See *Miller*, 398 S.E.2d at 551.

¹⁵⁰ *Id.* at 551–52.

¹⁵¹ *Id.* at 551.

¹⁵² *Id.*

¹⁵³ *Id.* at 550–52.

¹⁵⁴ *Id.* at 552.

know that the conduct provokes a reasonable apprehension of intimidation, threats or violence.”¹⁵⁵

In one fell swoop, *Miller* drastically narrowed the scope of Georgia’s mask ban. The law no longer targeted the causal, non-threatening mask wearer. In Georgia, individuals are free to mask because of health concerns, cold weather, or a love of costume play.¹⁵⁶ Indeed, in *Daniels v. State*,¹⁵⁷ decided in 1994, the Georgia Supreme Court held that a middle-aged man who played with neighborhood children while wearing a hockey mask had not violated the state mask law, in part because the festivities took place during the daytime and he did not intend to scare the children.¹⁵⁸ In the process, the court broadened the scope of *Miller* by holding that intent to intimidate would be triggered only if the wearer acted in “reckless disregard” to the possibility that the mask would intimidate someone else.¹⁵⁹

The Georgia intent-to-intimidate standard remains in force today. Not every mask wearer has profited from the law. For example, in a family law court case, the Georgia Court of Appeals applied section 16-11-38 to a teenager who rang a doorbell at night, masked, to play with a friend.¹⁶⁰ He rang the wrong doorbell and did not speak when the person answered the door.¹⁶¹ The court found an intent to intimidate because the teen, while trying to be “funny,” remained in place without explanation after ringing the wrong doorbell.¹⁶² Likewise, in *Gates v. Khokhar*,¹⁶³ the Eleventh Circuit, applying Georgia law, held in a § 1983 case, that a police officer had “arguable probable cause” to find that a mask-wearing protester’s failure to remove his mask in response to police orders at a nighttime

¹⁵⁵ *Id.*

¹⁵⁶ For example, after COVID, Georgia amended section 16-11-38 to permit mask wearing for medical reasons. *See* GA. CODE ANN. § 16-11-3(b)(5) (2025). Before this change, in theory, a person wearing a surgical mask to avoid getting sick was liable to the extent the COVID surgical mask concealed their identity. Of course, under *Miller*, the state would have to prove an intent to intimidate.

¹⁵⁷ 448 S.E.2d 185 (Ga. 1994).

¹⁵⁸ *Id.* at 188.

¹⁵⁹ *Id.* at 188–89. The tussle over the intent standard, already present in a concurring opinion in *Miller*, suggests that—as a matter of practical implementation—the intent-to-intimidate standard was not as easy to deploy as the *Miller* court might have hoped. *See Miller*, 398 S.E.2d at 553–54 (Hunt, J., concurring specially) (calling for a requirement of “actual” intent to intimidate).

¹⁶⁰ *In re I.M.W.*, 722 S.E.2d 586, 588–89 (Ga. Ct. App. 2012).

¹⁶¹ *Id.* at 588.

¹⁶² *Id.* at 589.

¹⁶³ 884 F.3d 1290 (11th Cir. 2018).

protest against police brutality constituted intent to intimidate under section 16-11-38.¹⁶⁴

The Georgia intent-to-intimidate approach blunts the sharp-edged debate over mask bans. On the one hand, it narrows the field of dispute by removing non-threatening mask wearing. Halloween maskers, people with health conditions, and fraidy cats who mask for no particular reason (but do so in a peaceful way) can go about their business without worrying about being arrested, facing criminal charges, and hiring a lawyer each time they want to take a stroll wearing a bandana.¹⁶⁵ This small step in the direction of personal freedom¹⁶⁶ recognizes the diverse people living in society, the reasons they might mask, and calls for government to get out of the way and let maskers (in non-emergency situations) live their lives in peace.

B. Competing Alternatives: Miller and the New York Mask Law Debate

The intent-to-intimidate approach has gained some traction in the New York debate over masks. New York Assembly Member Jeffrey Dinowitz, who in May 2024 called for New York to adopt a broad mask ban, narrowed his focus when, in January 2025, he proposed a new law.¹⁶⁷ Whereas Dinowitz's original proposal tracked Georgia's 1953 mask ban by punishing mask wearing that operated "so as to conceal the identity of the wearer,"¹⁶⁸ the new proposal does not punish masking at all; instead, it punishes masked harassment.¹⁶⁹ Closely tracking the language of *State v.*

¹⁶⁴ *Id.* at 1301–02. *Gates* carries less weight given that it was a qualified immunity case, so the question was not whether *Gates* violated the mask law, but whether the police had "arguable probable cause." *Id.* at 1300. Moreover, *Gates* had a dissent that faulted the majority for failing to inquire as to whether the wearer's conduct at the protest was "peaceful." *Id.* at 1308–09 (Williams, J., dissenting).

¹⁶⁵ On the other hand, the Georgia Court of Appeals voted 4-3 to find Mr. Daniels guilty. *Daniels v. State*, 438 S.E.2d 99, 101 (Ga. Ct. App. 1993) (relying on defendant's statement that he intended to "scare" the neighborhood children). In response, the dissent argued that defendant's "simple-minded attempt . . . to amuse himself or others" did not rise "to the level of intent required by *Miller*." *Id.* at 103 (Smith, J., concurring in part and dissenting in part). The court of appeals ruling in *Daniels* shows how human judges can interpret a given set of facts in differing ways, as well as the risk that even narrow mask bans will be interpreted broadly.

¹⁶⁶ See Kahn, *The Mask Wars and Social Control*, *supra* note 13, at 165 (arguing that how to present one's face is a "baseline" requirement in a liberal society).

¹⁶⁷ See Lewis, *Democratic Lawmakers and Civil Rights Groups Push for Mask Ban*, *supra* note 20; Lewis, *New York's 'Mask Ban' Wouldn't Actually Ban Masks*, *supra* note 21 (describing scaled back 2025 proposal).

¹⁶⁸ A.B. A10057A, 2023–2024 Leg., Reg. Sess. (N.Y. 2024); see also GA. CODE ANN. § 16-11-38(a)(1) (2025) (punishing mask wearing that has the effect of concealing one's face).

¹⁶⁹ A.B. A3133, 2025–2026 Leg., Reg. Sess. § 2 (N.Y. 2025) (proposing a new crime of masked harassment).

Miller, proposed section 240.12 would have required an intentional concealing of one's face as well as a specific requirement that the mask be worn "for the primary purpose of menacing or threatening violence against another person or placing another person or group of persons in reasonable fear of their physical safety."¹⁷⁰

To be sure, there is some ambiguity in the proposed section 240.12. After establishing a specific intent requirement, the proposal lists a series of exceptions based on health, safety and the wearing of holiday costumes that will apply so long as the mask is not worn to menace, threaten, or frighten others.¹⁷¹ This is a bit odd. If the statute really only applies when the "primary purpose" is threatening others, why are exceptions necessary? Moreover, the preamble—which interestingly does not mention college campuses¹⁷²—notes that "[m]asked actors, like the KKK[,] . . . frequently rely on . . . anonymity to intimidate, provoke violence, and carry out acts of terrorism."¹⁷³ On the other hand, the preamble also concedes that "masks are worn for many lawful purposes, including to protect one's health and safety or for religious reasons."¹⁷⁴

The question becomes how to balance these two competing prongs of the preamble. How frequently are masks used to intimidate others? How often are they worn for lawful purposes? Or, to narrow the focus, how often are masks worn at rallies, protests, and other public political settings for lawful purposes? The preamble seeks to send "a clear message" that "masked harassment and violence will not be tolerated" in New York.¹⁷⁵ But when is mask wearing harassment? To return to *State v. Miller*, when is masking done with an intent to intimidate others?

In this regard, supporters of the proposed New York masked-harassment law are trying to have things both ways. On the one hand, Assembly Member Jeffrey Dinowitz praised the bill for attending to First Amendment concerns,¹⁷⁶ while New York State Senate cosponsor James Skoufis described the bill as "more precise" and "more surgical."¹⁷⁷ And, to be clear, in some sense Dinowitz and Skoufis are correct—ideally, the new law will not be something people masking for health, religious, or personal safety reasons will need to worry about. Allie Bohm of the New

¹⁷⁰ *Id.* (proposed § 240.12(1)).

¹⁷¹ *Id.* (proposed § 240.12(2)).

¹⁷² Instead, the statute invokes January 6 protesters. *Id.* § 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Lewis, *New York's 'Mask Ban' Wouldn't Actually Ban Masks*, *supra* note 21.

¹⁷⁷ *Id.*

York Civil Liberties Union conceded as much when she called the proposal “less bad” than other anti-mask proposals.¹⁷⁸

One of these proposals recently became law. In May 2025, as part of a compromise brokered by New York Governor Kathy Hochul, New York enacted a law punishing “evading arrest by concealment of identity.”¹⁷⁹ Section 205.35 punishes anyone who, during the commission of or flight from a felony or a class A misdemeanor, “wears a mask or face covering or otherwise obscures their face, completely or partially, for no legitimate purpose with the intent to prevent their identification, apprehension, or arrest for such crime.”¹⁸⁰

On one level, the evading by concealment law is even narrower than the Georgia approach, because it comes into play only if there is an underlying crime. It would not, therefore, apply to a mask-wearing parent playing with a child, or a bronchitis sufferer masking while on the bus. At the same time, New York’s new law has some worrying possibilities. For example, protests often lead to trespassing and resisting arrest charges.¹⁸¹ The evading arrest law allows for the arrest of mask wearers—potentially where the mask wearer had no intent to participate in the protest, let alone evade arrest.

Consider the following scenario. Students dedicated to a specific cause seek to protest on campus grounds. Arguably, a participant in some of the recent Barnard and Columbia protests—such as the May 2025 protest at Butler Library,¹⁸² which took place indoors—might reasonably anticipate criminal liability.¹⁸³ They might even anticipate the possibility

¹⁷⁸ *Id.* For his part, Dinowitz remains skeptical of masking. He told a reporter that, despite participating in many protests over the years, he (Dinowitz) never wore a mask: “It never crossed my mind . . . because I wasn’t trying to intimidate anybody.” *Id.* While we do not know what the reporter asked Assembly Member Dinowitz to elicit this response, the previous paragraph of the article discussed the fear “pro-Palestine protesters” had of being deported by the Trump Administration as well as doxing at the height of the campus protests. *Id.*

¹⁷⁹ N.Y. PENAL LAW § 205.35 (2026); see Luke Tress, *New York Passes Law Backed by Jewish Groups to Crack Down on Masked Crime*, TIMES ISR. (May 9, 2025), <https://www.timesofisrael.com/new-york-passes-law-backed-by-jewish-groups-to-crack-down-on-masked-crime/> [<https://perma.cc/WVY9-RLKD>] (describing compromise that led to the new law).

¹⁸⁰ PENAL § 205.35.

¹⁸¹ Simple trespass, a violation, would not trigger the mask law. *Id.* § 140.05. Second degree criminal trespassing, a class A misdemeanor, requires entering a dwelling place. *Id.* § 140.15(2). This is unlikely unless the protest takes place at a dorm or the police treated the entire campus as a “dwelling place.” Resisting arrest is a class A misdemeanor, *id.* § 230.30, so the new anti-mask law would apply here.

¹⁸² Spencer Davis & Molly Bordoff, *Columbia Suspends Over 65 Students for Pro-Palestinian Protest in Butler Library*, COLUM. DAILY SPECTATOR (May 12, 2025), <https://www.columbiaspectator.com/news/2025/05/12/columbia-suspends-over-65-students-for-pro-palestinian-protest-in-butler-library/> [<https://perma.cc/8LXU-6TK5>].

¹⁸³ But see Meghnad Bose & Anna Oakes, *Undue Process: Students Studying at Columbia Library Were Suspended for Protest They Took No Part In*, INTERCEPT (May 10, 2025),

of charges for second degree trespassing (or resisting arrest) that would trigger the evading arrest law.

But what about the initial April 2024 protests which were largely peaceful and often outdoors? For example, Columbia University initially tolerated the Gaza solidarity encampment set up on the South Lawn.¹⁸⁴ A student visiting the encampment—to call for divestment, or to meet a friend—might wear a mask.¹⁸⁵ Yet, when Columbia changed its mind about the encampment and sent in the police,¹⁸⁶ the masked student would—had section 205.35 been in place—have risked liability for masking to evade arrest.¹⁸⁷

A student fearful of having their identity revealed will have to assess, more carefully than previously, whether campus authorities will send in the police. This includes a student wearing a COVID surgical mask for medical reasons because the statute punishes masks that “partially” cover one’s face.¹⁸⁸ Indeed, someone who wears makeup or sunglasses might be caught under the “otherwise obscures” language in the statute.¹⁸⁹ To be sure, if the student’s case reaches the courts, the “for no legitimate purpose” language—which tracks section 7 of New York’s disorderly conduct statute¹⁹⁰—might counteract some of this. New York courts have tended to interpret the “legitimate purpose” language in the defendant’s favor.¹⁹¹ But there is no guarantee that a police officer or prosecutor will be as kind.

<https://theintercept.com/2025/05/10/columbia-library-gaza-protests-students-suspended/> [<https://perma.cc/B3RS-GSD9>] (describing how a Muslim student, who was studying in Butler Library at the time of the protests, was trapped inside after the university closed the library and arrested when she tried to leave).

¹⁸⁴ See Katrina Ventura, *A Timeline of the 14-Day Gaza Solidarity Encampment at Columbia University*, COLUM. JOURNALISM SCH. (May 3, 2024), <https://columbianewsservice.com/2024/05/03/protest/> [<https://perma.cc/VN46-F7V8>]. The encampment started on April 17, 2024. *Id.*

¹⁸⁵ See Molly Greenwold, “*I Am Looking for a Community, but I Do Not Fit Anywhere.*”, HEY ALMA (May 9, 2024), <https://www.heyalma.com/i-am-looking-for-a-community-but-i-do-not-fit-anywhere/> [<https://perma.cc/NB3X-QYXK>]. A Jewish student at Barnard, Greenwold recounted how she split her time between Shabbat dinners at the campus Hillel and Passover seders at a solidarity encampment. *Id.*

¹⁸⁶ Ventura, *supra* note 184. The arrests took place on April 18, 2024—the day after the encampment began. *Id.*

¹⁸⁷ For example, the mask wearer could be charged with resisting arrest—which would then trigger the evading arrest ban. Moreover, N.Y. PENAL LAW § 205.35 (2025) could be read as punishing the concealing of one’s “identification” without reference to any specific crime.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See PENAL § 240. 20(7).

¹⁹¹ For example, in *People v. Millhollen*, 786 N.Y.S.2d 703 (N.Y. City Ct. 2004), a local court held that woman camped out in a tree on the campus of Cornell University had the legitimate purpose of protesting the felling of trees. *Id.* at 707. See also *People v. Griswald*, 648

Moreover, the “no legitimate purpose” standard asks the wrong question. In a free society, one should be allowed to mask for whatever reason one likes—even a reason that strikes the rest of the world as “not legitimate.” Instead, the focus should be on whether mask wearing is harmful. While I appreciate the narrow nature of the ban carved out by section 205.35, the new law risks giving university administrators, police, and local prosecutors the power to enforce a *de facto* ban on masks by declaring campus protests illegal.

Perhaps this is unlikely. But even unlikely events can lead to injustice. Not all masks fully conceal one’s identity. Not all protesters mask to evade arrest. A mask ban, if one should exist, should target the deliberate use of a mask to frighten others. Anything short of this opens the door to punishing mask wearers for the causes they represent rather than for the masks themselves.¹⁹² Restricting mask arrests and prosecutions to the narrow situation where the mask wearer intends to intimidate others avoids these problems.¹⁹³

C. Masks, Keffiyehs, and Intimidation

The Georgia intent-to-intimidate approach, for all its promise, leaves an open question: What is intimidatory? Does a college student protesting over the Gaza war intimidate others on campus simply by wearing a mask? Even if the student is not otherwise engaging with students who support the war? Or is the concern not with masks as such, but with keffiyehs—which for some students are associated with acts of terrorism and antisemitic violence?¹⁹⁴ If so, does it matter whether the

N.Y.S.2d 901, 904 (N.Y. Cnty. Ct. 1996) (dismissing charges under PENAL § 240.20(7) against woman feeding stray cats in an abandoned building). By contrast, the cases where the “no legitimate purpose” element was met involve situations a person on the street might think of as strange. *See, e.g.,* People v. Om, 984 N.Y.S.2d 633 (N.Y. City Ct. 2013) (unpublished table decision) (charges upheld where defendant jumped off a bridge into Long Island Sound); People v. Thomas, 930 N.Y.S.2d 176 (N.Y. App. Div. 2011) (unpublished table decision) (charges upheld where defendant rode “his bicycle the wrong way against rush-hour traffic,” threw his bicycle “so that it came to rest in a traffic lane” and cursed at officers).

¹⁹² This possibility seems particularly likely given the way some supporters of mask bans view students wearing masks (or keffiyehs) to protest the Gaza war as successors of the Ku Klux Klan. *See* Kahn, *Authoritarian Semiotics*, *supra* note 1, at 518 (describing Jeffrey Dinowitz comparing keffiyehs to Ku Klux Klan hoods—a comparison he later apologized for).

¹⁹³ The NYCLU Memorandum, *supra* note 9, makes a strong case against New York’s masked harassment law, arguing that the law will lead to disproportionate enforcement, expose protesters to doxxing, and risk public health—among other things. *Id.* at 1, 3, 6. I have my doubts as well—in part because New York is not Georgia, and some of the *Miller* approach’s appeal comes from cases like *Daniels*, *I.M.W.*, and *Hutzel*, which have applied the standard with nuance.

¹⁹⁴ For an overview of the keffiyeh as a garment and a political symbol, see Anu Lingala, A Sociopolitical History of the Keffiyeh (Apr. 26, 2014) (unpublished student paper),

keffiyeh is the object that is concealing the protesters face? (What happens, for instance, if the campus protester wears a keffiyeh around their neck, or as a shawl, but also wears a bandana or surgical mask to conceal their identity?)¹⁹⁵

In answering these questions, a semiotic approach can help.¹⁹⁶ A mask, or keffiyeh, is not only a garment—it is also a symbol.¹⁹⁷ From a semiotic perspective, symbols are fluid. They do not have fixed meanings but have different meanings for different people which change with time and place.¹⁹⁸ For example, from a semiotic perspective, a keffiyeh is a garment worn in Arab culture, a garment with association with airplane hijackings, a garment that keeps the sand out of one's eyes (and blunts the force of cold winter winds), and, during the 1980s, was a fashion piece for the new age Avant Garde set.¹⁹⁹

Any legal system struggles with these diverse meanings. Consider *Virginia v. Black* which dealt with the intimidatory implications of cross

https://www.academia.edu/109692672/Sociopolitical_History_Of_The_Keffiyeh
[<https://perma.cc/YG3T-8N8H>].

¹⁹⁵ For example, 2024 Green Party presidential candidate Jill Stein wore a keffiyeh around her shoulders. See TRT World (@trtworld), X (Aug. 22, 2024, at 11:00 CT), <https://x.com/trtworld/status/1826650719627116832?lang=en> [<https://perma.cc/4CNZ-6EA8>] (tweeting a photo of Stein, noting the keffiyeh “draped on her shoulders” and describing her as “the most prominent pro-Palestine voice in the US elections”). While this type of keffiyeh wearing might be off-putting to some, it does not conceal the wearer's identity.

¹⁹⁶ See, e.g., Kahn, *Authoritarian Semiotics*, *supra* note 1, at 515, 535 (describing appeal of masks as a semiotic symbol).

¹⁹⁷ To return to the COVID surgical mask debate, one could also argue that a mask is a “tool.” Conor Friedersdorf, *Masks Are a Tool, Not a Symbol*, ATLANTIC (May 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/masks-are-tool-not-symbol/611134/> [<https://perma.cc/T7C2-QU8S>]. The question becomes: What type of a tool is a mask worn during a pro-Palestine protest? Is it a tool that helps the wearer conceal their identity (and thus avoid doxing, deportation, or cancelation for legal activity)? Or is a mask/keffiyeh more like a burglar's tool that allows the wearer to commit a crime and escape without detection?

¹⁹⁸ For a similar argument about niqabs, see Mario Ricca, Don't Uncover that Face! Covid-19 Masks and the Niqab: Ironic Transfigurations of the ECtHR's Intercultural Blindness, 35 Int'l J. Semiotics L. 1119 (2020).

¹⁹⁹ See Lingala, *supra* note 194, at 3 (protecting against the heat); *id.* at 5–6 (use as symbol of Palestinian Revolt of 1936–39 and as replacement of the fez); *id.* at 13–17 (wearing by Leyla Khalid during 1969 hijacking); *id.* at 23–27 (worn during Vietnam war protests in the United States); *id.* at 32–33 (worn as 1980s street culture); *id.* at 37–38 (mass marketed by Urban Outfitters in the 2000s). Often the keffiyeh wearer did not know the broader context of the keffiyeh, let alone approve of it. For example, during the 1988 Intifada, American keffiyeh wearers were interviewed for a piece for *Time* magazine. *Id.* at 33 (quoting *Kaffiyehs: Scarves and Minds*, TIME (Mar. 20, 1988), <https://time.com/archive/6711882/kaffiyehs-scarves-and-minds/> [<https://perma.cc/8AFE-T6X6>])). One respondent described the keffiyeh as promoting the “ethnic type of look” while another didn't know the scarf he was wearing was a keffiyeh. *Id.* (quoting *Kaffiyehs: Scarves and Minds*, *supra*).

burning—presumably a far easier issue to decipher.²⁰⁰ The Court struggled with determining when cross burning is done with intent to intimidate, which a majority found punishable as a “true threat.”²⁰¹ Justice Clarence Thomas, in language echoing European support for laws banning Holocaust denial as inherently antisemitic, reached the conclusion that *all* cross burning is inherently intimidatory.²⁰² Justice Sandra Day O’Connor could not go this far. Citing examples of crosses burned during a 1939 wedding between a Klan member and a Nazi,²⁰³ as well as crosses burned in support of Richard Nixon’s 1960 presidential campaign,²⁰⁴ she viewed the intimidatory nature of cross burning as something that had to be established on a case-by-case basis.²⁰⁵

Masks and keffiyehs present equally challenging interpretive issues. At the heart of the dispute between Justices Thomas and O’Connor over cross burning is a question of whose perspective counts—the cross burner or the victim. From the perspective of the victim, Justice Thomas is probably right that a cross burnt on one’s lawn, or across the street, can only have one meaning.²⁰⁶ From the perspective of the defendant, however, things appear rather different. A cross burning done for an “innocent” purpose—perhaps reenacting a scene from the 1920s for a play or a film shooting—might harm and offend observers but fails to show the requisite intent to intimidate to attach criminal liability.

While some laws turn on victim perception, both Georgia’s court-modified mask statute and New York’s proposed masked-harassment law turn on the accused’s state of mind. The question then becomes what the pro-Palestine mask (or keffiyeh) wearer intends by wearing their garment at a protest rally? Undoubtedly some cases will parallel *IMW*,²⁰⁷ where the teenager stood masked, at the door of the “wrong” house, and remained even though the middle-aged woman who answered the door was terrified.²⁰⁸

²⁰⁰ For an overview of the debate over whether a burning cross is inherently intimidatory, see Robert A. Kahn, *Did the Burning Cross Speak? Virginia v. Black and the Debate Between Justices O’Connor and Thomas over the History of Cross Burning*, 39 *Stud. L., Pol., & Soc’y* 75 (2006).

²⁰¹ *Virginia v. Black*, 538 U.S. 343, 360 (2003).

²⁰² *Id.* at 391 (Thomas, J., dissenting) (concluding that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence”).

²⁰³ *Id.* at 357 (majority opinion).

²⁰⁴ *Id.* at 356–57.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 388 (Thomas, J., dissenting).

²⁰⁷ *In re I.M.W.*, 722 S.E.2d 586 (Ga. App. 2012).

²⁰⁸ *Id.* at 588–89.

For example, were a masked foe of the Gaza war to start laughing when an unmasked member of the college community said they were fearful because of the mask, there might be intent to intimidate—particularly if the incident occurred in close quarters, or the protester approached the community member. On the other hand, as often happened during the 2024 campus protests, if the mask or keffiyeh wearer was approached by someone upset by the message the protesters were conveying (by their masks, by signs, or simply by their presence on campus), it is harder to see an intent to intimidate.

Ultimately, these are fine-grained, factual judgments. For example, in *Hutzel v. State*,²⁰⁹ the Georgia Court of Appeals found the requisite intent to intimidate in a protest setting. *Hutzel* involved a rally by members of the National Socialist Movement; the defendant was one of a group of counter-protesters.²¹⁰ As in *Gates*,²¹¹ the defendant in *Hutzel* was arrested at a rally after being told by a police officer to remove his mask.²¹² But unlike the otherwise peaceful protester in *Gates*,²¹³ the defendant in *Hutzel* was shouting obscenities at the officer and was, along with others, trying to encircle the police.²¹⁴ So, if a masked protester behaves aggressively to police (or to counter-protesters and onlookers) by shouting, or surrounding the “target,” there is likely an intent to intimidate.

Recognizing that these types of situations exist, however, does not require giving up support for freedom of speech and civil liberties. Even Nadine Strossen, former president of the ACLU and passionate advocate for free speech, admitted that, in an appropriate factual situation, the state might arrest someone for harassing speech.²¹⁵ But the use of the coercive power of the state must turn on fact rather than supposition or general feelings about the symbolic message a mask or keffiyeh sends to others.²¹⁶

²⁰⁹ 859 S.E.2d 495 (Ga. App. 2021).

²¹⁰ *Id.* at 498.

²¹¹ *Gates v. Khokhar*, 884 F.3d 1290, 1301 (2018). The outcome in *Gates* might follow from the lesser standard the officers needed to show in the qualified immunity context under the “arguable probable cause” test. *Id.* at 1299–300.

²¹² *Hutzel*, 859 S.E.2d at 498.

²¹³ *See Gates*, 884 F.3d at 1302.

²¹⁴ *Hutzel*, 859 S.E.2d at 499.

²¹⁵ *Interview with Nadine Strossen*, *supra* note 92, at 396–97 (allowing that some prosecutions are legitimate even under *Brandenburg v. Ohio*). This is not to suggest that Strossen supports hate speech laws. She doesn’t support such laws (preferring to condemn hate speech by other means). *Id.* at 378. Rather, the Strossen example shows that one can stand for a principle without being an absolutist. (It also shows the practical difficulty of taking a genuinely absolutist approach to freedom of speech).

²¹⁶ For example, Ontario, Canada passed a law banning the wearing of keffiyehs in the parliament building. *See* Allison Jones & Liam Casey, *Speaker of Ontario Legislature Stands by Keffiyeh Ban*, *TORO. SUN* (Apr. 18, 2024), <https://torontosun.com/news/provincial/speaker-of-ontario-legislature-stands-by-keffiyeh-ban> [<https://perma.cc/LRT5-N2QS>]. The ban, which

In other words, the fact that someone is wearing a keffiyeh does not mean the wearer intends to intimidate others—even in the context of a campus protest over the Gaza war. Some Jewish students wear keffiyehs—indeed, so do some Israelis.²¹⁷ Other Jews and Israelis, among others, are triggered by keffiyehs.²¹⁸ This reflects the diverse groups of people who live together in a modern society. But a fear of the keffiyeh based on its symbolic connotations, no matter how deeply held by the onlooker or how reasonable given the onlooker’s lived experience, does not mean that the wearer intended to intimidate others.²¹⁹

The same logic applies to masks. Encountering a person who is wearing a mask might be frightening. As mask-ban supporters note, masking can facilitate the commission of crimes, while giving the wearer the courage to engage in hostile acts such as confronting others or writing hateful graffiti on the side of buildings. All of this can be true. And, indeed, a member of the college community—perhaps a criminal justice major who has studied mask wearing and its connection to criminality—might be fearful as a person wearing a ski mask or bandana walks across campus. But without more, the mask wearer has not violated the law.

In this regard, *Daniels v. State* is instructive. As stated above, *Daniels* involved a middle-aged man who played with teenaged children while wearing a hockey mask.²²⁰ The police officer who made the arrest, saw one of the children walking away from defendant—something the

was quite contentious, places front and center the question of whether a liberal society can punish the use of symbols it dislikes. *Id.*

²¹⁷ For instance, while interviewing keffiyeh wearers in the late 1980s, a reporter was told by Mordechai Levy, head of the Jewish Defense Organization in New York City, that keffiyehs were so numerous that “they are just like any other scarf.” *Keffiyehs: Scarves and Minds*, *supra* note 199. Anu Lingala even has a photo of Israeli Prime Minister David Ben Gurion wearing a keffiyeh while visiting troops in 1949. Lingala, *supra* note 194, at 19, 21.

²¹⁸ Andrew Lapin, ‘I Was Triggered’: Some Jews Are Struggling as They Encounter Keffiyehs in Their Daily Lives, JEWISH TELEGRAPHIC AGENCY (Nov. 20, 2024), <https://www.jta.org/2024/11/20/united-states/jews-struggle-with-how-to-react-to-seeing-keffiyehs-in-public> [<https://perma.cc/L8K4-X4R6>].

²¹⁹ This is particularly true given how the keffiyeh morphed into a fashion statement in the 1980s and then again in the 2000s. *See* Lingala, *supra* note 194, at 31–32 (street culture); *id.* at 38–39 (mass fashion culture). Even if, in the 1980s, some wearers donned the keffiyeh as an “oblique” sartorial challenge to the demonization of “all things Palestinian” in American culture, it is unclear that this was why Madonna or Pat Benatar wore keffiyehs, *id.* at 30–32, to say nothing of the people who clothe themselves after the style of their favorite fashion icons. If recently, the keffiyeh has once again been associated with Palestine, Lapin, *supra* note 218, writing in 2014, Anu Lingala could worry that the keffiyeh, appropriated by Western culture, had lost all associations with its original meaning. Lingala, *supra* note 194, at 47–48 (noting the fashion culture of the keffiyeh stripped how Palestinians of their agency and bemoaning how keffiyehs produced in China undercut Palestinian keffiyeh makers).

²²⁰ *Daniels v. State*, 448 S.E.2d 185, 188 (Ga. 1994).

officer interpreted as fear, on the part of the girl.²²¹ In overturning the charges against defendant, the Georgia Supreme Court disregarded the officer's state of mind.²²² It did not matter that the officer was "fearful" for the girl; what mattered was primarily the state of mind of Mr. Daniels (who claimed he was "entertaining" the children) and, to a lesser extent, the state of mind of the girl (who told the police officer she was not frightened.)²²³

The disregard of the police officer's perspective in *Daniels* is critical for understanding how an intent-to-intimidate mask law should operate on campus. In determining whether a mask, or keffiyeh, is worn with the intent to "menace" or "threaten" another, the court should disregard outside observers who might, in a manner analogous to the police officer in *Daniels*,²²⁴ impose their own views about the intent behind a mask wearer—or about the impact of the defendant's mask or keffiyeh wearing on the "victim." The intent-to-intimidate standard places the responsibility (and the liability if things go wrong) in the hands of the mask wearer. Given the penchant of police to overcharge, this may come as cold comfort to mask wearers.²²⁵ At the same time, the Georgia intent-to-intimidate approach puts the kibosh on over-eager attempts to use the presence of masks at the campus protests over Gaza as a pretext for imposing broad mask bans.

IV. MASKS IN COLONIAL AMERICA

The broad protection of masking provided by the intent-to-intimidate standard fits the robust conception of masking and disguise in colonial America. In *New York State Rifle & Pistol Ass'n v. Bruen*,²²⁶ Justice Clarence Thomas—interpreting the Second Amendment—asked whether a given regulation is "consistent with this Nation's historical tradition[s]."²²⁷ In crafting his argument, Justice Thomas cited laws dating from 1285 through the nineteenth century.²²⁸ In a similar way, colonial

²²¹ *Id.* at 187.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 188.

²²⁵ For example, in *Gates v. Khokar*, the officer used the wearer's failure to remove his mask as proof of an intent to intimidate, even though the wearer had a hearing problem and the crowd made it hard to hear the police command to unmask. 884 F.3d 1290, 1301–02 (11th Cir. 2018).

²²⁶ 142 S. Ct. 2111 (2022).

²²⁷ *Id.* at 2135. *Bruen* held that individuals have the "right to carry a handgun for self-defense outside the home." *Id.* at 2122.

²²⁸ *Id.* at 2135–45.

history provides support for the idea that our Founders were not overly eager to ban mask wearing.²²⁹

Our Founders—the ones who fought for independence—had a soft spot in their hearts for masks and disguises. One need look no further than the Boston Tea Party. In December 1773, a band of colonists disguised as “Mohawks” boarded ships docked in Boston Harbor and dumped British East India Company tea into the Atlantic.²³⁰ Although the dumping of tea was illegal—at least from a British point of view—our common understanding of the Tea Party (as Americans) is celebratory. As a short article on the Colonial Williamsburg Museum’s webpage explains, “Most Americans know the story of the Boston Tea Party of December 16, 1773. Many love it.”²³¹ From a cultural perspective, the use of disguise (dressing up as “Mohawks”) more than makes up for concerns about the lawlessness of the Tea Party itself.

To show how the love of disguise from the Boston Tea Party has traveled through the ages, consider the 1911 play *A Colonial Tea Party* published in *The Journal of Education* as a one-act play (for girls).²³² The start of the play is didactic. After one of the children, Polly, complains about “how stupid [it is] to entrain our friends with spiced hot water,”²³³ Mrs. Otis, an adult, explains why the Committee of Correspondence cares about tea.²³⁴ The issue, she tells the children, is “whether a parliament 3,000 miles away across the ocean shall decide how we shall be governed and taxed, without allowing any representation of the colonies in parliament.”²³⁵

The girls then attend a school dance.²³⁶ At the end of the dance, Mrs. Otis returns and reports seeing “[a] band of Indians” heading for the “tea wharves.”²³⁷ Mrs. Pitts describes how the “Indians” boarded the ships,

²²⁹ While citing *Bruen*, I do not necessarily endorse all aspects of originalism. However, a focus on the “history and tradition” of legal norms itself has a lengthy history, and there is something to be said for engaging in the debate over how our historical past is reinterpreted for the modern age. See Dahlia Lithwick & Mark Joseph Stern, *Can Ketanji Brown Jackson’s Take on History Be a Corrective to Amy Coney Barrett’s?*, SLATE (July 9, 2025), <https://slate.com/news-and-politics/2025/07/ketanji-brown-jackson-vs-amy-coney-barrett-history.html> [https://perma.cc/6TF8-WU65] (describing the pros and cons of engaging in debate over history with originalism); MARIO RICCA, *INTERCULTURAL SPACES OF LAW: TRANSLATING INVISIBILITIES* 169 (2023) (noting that legal texts convey implicit meanings that must be “translated” by the judge into the present day context).

²³⁰ *Why Did Colonists Dress as “Mohawks”*, *supra* note 37.

²³¹ *Id.*

²³² Winnifred C. Folan, *A Colonial Tea Party*, 73 J. EDUC. 571 (1911).

²³³ *Id.* at 571.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 572.

broke open the chests, and spilt the tea into Boston Harbor.²³⁸ Mrs. Warren then asks, “why should the Indians take a hand in our business?” to which Mrs. Pitts replies, “Well, my husband, Mr. Pitts, is the chief of these Mohawks.”²³⁹ The entire cast exclaims in unison: “Mr. Pitts!”²⁴⁰ The shock is palpable.

Mrs. Pitts then tells the rest of the story. She explains to the children: “Yes, the Mohawks are our own braves, who were on hand when the time came to act. But remember, of this you know nothing. It is a state secret.”²⁴¹ At this, Dorothy (one of the girls) replies, “How splendid!” while Polly exclaims, “Oh, how I wish I had been there!”²⁴²

The Tea Party shows the extent to which, by the early twentieth century, the Boston Tea Party had become a symbol of playful mask wearing. In this account, any sense of danger is downplayed. When Mrs. Pitts is asked whether anyone was hurt at the “tea party,” she reassures the children: “Nothing has been harmed, neither persons nor property.”²⁴³ The implication for today’s mask laws is clear—playful masking, where “neither persons nor property” are harmed—should be constitutionally protected.

To be sure, the actual Boston Tea Party was a more complex event—at a minimum, the tea was “harmed.” Yet even here, the colonial history establishes a nexus between protest, anonymity, and masks that supports extending First Amendment protection to masks. While some “Mohawks” tried to resemble Indians, for many protesters, the goal was to conceal one’s appearance by smearing their faces with “coal dust, burnt cork, . . . red ochre,” or whatever was available at “a nearby shop.”²⁴⁴

The Tea Partiers had good reasons to protect their anonymity. Several of the participants were apprentices, worried about “tory . . . masters”—especially in Boston, which in 1773 was still a small town where “it was easy to be recognized.”²⁴⁵ This made a “darkened face . . . useful.”²⁴⁶ As Joshua Wyeth, one of the “Mohawks” explained: “We should not have known each other, except for our voices.”²⁴⁷

To be sure, Peter Oliver, a loyalist, decried the costumes, arguing that the colonists had to “make their Agents first look like the Devil, in

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Why Did Colonists Dress as “Mohawks”*, *supra* note 37.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Order to make them Act like the Devil.”²⁴⁸ While Peter Oliver’s connection between disguise and crime presages the arguments Hannah Meyers would make in defense of mask bans in 2025,²⁴⁹ Oliver also viewed John Hancock and Samuel Adams as “demagogues” and left Boston with the departing British forces in March 1776.²⁵⁰

All in all, the Boston Tea Party reinforces the idea that the Founders would have had little concern about non-intimidatory masking. Plays like *The Tea Party* show that disguise is American as apple pie—indeed, Dorothy and Polly wished they could attend, while Mrs. Pitts reassured the girls (and the audience) that no one was harmed.²⁵¹ Likewise, mask wearing at a campus protest, or a solidarity encampment, ought to be permitted in the absence of harm (or, to use the Georgia language, “intent to intimidate”).²⁵²

As for the Tea Party itself, the experiences of Joseph Wyeth and his compatriots showed that protesters can have good reason to conceal their identities. Apprentices worried about being outed to their masters²⁵³—an eighteenth-century version of doxxing. Just as the Northern District of Indiana worried about the possibility of linking names to faces in a small community,²⁵⁴ the original Tea Partiers worried about having their identities revealed in Boston, at that time a small town.²⁵⁵

While Peter Oliver worried that masks would encourage violent acts,²⁵⁶ Oliver fled the colonies and dismissed John Hancock and Samuel Adams as “demagogues.”²⁵⁷ This makes it difficult to separate his arguments about masking and criminality from his broader rejection of the American Revolution.²⁵⁸ In this regard, one might then reasonably ask: Who should courts turn to when searching for our “national traditions?”²⁵⁹

²⁴⁸ *Id.*; see also Michael D. Hattem, *Peter Oliver (1713–1791)*, in *HISTORY FROM LOSS: A GLOBAL INTRODUCTION TO HISTORIES WRITTEN FROM DEFEAT, COLONIZATION, EXILE, AND IMPRISONMENT* 107 (Marnie Hughes-Warrington & Daniel Woolf eds., 2023). Peter Oliver also wrote a pamphlet criticizing the Revolution and its leaders in Massachusetts, including Samuel Adams and John Hancock. *Id.* at 110.

²⁴⁹ See Meyers, *supra* note 18 (arguing that masks embolden wearers to commit crimes).

²⁵⁰ Hattem, *supra* note 248, at 109.

²⁵¹ Folan, *supra* note 232, at 572.

²⁵² See *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990).

²⁵³ *Why Did Colonists Dress as “Mohawks”*, *supra* note 37.

²⁵⁴ *Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 841 (N.D. Ind. 1999).

²⁵⁵ *Why Did Colonists Dress as “Mohawks”*, *supra* note 37.

²⁵⁶ *Id.*

²⁵⁷ See Hattem, *supra* note 248, at 109.

²⁵⁸ Moreover, to the extent Oliver was concerned about the illegality of the Tea Party itself, nothing in the intent-to-intimidate approach prevents the state from punishing the underlying (illegal) activities people might do while masked—such as burglary, trespassing or vandalism.

²⁵⁹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

Colonists like Paul Revere who, after participating in the Boston Tea Party, took off his mask to make the first of his famous midnight rides?²⁶⁰ Or a Tory who fled Boston in 1776 with the departing British troops?²⁶¹

Moreover, the colonial interest in masks extended beyond politics. As part of an Anglo-American community centered on London, colonists were drawn to London's culture of masquerade balls—even though the first masquerade ball in the United States dates to 1801.²⁶² One sees this in the portraits by John Wollaston of high society women from Charleston, South Carolina—each with a mask in her hand.²⁶³ According to Jennifer Van Horn, the appeal of the mask was more about aping the latest London fashions—it was also about harnessing the “carnavalesque energy” of the masquerade ball and the mutability it implies.²⁶⁴

Colonists followed accounts of masked balls across the Atlantic, described in newspapers like *The Boston Evening Post*, and purchased prints and porcelain figures of mask wearers.²⁶⁵ More adventurous colonists crossed the ocean to participate in masked balls themselves.²⁶⁶ Meanwhile, researchers found documentary evidence of mask wearing in colonial America. According to Susan Holloway Scott, masks were worn “by females as young as George Washington’s four-year-old step-daughter Patsy and as old as a seventy-year-old Quaker grandmother.”²⁶⁷ According to Scott, these masks protected against sunburn and helped the wearer avoid male scrutiny.²⁶⁸ In other words, in colonial America, masks were both a symbol of “sexual license” that facilitated the mixing

²⁶⁰ *Why Did Colonists Dress as “Mohawks”*, *supra* note 37.

²⁶¹ Supporters of mask wearing can also draw inspiration from a more recent Tea Party of the late 2000s and early 2010s. See Joseph Kelly, *Thousands Protest at Tea Party Rally*, EAGLE (Apr. 18, 2010), <https://www.theeagleonline.com/article/2010/4/thousands-protest-at-tea-party-rally> [<https://perma.cc/X28L-ZZDU>] (describing “a man dressed up in a tar-and-feathers body suit and an elaborate mask combining features of President Barack Obama, the Joker and Fidel Castro”). If a Fidel-Joker-Obama mask was okay in 2010, why are masks (and keffiyehs) so threatening today?

²⁶² See Van Horn, *supra* note 38, at 12.

²⁶³ *Id.* at 10.

²⁶⁴ *Id.* at 11.

²⁶⁵ *Id.* at 12.

²⁶⁶ *Id.* at 13 (describing the account of Charleston social elite Joseph Addison, whose diary describes how he was “attacked” at a masquerade ball by a half dozen masked women); see also *id.* at 17 (describing portrait of colonist Robert Carter III depicted in a masquerade while in London).

²⁶⁷ See Susan Holloway Scott, *Those Mysterious 18thc Masks*, SUSAN HOLLOWAY SCOTT (June 26, 2020), <https://susanhollowayscott.com/blog/2020/7/26/qmp71fgg2fzwqcdogob0hxx1c19un> [<https://perma.cc/V5KV-XTZX>].

²⁶⁸ *Id.*

“between classes of people,”²⁶⁹ as well as a way for “the daughters of farmers” to avoid the male gaze.²⁷⁰

Given the broad acceptance, and use, of masks in colonial America, one wonders how a case like *People v. Archibald*²⁷¹ is possible. The defendant in *Archibald* was standing on a subway platform at 4:00am “wearing a white evening dress, high heel shoes, blonde wig, female undergarments, and facial makeup.”²⁷² After winking at an officer, and walking away, the defendant was arrested and charged with concealing his identity by “impersonating a female.”²⁷³ The Appellate Division upheld the charges, reasoning that New York’s mask ban does not make an exception for a wearer “feeling compelled” to mask.²⁷⁴

From the perspective of the eighteenth century, the outcome in *Archibald* is incongruous. Writing in dissent, Judge Marowitz found no connection between “men attired in female clothing” and the use of “attire” in the “scheme of murder and insurrection” of the 1840 anti-rent rioters.²⁷⁵ This is all true. Moreover, if history and tradition mean anything, the defendant in *Archibald* should have been free to dress as a woman regardless of the legislative intent behind New York’s mask law. If George Washington’s step-daughter can mask²⁷⁶—and men boarded ships to meet up with women at London’s masquerade balls²⁷⁷—it is hard to see why someone “disguising” their face should be punished two hundred years later.

CONCLUSION: A TRUCE IN THE MASK WARS?

The enforcement of today’s new mask bans and their vigorous enforcement is far from a constitutional slam dunk. The *Kerik* names vs. faces approach to First Amendment protection of mask wearing is a minority view.²⁷⁸ Wearers who don masks out of a fear of harassment can rely on the *NAACP v. Alabama* test.²⁷⁹ Finally, the *State v. Miller* line of

²⁶⁹ Van Horn, *supra* note 38, at 9.

²⁷⁰ Scott, *supra* note 267.

²⁷¹ 296 N.Y.S.2d 834 (N.Y. App. Div. 1968).

²⁷² *Id.* at 835–36.

²⁷³ *Id.*

²⁷⁴ *Id.* at 837. The court assessed the charges under section 240.35 of the penal code, which prevents concealing one’s face. *Id.* at 836.

²⁷⁵ *Id.* at 837 (Markowitz, J., dissenting).

²⁷⁶ Scott, *supra* note 267.

²⁷⁷ Van Horn, *supra* note 38, at 13.

²⁷⁸ See *supra* Part I.

²⁷⁹ See *supra* Part II.

cases in Georgia creates a world in which punishing mask wearing requires an intent to intimidate.²⁸⁰

Following these rules, courts should punish masking only when (1) the wearer has no fears of harassment if unmasked and (2) the wearer masks with the intent of intimidating someone. Courts will then likely ask: What is intimidatory? Is a keffiyeh or mask intimidatory whenever it is worn? Or does the context of the masking matter? If the post-*Miller* case law in Georgia is any guide, courts will approach these cases from the defendant/mask wearer's perspective and only sustain charges in those narrow situations where the objective circumstances indicate an intent to inspire fear. The narrow, intent-to-intimidate approach reflects the history of masking in colonial America, including the role of facial disguises in protests like the Boston Tea Party that helped establish the constitutional freedoms we revere today.²⁸¹

As a practical matter, Georgia's middle ground for mask bans might reach someone who wears a mask (or a keffiyeh, or a balaclava, or a bandana) while confronting another person at close quarters and refuses to unmask after the other person expresses fear. Liability arises from the intent to cause another person fear—not general disapproval of masks (or disapproval of a specific type of mask—such as a keffiyeh). The Georgia approach will restrict sweeping mask bans, like the one passed by Nassau County, and will protect campus protesters more reliably than New York's new evading-arrest law.²⁸² Not only that, the Georgia approach protects those who—to use Hannah Meyers' wording—mask to engage in “revelry.”²⁸³

At the same time, the middle ground approach proposed here would not protect ICE agents and local police officers who mask during immigration roundups.²⁸⁴ This is so, even if one takes seriously the concerns raised about doxxing and physical harm faced by the officers.²⁸⁵

²⁸⁰ See *supra* Part III.

²⁸¹ See *supra* Part IV.

²⁸² See *supra* notes 179–191 and accompanying text.

²⁸³ See Meyers, *supra* note 18.

²⁸⁴ See Taylor Robinson, *Nassau County Will Let Officers Wear Masks When Working with ICE*, N.Y. TIMES (July 11, 2025), <https://www.nytimes.com/2025/07/11/nyregion/nassau-county-police-officers-ice-masks.html> [<https://perma.cc/XK5H-EST8>]. Ironically, police officers in Nassau County would be able to mask at a time when many Nassau County residents are not allowed to do the same thing. See Nassau Mask Transparency Act, *supra* note 22 (banning, at a minimum, two or more people from masking in public for a reason that is not related to health, religion, or a traditional observance involving mask wearing).

²⁸⁵ See Stephen Lawrence, *ICE Raids in Los Angeles Detain Dozens, Spark Rage, Protests & Clashes*, S. PASADENAN (June 7, 2025), <https://southpasadenan.com/ice-raids-in-los-angeles-detain-dozens-spark-rage-protests-clashes/> [<https://perma.cc/2824-ZU23>] (describing unwillingness to place ICE officers at risk).

There are two reasons for this. First, the First Amendment protects the right to protest anonymously, it does not allow state officers to conceal their identities while on the job; nor does it create a secret police.²⁸⁶ Second, from the perspective of the middle ground approach, the ICE roundups are likely done with an intent to intimidate their targets. On one level, it is self-evident that a person confronted, and then physically restrained, by a group of masked attackers will be frightened.²⁸⁷ Not only that, the language ICE officials use to justify the roundups—promising to arrest political foes and categorizing criticism of the raids as “dangerous”—betrays an intent to intimidate.²⁸⁸ Nothing, therefore, in the middle ground, intent-to-intimidate approach to mask bans allows ICE agents to conceal their identities while working on the job.²⁸⁹

Georgia’s nuanced, contextual approach fits a society in which people mask (or disguise their faces) for a wide variety of reasons. By punishing intimidatory mask wearing, while allowing non-intimidatory masking, the middle ground, intent-to-intimidate approach offers a truce to the 2024–25 college-campus version of our mask wars. Such a truce will recognize—as Lee Bollinger has pointed out in his “fortress” model of free speech protection²⁹⁰—that today’s protests over the Gaza war might become tomorrow’s “No Kings” protests. The alternative—escalating mask bans based on who is masking—sets us on a road that minimizes human freedom and respect for others. The intent-to-intimidate approach charts a new course—one that might blunt the growing face

²⁸⁶ Opponents of the ICE raids have introduced The No Secret Police Act of 2025, which would ban ICE mask wearing. See Brandi Buchman, *Democrats Want to Ban Masked ICE Agents*, HUFFINGTON POST (June 26, 2025), https://www.huffpost.com/entry/democrats-want-to-ban-masked-ice-agents_n_685d9603e4b0bb5044ff94a5 [<https://perma.cc/PCS3-Q2NS>].

²⁸⁷ See Lawrence, *supra* note 285 (describing the use of “shock-and-awe” tactics). Lawrence added: “The Federal Government multi-agency raids were carried out with heavy military-like tactical presence. At the Westlake Home Depot, unmarked urban combat-style vans and camouflaged agents with rifles were seen as detainees were loaded up.” *Id.*

²⁸⁸ For example, after Boston Mayor Michelle Wu described ICE agents as a “secret police” and compared them to “a neo-Nazi group,” spokesperson Tricia McLaughlin accused Wu of “contributing to the surge in assaults of ICE officers through [the] repeated vilification and demonization of ICE.” Ted Hesson, Tim Reid & Mike Scarcella, *Los Angeles ICE Raids Fuel Controversy over Masked Agents*, REUTERS (June 9, 2025), <https://www.reuters.com/world/us/los-angeles-ice-raids-fuel-controversy-over-masked-agents-2025-06-09/> [<https://perma.cc/QF3J-DEMG>].

²⁸⁹ On the other hand, were an ICE agent to wear a mask as a private individual, the First Amendment and the right to decide how to present one’s face in public would apply.

²⁹⁰ Under the fortress model, individuals protect speech for “strategic reasons”—namely the fear that, sooner or later, everyone risks “becoming a persecuted minority.” BOLLINGER, *supra* note 72, at 76, 100.

authoritarianism of our times.²⁹¹ Thankfully, to paraphrase Led Zeppelin, “[t]here’s still time to change the road [we’re] on.”²⁹²

²⁹¹ See Kahn, *The Mask Wars and Social Control*, *supra* note 13, at 165 (describing “face authoritarianism” as “the effort of the state (or social groups) to compel individuals to reveal or hide their faces”).

²⁹² LED ZEPPELIN, *Stairway to Heaven*, on Led Zeppelin IV, at 04:37–04:41 (CD, Atl. Recs. Nov. 8, 1971).