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The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers

Rob Kahn

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**THE LONG ROAD BACK TO SKOKIE:
RETURNING THE FIRST AMENDMENT TO MASK
WEARERS**

*Rob Kahn**
Professor of Law
St. Thomas University

When the Seventh Circuit upheld the First Amendment right of Nazis to march in Skokie, Illinois in 1978, the protection of mask wearers was not far behind. Since then, doctrinal paths have diverged. While the Supreme Court continues to protect hate speech, mask wearing has been increasingly placed outside First Amendment protection. This Article seeks to get to the bottom of this doctrinal divergence by addressing the symbolic purposes of mask bans—rooted in repudiating the Ku Klux Klan—as well as the doctrinal steps taken over the past forty years to restrict the First Amendment claims of mask wearers. It also highlights the dangers posed by the current, state-friendly mask law doctrine in an age of technological growth, mass surveillance, and a move to anoint Antifa as the new Ku Klux Klan. The Article ends with a call for courts to restore mask wearing to its rightful place in the First Amendment pantheon.

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I. INTRODUCTION: THE DECLINE OF MASK BAN DOCTRINE

A. *A Puzzle and a Problem*

Today, the First Amendment protection of masks is in decline.¹ As late as the 1970s and 1980s—the very time the Seventh Circuit

* B.A. Columbia College, Columbia University, J.D. New York University, PhD Johns Hopkins University (Political Science), Professor of Law, St. Thomas University, Minneapolis, Minnesota. This Article grew out of a March 2019 presentation at St. Thomas University on Alabama’s mask ban and a May 2019 presentation on the symbolic messages mask laws convey about the state at the Third Annual Conference on Memory Laws in European and Comparative Perspective in Brussels, Belgium. I would like to thank Jacqueline Baronian, Tom Berg, Mike Paulsen, Greg Sisk, Rachel Moran, Jerry Organ, Mitchel Gordon, Julie Oseid, Niki Catlin, Megan McNevin, George Soroka, Félix Krawatzek, Grażyna Baranowska, Nikolay Kuposov, Maria Mälksoo, Uladzislau Belavusau, and Eric Heinze for their questions and comments. I also want to thank the staff of the *Brooklyn Journal of Law and Policy* for their careful editing of this Article.

¹ See Margot E. Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 815, 854–74 (2013) (citing to precedent upholding anti-mask state laws more recent than cases finding “anti-mask laws unconstitutional under the First Amendment”); James Pasley, *12 US States and 7 Countries That Have Barred Protesters from Wearing Masks*, *BUS. INSIDER* (Oct. 7, 2019), <https://www.businessinsider.com/countries-states-where-protesters-cant-wear-masks-2019-10> (noting how California, the District of Columbia, Ohio, Florida,

was defending the right of Nazis to march in Skokie, Illinois²—the First Amendment also appeared to protect mask wearers.³ Over the next forty years, this changed.⁴ As the United States Supreme Court vigorously protected a wide variety of offensive speech,⁵ mask ban doctrine drifted toward greater restrictions.⁶ Finally, the Second Circuit ruling in *Church of the American Knights of the Ku Klux Klan v. Kerik*⁷ slammed the door on mask law claims which, the

Georgia, Massachusetts, Michigan, North Carolina, North Dakota, Virginia and West Virginia have enacted some variation of an anti-mask law).

² See *Collin v. Smith*, 578 F.2d 1197, 1206–07 (7th Cir. 1978). The debate over whether Nazis had the right to hold a peaceful demonstration in a community with a high percentage of Holocaust survivors split the ACLU but stood as a monument to the idea that in the United States, the First Amendment protects offensive speech—even hate speech. For an overview of the Skokie Affair, see DONALD ALEXANDER DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT* (1985). See also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 38 (1986) (noting the degree to which “the United States . . . tolerate[s] racist rhetoric”); SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 120 (1994) (describing the Skokie Affair as showing the “national commitment to protecting hate speech”).

³ *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978) (upholding the right of Iranian students to wear masks to protest the Shah); *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978) (invalidating mask ban on overbreadth grounds); *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980) (same).

⁴ See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

⁵ See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (noting that the First Amendment protects lying about one’s military record); *Snyder v. Phelps*, 562 U.S. 443 (2011) (noting that free speech includes carrying signs with homophobic messages outside a military funeral); *Texas v. Johnson*, 491 U.S. 397 (1989) (noting that the First Amendment protects flag burning); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (developing the incitement test in the context of a Klan rally). The major exception, *Virginia v. Black*, 538 U.S. 343 (2003), involves cross burning, which, significantly, shares a Klan context with mask bans.

⁶ See, e.g., *Kerik*, 356 F.3d 197; *Miller*, 398 S.E.2d 547; *Berrill*, 474 S.E.2d 508.

⁷ *Kerik*, 356 F.3d 197.

court held, do not normally implicate symbolic speech or freedom of association concerns meriting First Amendment treatment.⁸

These doctrinal changes are important because today's mask bans are no longer simply about the Klan.⁹ In April 2018, when neo-Nazis and anti-racist protesters faced off in a small Georgia town, Georgia police used the state's mask law to arrest the anti-racist protesters.¹⁰ Later the same year, officers arrested Carlos Chaverst Jr. under Alabama's mask ban after his leading a protest against the officer-involved shooting of an African American at a metro-Birmingham shopping mall.¹¹ Meanwhile, the city of Portland, Oregon is considering adopting an anti-mask law in response to repeated clashes between racist and anti-racist protesters.¹² These examples conflict with the popular understanding that mask laws were intended and used to target the Ku Klux Klan.¹³ Klan members,

⁸ *Id.* at 205–09 (rejecting expressive speech claim and rejecting anonymous speech claim).

⁹ See *infra* notes 11–19 and accompanying text (describing the uses of mask bans outside of the Klan context).

¹⁰ Meagan Flynn, *Georgia Police Invoke Law Made for KKK to Arrest Anti-Racism Protesters*, WASH. POST (Apr. 23, 2018, 5:42 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/04/23/georgia-police-invoke-anti-mask-law-made-for-kkk-to-arrest-racism-protesters/?noredirect=on&utm_term=.1d12c52d45ab.

¹¹ See Carol Robinson & Anna Beahm, *Protest Organizer Carlos Chaverst Jr. Arrested for 2nd Time in 48 Hours*, BIRMINGHAM REAL-TIME NEWS (Dec. 13, 2018), <https://www.al.com/news/birmingham/2018/12/protest-organizer-carlos-chaverst-jr-arrested-for-2nd-time-in-48-hours.html>. Chaverst was protesting the shooting of Emantic Fitzgerald Bradford Jr. who was shot at the Riverchase Galleria on November 22, 2018. *Id.* The mask wearing charge came at a December 6th protest at Renaissance Ross Bridge. *Id.* Let me add that I was originally drawn to this topic after I was asked by a local Birmingham reporter for my opinions on the Alabama law. See Janae Pierre, *Experts: Alabama's Mask Law is Outdated*, WBHM (Jan. 16, 2019), <https://wbhm.org/feature/2019/experts-alabamas-mask-law-is-outdated/>.

¹² Zusha Elinson, *Portland Considers Antimask Law Aimed at Antifa Violence*, WALL STREET J. (July 18, 2019, 5:30 AM), <https://www.wsj.com/articles/portland-considers-antimask-law-aimed-at-antifa-violence-11563442203>.

¹³ See Rob Kahn, *Mask Bans as Expressions of Memory Politics in the United States* 8–10 (2019) (unpublished paper presented at Memory Laws in Comparative European Perspective Conference, Brussels Belgium, May 2019)

however, have faded as the central targets of such laws: over the past several years, mask bans have been used (or proposed) against a wide variety of mask wearers, including Antifa,¹⁴ but also against Muslims,¹⁵ clowns¹⁶ and peaceful protesters.¹⁷ Indeed, the revival of mask bans is a global phenomenon, as examples from around the world attest.¹⁸

[hereinafter Kahn, Mask Bans] (providing more examples to defeat the popular notion that mask law bans were created to combat the Ku Klux Klan).

¹⁴ In 2017, an Arizona state legislator proposed a mask ban after comparing Antifa to the Klan. Ben Giles, *Legislator to Draft Law to Unmask Protesters He Compares to KKK*, ARIZ. CAP. TIMES (Aug. 23, 2017), <https://azcapitoltimes.com/news/2017/08/23/jay-lawrence-law-to-unmask-protesters-kkk/>. In June 2018, New York Republican Representative Dan Donovan introduced H.R. 6054, the “Unmasking Antifa Act of 2018,” which provided 15-year prison sentences for mask wearing with the intent to intimidate someone in the exercise of their constitutional rights. H.R. 6054, 115th Cong. (2018).

¹⁵ In 2016, a Georgia lawmaker proposed amending the state’s mask ban to replace “he” with “he or she,” a change that may have expanded the ban to cover Islamic clothing that conceals the wearer’s identity. *After Muslim Backlash, Georgia Lawmaker Drops Change to No-Mask Law*, CBS NEWS (Nov. 18, 2016, 10:27 AM), <https://www.cbsnews.com/news/muslim-backlash-georgia-lawmaker-change-no-mask-law/> [hereinafter *After Muslim Backlash*].

¹⁶ In 2016, one Mississippi county responded to the scary clown panic by banning clown masks until Halloween. See Austin Vining, *Trick or Treat?: Mississippi County Doesn’t Clown Around With Halloween Costumes*, 36 MISS. C. L. REV. 350, 351 (2018); see also Nicholas Mignaneli & Susan Siggelakis, *No Laughing Matter: Phantom Clowns, Moral Panic and the Law*, 13 LSD J. 68, 71–79, 82–89 (2017) (placing scary clown panic in broader context of the social role of clowns and *coulrophobia*—the irrational fear of clowns).

¹⁷ In addition to the Georgia and Alabama cases described above, in 2014, Atlanta police arrested protesters in downtown Atlanta wearing *V for Vendetta* masks protesting a Ferguson, Missouri Grand Jury’s decision not to bring charges against the killer of Michael Brown; the Eleventh Circuit defended the protesters’ arrest on the basis of qualified immunity. *Gates v. Khokhar*, 884 F.3d 1290, 1295, 1301–02 (11th Cir. 2018).

¹⁸ Over the past decade, a number of European countries have enacted mask bans, often in response to face veiling by Muslim women. See Dan Bilefsky & Victor Homola, *Austrian Parliament Bans Full Facial Veils in Public*, N.Y. TIMES (May, 17, 2017), <https://www.nytimes.com/2017/05/17/world/europe/austria-veil-ban-muslim.html> (describing mask bans in France, Belgium and Austria). On October 4, 2019, Mrs. Carrie Lam, the leader of Hong Kong, used the colonial-era Emergency Regulations Ordinance to enact a mask ban in response to the

The recent developments in mask law doctrine raise a puzzle and a problem.¹⁹ The puzzle refers to why courts began to favor mask bans in the 1990s and 2000s—a time when the Klan was “a shadow of its former self.”²⁰ This Article explores why, at pivotal moments and in consideration of bans’ historical intentions, courts have lurched toward greater restrictions on mask wearing.²¹ The problem with a state-friendly mask ban doctrine is, as noted above, that mask laws are currently a growth industry, a growth exacerbated by the expansion of mass surveillance.²² At a moment when individuals increasingly have rational reasons for wearing masks, mask bans are more present than ever before, and First Amendment protection for harmless, non-threatening (“innocent”) mask wearing has dropped out of sight.

In *The Tolerant Society*, Lee Bollinger posits that tolerating extremist speech makes society stronger by eliciting self-control toward antisocial behavior; this is also the message of the Skokie affair—tolerating extremists makes society freer by encouraging its members to develop a thicker skin.²³ The hope behind this Article is 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. A society which understands that sometimes people don masks, then, is a stronger society because it better respects the human dignity and privacy rights of others.

This introduction describes the key doctrinal shifts that led to *Kerik*’s conclusion that mask wearing never raises First Amendment

recent protests there. See James Pomfret & Greg Torode, *Explainer: Hong Kong’s Controversial Anti-Mask Ban and Emergency Regulations*, REUTERS (Oct. 4, 2019, 8:35 AM), <https://www.reuters.com/article/us-hongkong-protests-explainer/explainer-hong-kongs-controversial-anti-mask-ban-and-emergency-regulations-idUSKBN1WJ1FM>.

¹⁹ See *infra* Section I.D (discussing how despite the anti-mask laws’ connection to our nation’s past, these same laws monitor individuals completing considerably mundane tasks).

²⁰ Wayne R. Allen, *Klan, Cloth and the Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819, 827 (1991).

²¹ See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

²² See *infra* Section I.D.

²³ BOLLINGER, *supra* note 2, at 9.

anonymity concerns and only raises speech concerns if the mask carries a message independent of the rest of the wearer's costume.²⁴ To provide context, it then relates the newfound popularity of mask bans in the 1990s and 2000s to their usefulness in symbolically repudiating the Ku Klux Klan in a society seeking to define itself as colorblind and post-racial.²⁵ Finally, it addresses potential harms posed by broad, all-encompassing mask bans and lays out the plan for the rest of the Article.²⁶

B. Three Turning Points in Mask Law Doctrine

The first turning point on the long road from Skokie to *Kerik* came in 1990, when in *State v. Miller*,²⁷ the Georgia Supreme Court narrowed but ultimately sustained Georgia's mask law²⁸ after a Klan

²⁴ *Kerik*, 356 F.3d at 205–09 (rejecting anonymity and expressive speech claims of mask wearers).

²⁵ See *infra* Section I.C.

²⁶ See *infra* Section I.D. At this point let me offer a few caveats. First, although there are great analogies between mask wearing and online anonymity, my Article does not address online mask wearing. See Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 815, 815 (2013). It does, however, take up how social media and the internet may make physical mask wearing necessary. See also *infra* Section IV.A (discussing the rise of mass surveillance in the digital age). Second, my analysis focuses on the First Amendment; as such I do not have much to say about whether mask bans violate Equal Protection. While at least one court has considered such arguments, this is not where most of the action is when it comes to mask bans. See, e.g., *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813, 819 (Cal. Ct. App. 1978) (invalidating a mask ban on Equal Protection grounds). Finally, despite its length, this is not a definitive, or even comprehensive discussion of all mask ban cases in the United States; nor is it politically neutral. Rather, my Article begins from the premise that mask law doctrine has, over the past forty years, lost its way and offers impressionistic, heuristic arguments about why this may be the case and how to restore the First Amendment to mask wearers.

²⁷ 398 S.E.2d 547 (Ga. 1990).

²⁸ Georgia's "Anti-Mask Act" provided as follows:

- (a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the

member challenged the constitutionality of the statute as, in part, violating his freedoms of speech and association (including his use of symbolic speech) and as being overly broad.²⁹ In reaching this conclusion, the majority relied heavily on the history of Klan terror supposedly responsible for the passage of the Georgia law in 1951.³⁰ From the wider perspective of mask law doctrine, *Miller* is significant because it departed from an earlier path charted by *Robinson v. State* in which the Florida Supreme Court rejected the state's mask ban as overbroad.³¹

private property of another without the written permission of the owner or occupier of the property to do so.

(b) This Code section shall not apply to:

(1) A person wearing a traditional holiday costume on the occasion of the holiday;

(2) A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade or profession, or sporting activity;

(3) A person using a mask in a theatrical production including use in Mardi Gras celebrations and masquerade balls; or

(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.

GA. CODE ANN. § 16-11-38 (West 2019).

²⁹ *Miller*, 398 S.E.2d at 549.

³⁰ *See id.* at 549–50 (The court noted the inclusion of a “Statement of Public Policy” in the Anti-mask Act, which was reflective of the legislature’s “awareness of and concern over the dangers to society posed by anonymous vigilante organizations.”).

³¹ *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981). Section 876.13 of the Florida statute at issue and then rejected as overbroad by the court provided:

No person or persons shall in this state, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be, or appear upon or within the public property of any municipality or county of the state.

Id. at 1076. One difference between the Georgia and Florida statutes is that the Florida statute at issue in *Robinson* had no exceptions. Otherwise, the two statutes were quite similar.

A second turning point came in 1996.³² In *State v. Berrill*, the West Virginia Supreme Court decided a case involving an angry parent who attended a school board meeting in a devil costume, complete with a mask, to protest the high school's devil mascot.³³ Given the setting, the defendant's erratic behavior³⁴ and the fear it engendered,³⁵ the court easily justified application of the state mask ban by relying on the state's interest in safety.³⁶ But the court went further. Turning to the *Spence v. Washington* expressive content test for First Amendment claimants³⁷—something the court in *Miller* conceded to the defendants without challenging³⁸—it held that while the defendant had an expressive intent (namely to show the audience what it felt like to confront the devil),³⁹ this intent was not understood by the audience.⁴⁰ Furthermore, the court noted that the defendant was not prevented from “demonstrating his perception of the evil appearance of the devil, as long as he did not conceal his identity while doing so.”⁴¹ The court concluded that the anti-mask statute did not prevent the defendant from delivering his message, and any restriction placed on his freedoms by the statute was, in fact, minimal.⁴²

³² See generally *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996) (upholding the West Virginia state mask ban).

³³ *Id.* at 509.

³⁴ According to the court, the defendant “pranced” around the meeting room. *Id.* at 510.

³⁵ Some of the attendees worried that the defendant might have a gun. *Id.* at 516.

³⁶ *Id.* at 515.

³⁷ *Spence v. State of Wash.*, 418 U.S. 405, 410–11 (1974) (per curiam) (A First Amendment claimant must show “[a]n intent to convey a particularized message” and that “the likelihood was great that the message would be understood by those who viewed it.”). See generally Caitlin Housley, *A Uniform Test Isn't Here Right Now, But Please Leave a Message: How Altering the Spence Symbolic Speech Test Can Better Meet the Needs of an Expressive Society*, 103 KY. L.J. 657 (2014–2015) (providing an overview of the *Spence* test).

³⁸ *State v. Miller*, 398 S.E.2d 547, 550 n.2 (Ga. 1990).

³⁹ *Berrill*, 474 S.E.2d at 516.

⁴⁰ *Id.*

⁴¹ *Id.* at 515.

⁴² *Id.*

The final turning point came in 2004 when the Second Circuit, reversing the Southern District of New York, held in *Kerik* that members of the Church of the American Knights of the Ku Klux Klan could not protest in New York City while masked.⁴³ In an opinion by Judge José Cabranes, signed on to by now-Supreme Court Justice Sonia Sotomayor, *Kerik* took *Berrill*'s use of the *Spence* test a step further.⁴⁴ The Second Circuit reasoned that the Ku Klux Klan mask "does not communicate any message that the robe and hood do not."⁴⁵ In essence, *Kerik* constructed the following standard: when a mask is accompanied by a costume, the mask must have some expressive content independent of the costume to trigger First Amendment protection for the wearer.⁴⁶

In addition, *Kerik* rejected the plaintiff's freedom of association claim.⁴⁷ This claim, based on *NAACP v. Alabama*⁴⁸—and used in several earlier cases that upheld challenges to mask bans⁴⁹—requires that the wearer show that he or she will face harassment if forced to unmask, provided that the ordinance is not narrowly tailored to a compelling state interest served by the mask ban.⁵⁰ *Kerik*, however, dispensed with *American Knights of the Ku Klux Klan v. City of Goshen*, with *Aryan v. Mackey* and with *Ghafari v. Municipal Court*.⁵¹ Instead, it categorically held that *NAACP* does not apply to masks.⁵² In the court's words, "the Supreme Court has never held that freedom of association or the right to engage in

⁴³ Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004) *rev'g* 232 F. Supp. 2d 205 (S.D.N.Y. 2002).

⁴⁴ *Kerik*, 356 F.3d at 205–08.

⁴⁵ *Id.* at 206.

⁴⁶ *Id.*

⁴⁷ *Id.* at 209.

⁴⁸ 357 U.S. 449, 462 (1957) (recognizing "the vital relationship between freedom to associate and privacy in one's associations").

⁴⁹ See, e.g., Am. Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 838 (N.D. Ind. 1999); Aryan v. Mackey, 462 F. Supp. 90, 92 (N.D. Tex. 1978); Ghafari v. Mun. Court for S.F. Judicial Dist., 150 Cal. Rptr. 813, 819 (Cal. Ct. App. 1978). For example, the Klan members in *Goshen* presented evidence of violence, job firings and other forms of retaliation. *Goshen*, 50 F. Supp. 2d at 838.

⁵⁰ *Goshen*, 50 F. Supp. 2d at 842 (applying the compelling state interest test).

⁵¹ See *Kerik*, 356 F.3d 197; *Goshen*, 50 F. Supp. 2d 835; *Aryan*, 462 F. Supp. 90; *Ghafari*, 150 Cal. Rptr. 813.

⁵² *Kerik*, 356 F.3d at 209.

anonymous speech entails a right to conceal one's appearance in a public demonstration. Nor has any Circuit found such a right."⁵³

C. Mask Bans and White Supremacy

Behind these doctrinal changes are broader cultural questions. What led courts to crack down on mask wearers? What made the anti-Klan rationale so tempting? The 1950s provide a clue, as a time when a series of southern states including South Carolina, Georgia and Alabama enacted their mask bans.⁵⁴ These laws were enacted to forestall desegregation by showing the nation as a whole that “progressive” Southern elites were prepared to stand up to the Klan—something that previously had not always been the case. In effect, the Southern elites cast the Klan as the cause of bigotry and racial antagonism while seeking to preserve segregation as something in the best interests of everyone, including African Americans.⁵⁵

In a similar fashion, the Georgia Supreme Court in *Miller* invoked the history of Klan terror to sustain Georgia's anti-mask law⁵⁶ to demonize the Klan—and the Klan mask—and restore the good name of the state without digging too deep into the lingering question of white supremacy, including the mixed history behind the passage of Georgia's mask ban.⁵⁷ The trend toward demonizing the Klan, while providing significant leniency to the broader system of segregation, was also evident in a 1951 law review article by Jack

⁵³ *Id.*

⁵⁴ Alabama enacted its mask ban in 1949, and Georgia and South Carolina enacted their bans in 1951. See Kahn, Mask Bans, *supra* note 13, at 20–21 (describing the passage of anti-mask laws in all three states).

⁵⁵ See JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936–1965 121–50 (2011); Kahn, Mask Bans, *supra* note 13, at 18–22.

⁵⁶ *State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990).

⁵⁷ While the *Miller* court quotes from a pamphlet describing the evils of “public disguise” and quotes from Judge Osgood Williams, according to Ward, one of the act's sponsors Georgia Governor Herman Talmadge threw his support behind the mask ban because his counterpart Governor Jimmy Byrnes had just passed a similar bill in South Carolina. WARD, *supra* note 55, at 130–31; Kahn, Mask Bans, *supra* note 13, at 20.

Swertfeger Jr. appearing in the inaugural issue of the *Journal of Public Law*.⁵⁸

While Swertfeger drafted a model anti-mask act that he hoped would, by eliminating any intent requirement, “deal[] a staggering blow to the Klan,”⁵⁹ he had little to say about segregation or white supremacy. Indeed, when introducing the subject, he described the “lawlessness of the Reconstruction period under the carpet-baggers and Northern scalawags”⁶⁰ before quoting from a 1924 book praising the Klan for playing “a most important role in the overthrow of carpet-bag rule,” noting that “[b]urnings of cotton gins, petty thievery and assaults upon women became rare.”⁶¹ Similarly, writing in the *Georgia Law Review* forty years later in defense of mask bans in the wake of *Miller*, Wayne Allen referred to the Civil War as the “War Between the States” and described the “horseback rides by Klansmen dressed in sheets, grotesque masks and pointed hats” as “initially prankish.”⁶²

The point of this critique is not to embarrass Swertfeger or Allen, both of whom make thoughtful, persuasive cases for mask bans,⁶³ so much as to show how a concern to oppose the Klan, to set it aside as particularly evil, can co-exist with a distancing of the more difficultly defined evils of institutional racism and white supremacy.⁶⁴ In this regard, a case like *Miller* (and, to a lesser extent,

⁵⁸ See Jack Swertfeger Jr., *Comment: Anti-Mask and Anti-Klan Laws*, 1 J. PUB. L. 182, 182 (1951).

⁵⁹ *Id.* at 192.

⁶⁰ *Id.* at 182 n.2 (citation omitted).

⁶¹ *Id.* (quoting JOHN MOFFAT MECKLIN, *THE KU KLUX KLAN: A STUDY OF THE AMERICAN MIND* 65 (1924)).

⁶² Allen, *supra* note 20, at 822.

⁶³ Swertfeger provides a useful distinction between mask bans that require a showing of intent (weak laws) and those that make mask wearing a strict liability offense (strong laws) and provides a draft anti-mask law. Swertfeger, *supra* note 58, at 188, 190. For his part, Allen makes an interesting distinction between legislative purpose (a legal question) and legislative motive (a political question) to explain how the Georgia legislature could pass a law targeting the Klan that was, nevertheless, content neutral. Allen, *supra* note 20, at 843–45.

⁶⁴ For more, see Kahn, *Mask Bans*, *supra* note 13, at 3–4 (describing the anti-Klan mask laws as promoting a memory politics of distancing and deflecting blame).

Kerik)⁶⁵ operates as a law affecting memory⁶⁶—not that different from the taking down of a statue commemorating a Confederate general, or the renaming of a public school or body of water doing the same.⁶⁷ The purpose of these decisions is to make a disapproving statement, and in *Miller*'s case, to show that even though Georgia is not a utopia for race relations, it at least repudiates the Klan.

D. Masks and Surveillance

Unlike the definitive moment of removing a statue or renaming a school,⁶⁸ however, mask bans make up an organic, living part of criminal law. They are enforced by police officers and prosecutors and are backed up with fines and, occasionally, prison sentences—sometimes in situations not likely contemplated by the drafters.⁶⁹ Herein lies the problem with mask bans—one I did not sufficiently

⁶⁵ *Kerik* contains an extended passage in which the Second Circuit describes the history of New York's anti-mask law which, as the court rightly notes, predated the Klan but instead was "enacted in 1845 to thwart armed insurrections by Hudson Valley tenant farmers who used disguises to attack law enforcement officers." *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203 (2d Cir. 2004). The Second Circuit, however, gives what we shall see in Part II: a somewhat overexcited account of the insurrection. *See infra* Part II.

⁶⁶ *See* Eric Heinze, *Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse* of LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 413–33 (Uladizislau Belavusau & Aleksandra Gilszczyńska-Grabias eds., 2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The mask ban described in *Walpole v. State*, 68 Tenn. 370, 371 (Tenn. 1878), carried a prison term of ten to twenty years. *Id.* (describing Act 1869-70, ch. 54, sec. 2, T & S. Rev. sec 4770). Modern mask bans are more lenient, but some still allow for imprisonment. For example, GA. CODE ANN. § 16-11-38 treats mask wearing as a misdemeanor which, under GA. CODE ANN. § 17-10-3, is punishable by a \$1,000 fine or up to twelve months' imprisonment. On the other hand, in Alabama and New York, mask wearing is a violation. *See* ALA. CODE §13A-11-9 (treating mask wearing as a form of loitering which, in turn, is a violation); N.Y. PENAL LAW § 240.35. On the other hand, under the proposed Unmasking Antifa Act, mask wearers would face fifteen-year sentences (with two additional years if destruction of property is involved). *See* H.R. 6054, 115th Cong. §§ 2–3 (2018).

appreciate when writing about them over a decade ago.⁷⁰ The mask bans are not simply symbolic monuments to the evil of the Klan or our racist past. The mask bans are used, against real, live mask wearers—not all of whom are racists or members of violent organizations, like what Antifa is imagined to be.⁷¹ What, for example, was the message conveyed by the Georgia legislator who wanted to make sure that mask bans applied to women as well as men?⁷²

Moreover, many state mask bans—what Swertfeger calls “strong” mask bans⁷³—punish all public mask wearing in a given jurisdiction subject to a small range of exceptions (such as masquerade balls or masks used for climate or health reasons).⁷⁴

⁷⁰ Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 176 (2005–2006) [hereinafter Kahn, *Cross-Burning*] (explaining the outcome in *Miller* by arguing that some “hateful acts . . . resonate so strongly” that they “imperil not only the victim but also the identity of the larger society as tolerant and non-racist”).

⁷¹ There does not seem to be a clear idea about who or what “Antifa” is. For instance, two writers eager to protect businesses against violent protests can only say that Antifa “operate[s] without any centralized leadership or any one organization” but often uses violent methods to achieve goals of “peace and inclusivity.” John I. Winn & Kevin H. McGovern, *Defending Public Safety and Business Infrastructure: Effective Statutory Responses to Black Bloc Terrorism*, 57 WASHBURN L.J., 1, 3 (2018). Despite the difficulty in identifying the group, 350,000 people signed a petition calling on the White House to declare “AntiFa” a terror group. *Id.* at 4.

⁷² See *After Muslim Backlash*, *supra* note 15. To be fair, most statutes would be better using gender neutral language. In addition, precise language can narrow the scope of mask bans and lessen the risk of arbitrary enforcement. On the other hand, expanding a mask ban to make sure that it covers (Muslim) women accomplishes neither of these goals. Instead, it feeds into a larger trend in Europe to outlaw the burqa and niqab with bans whose facially neutral language has a clear target—Muslim clothing. See Marie Haspeslagh, [The Belgian Burqa-Ban] Unveiled from a human rights perspective, 15–16, 20, 23, (May 13, 2012) (Master Thesis. Faculty of Law, University of Ghent) (describing how Belgium’s 2011 mask ban, while punishing the state of being “unrecognizable,” was motivated by concerns about Islam in general and the burqa in particular).

⁷³ Swertfeger, *supra* note 58, at 188.

⁷⁴ Alabama exempts masquerade parties, public parades, presentations “of an educational, religious or historical character” and sporting events. ALA. CODE §§ 13A-11-9(b), 13A-11-140 (2019). Meanwhile, Georgia exempts “traditional

These laws, in theory, could be used to punish someone who wears a mask while mowing the lawn, taking out garbage, or going to the grocery store. While one might object and insist that the police are too busy to go after every last lawn-mowing mask wearer, there are instances of such enforcement, such as in *Daniels v. State*,⁷⁵ in which a man, playing with neighborhood children he knew, was stopped by the police and arrested because he was wearing a mask.⁷⁶ How does the arrest of a middle-aged African American man living on Supplemental Security Income further the mission of symbolically repudiating the Ku Klux Klan?⁷⁷

But the problem with mask bans—aside from the divergent issues of potential arbitrary enforcement or absurd results—runs deeper in that mask wearing today may actually be a reasonable response to life in our increasingly digital world. For instance, in 1990, when the Georgia Supreme Court decided *Miller*,⁷⁸ no one had a smart phone.⁷⁹ If a mask wearer removed the mask, someone could snap a picture, but the photographer would have to get the film developed before ever seeing the image. Today, it's not quite like that. Unsuspecting people from the community go to—for instance—the Unite the Right rally, are seen on national TV, and

holiday costumes,” masks worn for safety purposes while engaged in an occupation, trade, profession or sporting activity, masks worn as part of a theatrical production (including Mardi Gras celebrations and masquerade balls) and gas masks used during preparedness drills and emergencies. GA. CODE ANN. § 16-11-38(b)(1)-(4). *See also* N.Y. PENAL LAW § 240.35(4) (McKinney 2019) (exempting masquerade parties “or like entertainment” when the entertainment takes place in a city that regulates such entertainment and the mask wearer has received permission).

⁷⁵ 448 S.E.2d 185 (Ga. 1994).

⁷⁶ While the Georgia Supreme Court ultimately threw out the charges against Daniels, the Court of Appeals sided with Georgia, albeit in a split decision. *Daniels v. State*, 438 S.E.2d 99, 101–02 (Ga. App. 1993).

⁷⁷ The details about Daniels come from the appellate brief his lawyer filed to the Georgia Supreme Court. Brief of Petitioner, *Daniels v. State*, 448 S.E.2d 185 (1994), (No. S94G0362), 1994 WL16056819, at *3–6.

⁷⁸ *See generally* *State v. Miller*, 398 S.E.2d 547 (Ga. 1990) (reversing the trial court's decision and denying reconsideration in December 1990).

⁷⁹ Steven Tweedle, *The World's First Smartphone, Simon, Was Created 15 Years Before the iPhone*, BUS. INSIDER (June 14, 2015, 8:00 AM), <https://www.businessinsider.com/worlds-first-smartphone-simon-launched-before-iphone-2015-6>.

lose their jobs.⁸⁰ It seems unfair. Everyone today is just one temper tantrum away from being captured on a viral video that hits the front page of MSN or the Huffington Post.⁸¹ Compounding this issue is the heightened concern with privacy, as cities increasingly rely on facial recognition technology in their surveillance programs.⁸² Given all of this, perhaps mask wearing is a reasonable response to modern life.

There's just one problem—the law (as currently constituted) simply will not let us wear masks. While *Robinson* struck down a mask ban because it was overbroad,⁸³ no court has done so since then. Although it speaks for only the Second Circuit, the message in *Kerik* is clear—*NAACP*, which recognized a strong relationship between freedom to associate and privacy in an individual's associations—does not apply to mask wearers.⁸⁴ Nor will a symbolic speech claim fare much better. Scott Skinner-Thompson makes the interesting argument that, in an age of surveillance, masks send a message of resistance,⁸⁵ much as the masks worn by Iranian students

⁸⁰ After the 2017 protests Charlottesville, Virginia, right-wing participants were identified by photos and targeted. See Maura Judkis, *Charlottesville White Nationalist Demonstrator Loses Job at a Libertarian Hot Dog Shop*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/news/food/wp/2017/08/14/charlottesville-white-nationalist-demonstrator-fired-from-libertarian-hot-dog-shop/>.

⁸¹ For example, as I am writing this section of the paper, MSN has a story of two hunters who were caught kissing after killing a lion. The photo went viral, which led the company that organized the safari that organized the lion hunt to disable its Facebook page. See Caitlin O'Kane, *Couple's Kissing Photo with Dead Lion Goes Viral*, MSN (July 17, 2019), <https://www.msn.com/en-us/news/world/couples-kissing-photo-with-dead-lion-goes-viral/ar-AAEteJh>.

⁸² For a discussion of facial recognition technology, see Sanil Chinoy, *The Racist History Behind Facial Recognition*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/opinion/facial-recognition-race.html> (describing dubious use of facial recognition technology to identify emotional states of individuals).

⁸³ *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981).

⁸⁴ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004).

⁸⁵ See Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1703 (2017) (noting “[t]he expressive power of attempts at physical obfuscation” such as masks).

protesting the Shah described in *Aryan*⁸⁶ became symbols of protest. In *Berrill*, however, the court suggested that the defendant could convey his dislike for the school mascot without wearing a devil mask.⁸⁷ Likewise, there are many ways to protest the lack of privacy in modern life that do not involve wearing a mask.⁸⁸ Finally, under *Kerik*, a privacy protester should be wary of what he or she wears along with the mask⁸⁹—lest the court conclude that the mask adds nothing not already conveyed by,⁹⁰ for example, the protester’s black turtleneck sweater.

⁸⁶ In *Aryan*, Iranian students sought to protest the Iranian Shah on their campus at Texas Tech University. The university granted a permit for the protest, provided that the students not wear masks, on the theory that similar protests had involved violence and that anonymity might permit, if not encourage, additional violence. The students petitioned the court for a temporary restraining order, keeping the no-mask condition from limiting the protest. The court held that the condition violated the students’ rights regarding the masks’ non-communicative functions: despite Texas Tech’s great interest in preventing on-campus violence, many students would be afraid to march in protest because they “feared reprisals from the Shah.” Forcing the students to give up their anonymity, the court held, equated to a prohibition on their speech. Additionally, the court held that the masks served a communicative purpose in that they had gained significance as symbols of opposition to the Shah’s oppressive regime. Texas Tech argued that the students’ actions violated the constitutional rights of the Shah’s son, the Prince, who lived near the university, because their use of masks constituted actions prohibited by what the opinion terms the Ku Klux Klan Act, 42 U.S.C. § 1985(3) (2018), but the court rejected this argument. *Aryan v. Mackey*, 462 F. Supp. 90, 91–92 (N.D. Tex. 1978).

⁸⁷ *State v. Berrill*, 474 S.E.2d 508, 515 (W. Va. 1996).

⁸⁸ See, e.g., Michele Gilman, *Voices of the Poor Must Be Heard in the Data Privacy Debate*, JURIST (May 14, 2019, 10:09 AM), <https://www.jurist.org/commentary/2019/05/voices-of-the-poor-must-be-heard-in-the-data-privacy-debate/>; Bobbie Johnson & Afua Hirsh, *Facebook Backtracks After Online Privacy Protest*, GUARDIAN (Feb. 18, 2009, 19:01 EST), <https://www.theguardian.com/technology/2009/feb/19/facebook-personal-data>; Jaikumar Vijayan, *Privacy Groups Protest CISPA Bill*, COMPUTER WORLD (Feb. 14, 2013, 4:03 PM PST), <https://www.computerworld.com/article/2495030/privacy-groups-protest-cispa-bill.html>.

⁸⁹ See *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 (2d Cir. 2004).

⁹⁰ *Id.*

So that is our dilemma. The rest of this Article will address what led courts to narrow First Amendment protections for mask wearers and how mask wearing can be restored to its rightful place in the First Amendment pantheon. Part II gives a history of mask bans, starting from 1845 when New York enacted the nation's first mask ban (more than twenty years before the rise of the Ku Klux Klan) and extending through the mid-1970s.⁹¹ Part III returns to the scene of the crime—*Kerik, Miller* and *Berrill*⁹²—and explores how over a four-decade period, judges narrowed First Amendment protections of mask wearers, often with the help of the historical models outlined in Part II.⁹³

Part IV turns to present day.⁹⁴ In an age of mass surveillance and facial recognition technology, masks seem more necessary than ever. Yet in *Gates v. Khokhar*, a federal court once again slammed the door shut on mask wearers.⁹⁵ Despite the Pandora's Box of mask ban proposals,⁹⁶ however, there is hope. In a bracing dissent in *Gates*, Judge Kathleen Williams provides a roadmap for bringing masks back into the First Amendment mainstream.⁹⁷ This Article then concludes with a few brief comments about the future of mask law doctrine.⁹⁸

II. TWO STORIES ABOUT MASK BANS

Before diving deeper into *Church of the American Knights of the Ku Klux Klan v. Kerik*,⁹⁹ *State v. Miller*,¹⁰⁰ and *State v. Berrill*,¹⁰¹ we must place the mask bans in a broader historical perspective. To that

⁹¹ *Infra* Part II.

⁹² See *Kerik*, 356 F.3d 197; *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

⁹³ *Infra* Part III.

⁹⁴ *Infra* Part IV.

⁹⁵ *Gates v. Khokhar*, 884 F.3d 1290, 1295, 1301–02 (11th Cir. 2018).

⁹⁶ See *supra* notes 10–18 and accompanying text.

⁹⁷ See *Gates*, 884 F.3d at 1305 (Williams, J., dissenting in part).

⁹⁸ *Infra* Conclusion.

⁹⁹ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).

¹⁰⁰ *State v. Miller*, 398 S.E.2d 547 (Ga. 1990).

¹⁰¹ *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

end, this Part offers two competing stories one can tell about masks—one about New York’s mask ban centered on state security,¹⁰² and another about using mask bans to repudiate the Ku Klux Klan.¹⁰³ As we shall see in Part III, both stories contributed to the tightening of mask law doctrine in the 1990s and 2000s.¹⁰⁴ That said, the story of state security behind the New York mask ban¹⁰⁵ is more amenable to moderating influences than the story of symbolic repudiation of hate behind the anti-Klan mask bans.

A. New York: Mask Bans, Anxiety and State Security

New York passed its mask ban in 1845 as a response to the Renters’ War of the 1840s, during which tenants dressed up as “Indians,” donned masks and challenged attempts by state officials to collect back rent.¹⁰⁶ While the mask ban has been on the books since then, the State of New York made peace with the renters, conceding most of their demands during the late 1840s.¹⁰⁷ What remains from the New York experience is the general idea that masks are threatening, and that states, in assessing these threats, pass laws that have lasting consequences.¹⁰⁸ At the same time, courts

¹⁰² See *infra* Section II.A.

¹⁰³ See *infra* Section II.B.

¹⁰⁴ See *infra* Part III.

¹⁰⁵ See *infra* Section II.A.

¹⁰⁶ REEVE HUSTON, *LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK* 146–50 (2000); Arthur E. Sutherland, *The Tenantry on the New York Manors: A Chapter of Legal History*, 41 *CORNELL L.Q.* 620, 626–27 (1956) (describing the passage of the original ban); see Kahn, *Mask Bans*, *supra* note 13, at 8–10.

¹⁰⁷ Sutherland, *supra* note 106, at 632–37 (describing legislative gains for the tenants).

¹⁰⁸ For instance, aside from being used against anarchists (*People v. Aboaf*, 721 N.Y.S.2d 725 (N.Y. Crim. Ct. 2001)) and the Klan (*Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004))—groups that present (theoretically at least) a threat to the state—the New York mask ban has been used against people who pose no such threat. See *People v. Archibald*, 296 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 1968) (applying mask ban to a man dressed in women’s clothing at a subway station at 4:00 AM); cf. *People v. Luechini*, 136 N.Y.S 319, 320–21 (N.Y. Crim. Ct. 1912) (throwing out the

interpreting New York's mask law today do not generally harken back to the Renters' War in their opinions.¹⁰⁹

The Second Circuit ruling in *Kerik* is a notable exception.¹¹⁰ The picture painted of the Renters' War in *Kerik* is one of "armed insurrections" by "tenant farmers" who "used disguises to attack law enforcement officers."¹¹¹ As the Second Circuit describes it, these anti-renters, faced with "[d]epressions in the price[] of wheat and the loss of soil productivity,"¹¹² fell into debt, which posed problems when landlord Stephen Van Rensselaer IV "demanded repayment of outstanding debts, and sought to evict tenants who did not pay."¹¹³ In response, some anti-renters mustered funds for litigation and lobbying, while others "formed bands of so-called 'Indians,' disguised in calico gowns and leather masks, who forcibly thwarted landlords' efforts to serve farmers with process or conduct distress sales."¹¹⁴ According to the court, "[t]he operations of [these] masked Indians commonly involved intimidation, and sometimes tarring and feathering, but also caused three deaths from 1844–45, including the death of a sheriff."¹¹⁵

In response to this "civil unrest," the court continued, in January 1845, the legislature passed "[a]n Act to prevent persons appearing disguised and armed."¹¹⁶ The law authorized the arrest of anyone who "appear[s] in any road or public highway, or in any field, lot, wood, or enclosure" whose face is "painted, discolored, covered or

conviction of a mask wearer in front of a motion picture house who claimed to represent "the White Slave").

¹⁰⁹ For instance, the majority opinion in *Archibald*, 296 N.Y.S.2d 834, does not mention the Renters' War, nor does the court in *Aboaf*, 721 N.Y.S.2d 725. See also *Luechini*, 136 N.Y.S. 319 (lacking any mention of the Renters' War).

¹¹⁰ *Kerik*, 356 F.3d. at 203–05; see also *Archibald*, 296 N.Y.S.2d at 837 (Markowitz, J., dissenting) (describing the Renters' War to show the legislature was not concerned with non-violent men appearing in women's attire).

¹¹¹ *Kerik*, 356 F.3d. at 203.

¹¹² *Id.* at 204.

¹¹³ *Id.* The Second Circuit notes Stephen Van Rensselaer IV's father, Stephen Van Rensselaer III, was known as the "Good Patron" (the good landlord), without explaining how the father got that name. *Id.*

¹¹⁴ *Id.* (citing HUSTON, *supra* note 106, at 116–19).

¹¹⁵ *Id.* (citing HUSTON, *supra* note 106, at 120, 146–50).

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting Laws of the State of New York, 68th sess., at 5–7).

concealed, or being otherwise disguised in a manner calculated to prevent him from being identified.”¹¹⁷ Such a person was to be brought before a judge and, unless the person gave “a good account of himself,” deemed a vagrant and sentenced to six months in jail.¹¹⁸ According to Governor Silas Wright, the mask law was necessary because “the disguises of . . . organized bands calling themselves Indians” made it difficult for “eye witnesses on the spot” to identify the perpetrators.¹¹⁹ Governor Wright added that the new law would “aid in the prevention of the crimes which recently ha[d] been so daringly committed.”¹²⁰ From this historical overview, the *Kerik* court concluded that “New York’s anti-mask law was therefore indisputably aimed at deterring violence and the apprehension of wrongdoers” rather than purporting “to suppress any particular viewpoint.”¹²¹

The Second Circuit’s finding about viewpoint discrimination highlights an important distinction between the New York and anti-Klan stories about mask bans: as we shall see, it is much harder to argue credibly that other anti-mask bans were not motivated by intent to suppress the Klan (even if the statutes themselves are facially neutral).¹²² As such, this decision represents a strength of the New York mask ban’s story of state security. That said, *Kerik* also raises a weakness of the state security discourse—namely, that governments sometimes overreach and create statutes that are more restrictive than necessary.¹²³

To that end, consider what the *Kerik* account of the Renters’ War and the enactment of the 1845 mask law leaves out. To begin with, the court’s characterization of the renters’ grievances is one-

¹¹⁷ *Id.* (internal quotations and citation omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting STATE OF N.Y., 4 MESSAGES FROM THE GOVERNORS 149 (Charles Z. Lincoln ed., 1909)) (internal quotations omitted).

¹²⁰ *Id.* at 205 (quoting STATE OF N.Y., 4 MESSAGES FROM THE GOVERNORS 149 (Charles Z. Lincoln ed., 1909)) (internal quotations omitted).

¹²¹ *Id.* at 205.

¹²² For more, see Allen, *supra* note 20, at 843–45 (conceding that Georgia’s mask ban had an anti-Klan motive but holding that this was irrelevant).

¹²³ See *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 202 (2d Cir. 2004).

dimensional.¹²⁴ For the *Kerik* court, the renters are victims of the forces of nature and history—cheap wheat and bad soil.¹²⁵ As students of origins of revolution well know, however, it is not bad conditions that bring about revolutionary upsurges so much as when good times are followed by a sudden downturn.¹²⁶ The same was true for the anti-rent tenants.¹²⁷ Stephen Rensselaer III was called the “Good Poltroon” for a reason—he refused to collect back rents from tenants and promised not to collect them after he died.¹²⁸ The decision of his son Stephen Van Rensselaer IV to collect the rents was one of the precipitating causes of the Renters’ War.¹²⁹ In other words, the renters who donned masks were not last-gasp farmers lashing out; they felt a promise made to them by the Van Rensselaers had been broken.¹³⁰

Similar problems exist with *Kerik*’s description of the so-called Indians’ “operations.”¹³¹ While the court was right that the anti-renters intimidated state officials, tarred and feathered some, and that three law enforcement officials ultimately died at the hands of the “Indians,”¹³² the actual story is less threatening than the court made it out to be. Importantly, not all the interactions between law enforcement and the anti-renter mask wearers were adversarial.¹³³ When the disguised protesting tenants knew that a sheriff was enforcing a sale of property against his will, they were cordial, if not downright friendly. For instance, in a part of Reeve Huston’s *Land and Freedom: Rural Society, Popular Protest, and Party Politics in*

¹²⁴ See *id.* at 204–05 (viewing renters as victims of bad economic conditions).

¹²⁵ *Id.* at 204.

¹²⁶ See JACK GOLDSTONE, *REVOLUTIONS: A VERY SHORT INTRODUCTION* 11 (2014) (describing how some scholars attribute revolutions to “relative deprivation” and arguing that “when people’s expectations for further progress are dashed, they rise up in protest”).

¹²⁷ See *Kerik*, 356 F.3d at 204.

¹²⁸ See *id.*

¹²⁹ See Sutherland, *supra* note 106, at 626.

¹³⁰ *Id.* at 625.

¹³¹ *Kerik*, 356 F.3d at 204.

¹³² *Id.*

¹³³ HUSTON, *supra* note 106, at 120.

Antebellum New York cited to in *Kerik*,¹³⁴ the author relates that one band of Indians, after stopping an eviction, marched the sheriff involved to a local tavern for a glass of brandy.¹³⁵

Moreover, the Second Circuit's statement about the three deaths and their relation to the passage of the mask law¹³⁶ is somewhat misleading. According to Huston, on December 18, 1844, a group of masked Indians rushed into an anti-renter rally.¹³⁷ As they entered, "they whopped, yelled, and fired their pistols into the air," killing a young farm hand with a stray shot.¹³⁸ The next death occurred the following day when, according to Huston, a group of five men hauling timber from a lot were attacked by a band of fifty Indians.¹³⁹ One of the men had just purchased a lot from William Van Rensselaer.¹⁴⁰ When the Indians attacked, one of the men charged the Indians with an axe.¹⁴¹ In response, an Indian pointed a pistol at the man, warning the axe-wielding attacker that he would shoot.¹⁴² In the fracas that ensued, one Indian shot the attacker, who died from his wounds.¹⁴³

These incidents led to a swift reaction.¹⁴⁴ Opposing newspaper editors described the anti-renter movement as an "insurrection," and local officials called out the militia. It was against this background that Governor Silas Wright appealed to the state legislature to, in Huston's words, "make the act of appearing armed and in disguise a felony."¹⁴⁵ At the same time, some anti-renters worried that the activities of the Indians would alienate support for the broader anti-rent cause and urged for the Indians to disband.¹⁴⁶

¹³⁴ *Kerik*, 365 F.3d at 204 (citing HUSTON, *supra* note 106, at 120, 146–50).

¹³⁵ HUSTON, *supra* note 106, at 120.

¹³⁶ *Kerik*, 356 F.3d at 204.

¹³⁷ HUSTON, *supra* note 106, at 147.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 147–48.

Initially, the Indians continued their attacks while decrying the new law, which they saw as a conspiracy to “crush the anti-rent movement” and “suppress[] their civil liberties.”¹⁴⁷ The raids continued in part because the legislative strategy promoted by the broader anti-rent movement could not ensure “the protection of specific kin and neighbors” targeted by the evictions.¹⁴⁸ Things continued this way until August 1845, when a confrontation between a band of Indians and a sheriff’s posse led to a third killing, triggering a wave of state repression that broke the back of the mask-wearing Indians.¹⁴⁹

These events unfolded as follows. On August 7, 1845, a band of between 100 and 200 Indians were protesting a distress sale.¹⁵⁰ When a sheriff tried to lead cattle off the sale property, the Indians surrounded the cattle—a tactic that, before the December 1844 events, would have led the sheriff to back down.¹⁵¹ Instead, a deputy sheriff and a constable rode into the Indians, guns drawn; in response, the Indian “chief” told the tribe to shoot at the horses.¹⁵² While the horses were killed, so too was the deputy sheriff.¹⁵³ In response, Governor Wright declared three counties to be in a state of rebellion and sent in troops.¹⁵⁴ According to Huston, these forces “adopted something like the Indians’ tactics of intimidation,” breaking into houses and shooting at anti-rent sympathizers.¹⁵⁵ The impact of these actions was “devastating”—according to Huston, entire neighborhoods were stripped of their young men as those not arrested fled across the border to Pennsylvania.¹⁵⁶

Assuming Huston’s historical account is accurate, *Kerik*’s description of the killings and their connection to the 1845 anti-mask

¹⁴⁷ *Id.* at 148. Huston quotes an anti-renter call to action, critiquing those “impish lords” who “make it a crime, for you, to *speak* your wrongs.” *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 149.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 150.

law is problematic.¹⁵⁷ Firstly, all three killings had an “accidental” quality to them.¹⁵⁸ The Indians did not ride into the farmland with the intent to kill sheriffs, deputies and constables.¹⁵⁹ Indeed, two of the three killings—the farmhand killed by the stray shot and the axe-wielding timber hauler—did not involve state officials at all.¹⁶⁰ The killing of the sheriff in August 1845 was a different matter, but this occurred after the passage of the anti-mask law—not before, as the *Kerik* opinion can be read to suggest.¹⁶¹ At the same time, the disguised tenants themselves recognized the exceptional nature of the August 1845 killing.¹⁶² According to Arthur E. Sutherland, “It was all very well to dress up as an Indian, carry a gun, blow a horn on a mountainside, and boast about what would be done to any of the landlords’ men if they tried their tricks, but murder was different.”¹⁶³

Finally, there is the question of the aftermath of the anti-rent movement. *Kerik* speaks of “armed insurrections,” “crimes . . . daringly committed” and “the apprehension of wrongdoers.”¹⁶⁴ Given this language, one might expect that the Indians and the anti-renters were relegated to the dustbin of history. In reality, the anti-renter movement won a series of electoral victories in the Spring of 1845¹⁶⁵ and by 1848 had achieved a

¹⁵⁷ See *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203–05 (2d Cir. 2004).

¹⁵⁸ See *supra* notes 137–44, 150–54 and accompanying text.

¹⁵⁹ See HUSTON, *supra* note 106, at 119–20 (describing how the “natives” knew “how to distinguish between friend and foe” and recognized that “even sympathetic sheriffs had to serve process”).

¹⁶⁰ *Id.* at 147.

¹⁶¹ *Kerik*, 356 F.3d at 204. While *Kerik* accurately recounts that these killings took place in 1844 and 1845, the organization of the opinion—which mentions the killings first, and then takes up the decision to enact an anti-mask act—gives the impression that all three killings took place before the mask act was passed.

¹⁶² Sutherland, *supra* note 106, at 627.

¹⁶³ *Id.*

¹⁶⁴ *Kerik*, 356 F.3d at 205.

¹⁶⁵ HUSTON, *supra* note 106, at 151–52.

number of their goals, including adding a ban on feudal rents to the New York State Constitution.¹⁶⁶ *Kerik* makes no mention of this.¹⁶⁷

Taken collectively, *Kerik*'s historical discussion of the 1845 mask ban shows how the rationale of state security can be exaggerated to justify suppression of civil liberties—in this case, mask wearing.¹⁶⁸ The mask wearers are presented as killers, even though the killings were isolated and arose under exceptional circumstances, and the last killing led the Indians to disband.¹⁶⁹ They were presented as outsiders, even though within three years of the passage of the mask ban, the Indians and the anti-rent movement achieved most of their political aims.¹⁷⁰

At the same time, there are some grounds for hope. The story is one of a frightened governor and state legislature responding to a pair of killings on successive days. Governor Wright's call for the mask bans was narrow—the intent was to punish *armed* mask wearers.¹⁷¹ While the ultimate ban was broader, it contained a provision according to which the wearer could avoid prison by giving “a good account of himself.”¹⁷² Finally, the anti-renters “won” the war. Mask wearing is not, therefore, just about outsiders who commit criminal acts: it is about social groups that succeed politically, but when it comes to mask wearing, sometimes go too far with their tactics.¹⁷³

More generally, New York's 1845 mask ban was enacted during a social crisis that lasted about four years.¹⁷⁴ While the law has been

¹⁶⁶ Sutherland, *supra* note 106, at 632–33.

¹⁶⁷ See generally *Kerik*, 365 F.3d 197 (lacking any mention of how the anti-renter movement won elections or successfully added a federal rent ban to the New York State Constitution).

¹⁶⁸ *Id.* at 203 (describing activities of tenant farmers as an “armed insurrection”).

¹⁶⁹ See *supra* notes 137–44, 150–54 and accompanying text.

¹⁷⁰ See Sutherland, *supra* note 106, at 632 (describing political gains of the renters in the late 1840s).

¹⁷¹ HUSTON, *supra* note 106, at 147 (The governor “called . . . to make the act of appearing armed and in disguise a felony.”).

¹⁷² *Kerik*, 356 F.3d at 204 (citing Laws of the State of New York, 68th sess., at 5).

¹⁷³ This is one way of describing Antifa.

¹⁷⁴ The first masked Indians appeared in 1841. HUSTON, *supra* note 106, at 116. The first acts of violence described by the *Kerik* court (see *Kerik*, 356 F. 3d

on the books for over 170 years and has been interpreted strictly,¹⁷⁵ the story it tells about mask wearing does not support the narrowing of First Amendment protections for mask wearers seen in *Kerik*, *Miller* and *Berrill*.¹⁷⁶ If the ban were truly about “armed insurrection,” there should be no problem allowing as-applied challenges to it based on anonymity and symbolic speech concerns. In essence, the story behind the 1845 mask ban is based on the power of the United States (or its constituent individual states) to counter “true threats.”¹⁷⁷ When no true threat is present, mask wearing should not be prohibited. As we shall see, the story behind anti-Klan mask bans is quite different.

B. Anti-Klan Mask Bans as an Expression of Moral Outrage

Most mask bans were directed against the Ku Klux Klan.¹⁷⁸ Unlike the New York 1845 mask ban, enacted largely on security grounds against a transient threat,¹⁷⁹ the anti-Klan mask bans carried a message of moral repudiation, one that complicates the task of opposing mask bans.¹⁸⁰ If the Klan is evil, then a mask ban becomes a necessary secondary evil. While the moral defense of mask bans is most evident in *Miller*,¹⁸¹ the theme of good versus evil plays out during all three major periods of Klan activity.¹⁸²

at 203–04) took place in December 1844. HUSTON, *supra* note 106, at 147. The final killing took place in August 1845. *Id.*

¹⁷⁵ See *People v. Archibald*, 296 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 1968) (applying mask ban to a man dressed as a woman).

¹⁷⁶ See, e.g., *Kerik*, 356 F.3d 197; *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

¹⁷⁷ *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (distinguishing threats from constitutionally protected speech).

¹⁷⁸ See Swertfeger, *supra* note 58, at 182 (describing anti-mask laws as primarily “directed at the Ku Klux Klan”).

¹⁷⁹ See *supra* Section II.A.

¹⁸⁰ See *infra* Section II.B.

¹⁸¹ *Miller*, 398 S.E.2d at 550–51.

¹⁸² Here I follow David Chalmers, who distinguishes between a First Klan active during Reconstruction, a Second Klan active in the 1920s and a Third Klan active in the 1940s and 1950s. See DAVID CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 2–7 (1981).

The first Klan of the 1860s and early 1870s terrorized African Americans and sought to drum up opposition to Reconstruction.¹⁸³ When early Klan activity was local, it was dismissed as innocent or exaggerated.¹⁸⁴ Against this atmosphere, measures like the 1870 Enforcement Act¹⁸⁵ (which included an anti-mask provision) had two functions: on the one hand, they expanded the ability of the federal government to combat the Klan; on the other, they conveyed the message that despite skepticism, the Klan was a serious problem.¹⁸⁶

The courts knew this as well. For instance, in *Walpole v. State*, a criminal defendant sought review of a Tennessee circuit court decision which convicted him of violating mask-ban provisions of the Tennessee Code colloquially known as the Ku Klux law.¹⁸⁷ The court explained to the defendant robber caught in a chicken coop wearing a mask that, while the ten-year minimum penalty under Tennessee's mask law might seem unfair, these penalties "have proved themselves wholesome in the partial suppression of the greatest of the disturbing elements of social order in this State."¹⁸⁸ Likewise, in *Dale v. Gunter*,¹⁸⁹ the Alabama Supreme Court interpreted an 1868 statute requiring the state to pay \$5,000 to a widow or widower whose spouse was killed by an outlaw, or by "a person or persons in disguise," and recited from the Preamble of the 1868 law that "men . . . under the cover of masks, armed with knives, revolvers and other deadly weapons . . . generally in the late hours of the night . . . commit violence and outrages upon peaceable

¹⁸³ See Kahn, Mask Bans, *supra* note 13, at 11–14.

¹⁸⁴ Elaine Frantz Parsons, *Klan Skepticism and Denial in Reconstruction Era Public Discourse*, 77 J. S. HIST. 53, 76 (2011).

¹⁸⁵ 18 U.S.C. § 241 (2018) (codified as 18 U.S.C. § 241 (1996)).

¹⁸⁶ Parsons, *supra* note 184, at 57–78. According to Parsons, Klan denial helped undermine Reconstruction by showing, in the minds of Klan supporters, at least that "freed people and their allies . . . were terrified and superstitious people who could be manipulated by absurd theatrical displays and who, therefore, would make poor citizens." *Id.* at 83–87.

¹⁸⁷ *Walpole v. State*, 68 Tenn. 370, 370–71 (Tenn. 1878).

¹⁸⁸ *Id.* at 373.

¹⁸⁹ 46 Ala. 118 (1871).

and law abiding citizens.”¹⁹⁰ These early courts focused on what the mask bans represented¹⁹¹ rather than on why or whether they were necessary. The United States had just gone through a bloody war and was struggling with Reconstruction.¹⁹² As the court in *Walpole* noted, the object of mask bans “was to repress a great evil which arose in this country after the war.”¹⁹³

In the 1920s, the nature of the Klan and the function of mask laws changed, but the general moral message of repudiating the Klan did not. The Second Klan was a mass organization with millions of members—some of whom used masks so that they could maintain positions in society without revealing their Klan identities, thereby sending the message that the Klan and social institutions were aligned.¹⁹⁴ This was because the Klan—in addition to targeting African Americans, Jews, Catholics and immigrants—also sought to replace the old order, especially in the South.¹⁹⁵ One way the Klan would do this was by using their masks to conceal their identities. For example, in Arizona, masked Klan members often went to churches during Sunday services to make donations.¹⁹⁶

As a result, mask bans were less about stopping night riders from committing unspeakable crimes than about identifying the supposedly good citizens of the community who hid behind the shield of anonymity. Opponents of the Klan focused on the mask’s

¹⁹⁰ *Id.* at 137, 140–41. On the other hand, the court held against the plaintiff, a widow whose husband was killed by an attacker lying in the bushes, which the court held was an ambush and not a disguise. *Id.* at 143.

¹⁹¹ See, e.g., *Walpole*, 68 Tenn. at 371–72 (presenting the “great evil” of the Klan as self-explanatory).

¹⁹² *Civil War and Reconstruction*, LIBR. CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/civilwar/> (last visited Oct. 26, 2019).

¹⁹³ *Walpole*, 68 Tenn. at 371–72.

¹⁹⁴ See Kahn, Mask Bans, *supra* note 13, at 14–18.

¹⁹⁵ See Paul M. Pruitt Jr., *Historic Notes and Document: Judge Henry D. Clayton and “A Klansman”*: A Revealing Exchange of Views, 81 FLA. HIST. Q. 323, 334 (2003) (describing how Southern elites had “come to view the Klan as an altogether too-successful challenger of traditional Democratic machines”).

¹⁹⁶ See Sue Wilson Abbey, *The Ku Klux Klan in Arizona, 1921–25*, 14 J. ARIZ. HIST. 10, 13 (1973).

falsity rather than on its tendency to cause violence.¹⁹⁷ For instance, W.E.B. Dubois argued that the Klan, as a group, was “sworn to lie,” adding, “It does not make any difference what the Ku Klux Klan is fighting for or against. Its method is wrong and dangerous and uncivilized.”¹⁹⁸ Addressing a 1922 meeting of the Florida Bar Association, Florida Judge Henry D. Clayton—of Clayton Anti-Trust Act fame¹⁹⁹—argued that there was “no place for an invisible empire in the United States, nor reason for clan or gang to do any part of the business of governing or correcting or punishing citizens or a citizen.”²⁰⁰ Clayton added that “the confidence begotten by the possession of the power of numbers and secrecy accompanied by intolerance make manifest the harm to come from secret organizations.”²⁰¹ Worse still, the Klan outrages “are not perpetuated as the avowed acts of criminals of miscreants but are committed under the guise and pretense of morality, reform and uplift”—something Clayton saw as a form of “self-deception.”²⁰²

The concern about the Klan secrecy came to the fore in 1928 in *People of the State of New York ex. rel. Bryant v. Zimmerman*,²⁰³ where the United States Supreme Court upheld the application of a New York law requiring unincorporated organizations of over twenty members that administer an oath as a condition of membership to file a membership list with the secretary of state’s office.²⁰⁴ The statute made an exception for labor unions.²⁰⁵ In *Zimmerman*, a relator who belonged to the Buffalo Provisional Klan of the Knights of the Ku Klux Klan was charged for failing to satisfy the reporting requirement.²⁰⁶ In explaining why the exemption for labor unions did not raise Equal Protection concerns, the Court

¹⁹⁷ See, e.g., W.E. Burghardt Du Bois, *The Shape of Fear*, 223 N. AM. REV. 291, 294, 302–04 (1926) (chiding the Klan for its secrecy).

¹⁹⁸ *Id.* at 302, 304.

¹⁹⁹ Pruitt, *supra* note 195, at 334.

²⁰⁰ *Id.* at 335 (quoting speech of Henry D. Clayton to the Florida Bar Association, June 16, 1922).

²⁰¹ *Id.* at 338.

²⁰² *Id.*

²⁰³ 278 U.S. 63 (1928).

²⁰⁴ *Id.* at 77.

²⁰⁵ *Id.* at 66.

²⁰⁶ *Id.* at 71.

noted the “manifest tendency on the part of one class [i.e., the Klan] to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to the public welfare.”²⁰⁷ The Court also mentioned a recent Congressional Report on the Ku Klux Klan describing its support for “white supremacy,” “its crusade against Catholics, Jews, and negroes” and efforts to “assum[e] a sort of guardianship over the administration of local, state, and national affairs” by “taking into its own hands the punishment of what some of its members conceived to be crimes.”²⁰⁸

The same concerns about membership lists also extended to masks. From the perspective of the Rev. Dr. Joseph Silverman, Rabbi Emeritus at Temple Emanu-El, anti-mask laws and demands for membership lists were two parts of one piece: both targeted actions of people “aroused to the necessity of combating the un-American and irreligious conspiracy that strikes at the very vitals of American life, its peace and security.”²⁰⁹ Mask bans were as focused on Klan recruitment as they were on stopping Klan violence. For instance, Sue Wilson Abbey, surveying the situation in Arizona, viewed the proposed 1923 anti-mask law as reflecting the activities and expansion of the Klan.²¹⁰

During the first two waves of Klan activity, mask bans served a practical purpose—either stopping Klan night riding or preventing the Klan from expanding.²¹¹ The situation behind the third wave of mask bans of the 1940s and 1950s, however, was different. While there were instances in which Klan activity led to the passage of mask bans (as, for instance, in Alabama where a dawn raid by forty Klansmen on an interracial Girl Scout camp helped spur the passage

²⁰⁷ *Id.* at 75.

²⁰⁸ *Id.* at 76–77.

²⁰⁹ Joseph Silverman, *The Ku Klux Klan: A Paradox*, 223 N. AM. REV. 282, 290 (1926).

²¹⁰ Abbey, *supra* note 196, at 21 (noting that immediately before discussing the March 1923 proposal for an anti-mask ban, Wilson related how in Tucson the Klan sought to recruit teenage boys).

²¹¹ See Kahn, *Masks Bans*, *supra* note 13, at 12–18.

of that state's mask ban),²¹² the general pattern, as we have seen,²¹³ was for states to enact mask bans to make a statement that they hoped would convince the rest of the country that "separate but equal" was compatible with a "civilized" progressive South.²¹⁴

For example, in South Carolina, Governor James Byrnes ran on a platform of "equal educational opportunity" which he hoped would enable him to cast the NAACP as extremists.²¹⁵ Yet this was a difficult program to achieve, in part because whites objected to spending money on African American schools,²¹⁶ and in part because continued Klan activity risked undermining the good impression the Governor was committed to making.²¹⁷ With these concerns in mind, Byrnes passed an anti-Klan mask ban in South Carolina in 1951.²¹⁸ Developments in Georgia were roughly similar.

²¹² See Solomon Kimerling, *Unmasking the Klan: Late 1940s Coalition Against Racial Violence*, WELD: BIRMINGHAM'S NEWSPAPER (Jul. 18, 2012), <https://weldbham.com/blog/2012/07/18/unmasking-the-klan-late-1940s-coalition-against-racial-violence/>; see also Kahn, Mask Bans, *supra* note 13, at 21–22 (describing Alabama as an example of a "bottom-up" mask ban).

²¹³ See *supra* notes 55–56 and accompanying text.

²¹⁴ See WARD, *supra* note 55, at 121; see also Kahn, Mask Bans, *supra* note 13, at 18–23 (discussing political attempts to use the anti-mask legislation as a means to portray the South as "tolerant" and "civilized").

²¹⁵ See WARD, *supra* note 55, at 122, 137.

²¹⁶ See *id.* at 137. To that end, Byrnes threatened that, if desegregation succeeded, he would shut down South Carolina's public education system, leaving African Americans without any educational opportunities at all. *Id.* at 127–28.

²¹⁷ *Id.* at 128–30. For example, The Grand Kleagle of South Carolina Thomas Hamilton tried to make common cause with Byrnes by arguing that both he and Byrnes supported racial integrity and conservative principles. *Id.* at 130.

²¹⁸ *Id.* at 129. Section 16-7-110 of South Carolina's criminal statute, entitled "Wearing masks and the like," provides that:

No person over sixteen years of age shall appear or enter upon any lane, walk, alley, street, road, public way or highway of this State or upon the public property of the State or of any municipality or county in this State while wearing a mask or other device which conceals his identity. Nor shall any such person demand entrance or admission to or enter upon the premises or into the enclosure or house of any other person while wearing a mask or device which conceals his identity. Nor shall any such person, while wearing a mask or device which conceals his identity, participate in any meeting or

Georgia Governor Herman Talmadge passed an anti-mask law in 1951, a few months after South Carolina passed its law.²¹⁹ Once again, Governor Talmadge was less concerned about defending the rights of African Americans—to say nothing of ending Jim Crow laws—than in making a statement that symbolically repudiated the Klan.²²⁰

African Americans at the time were skeptical of Governor Talmadge's intentions, and one columnist asked in the context of school equalization whether the Governor had “sprouted wings and halo.”²²¹ The Supreme Court of Georgia, writing thirty-nine years later, was not so savvy; it described the circumstances of the mask ban as being passed “in response to a demonstrated need to safeguard the people from terrorization by masked vigilantes.”²²² *Miller* also described how the years leading up to the South Carolina mask ban had seen “increased harassment, intimidation and violence against racial and religious minorities carried out by mask-wearing Klansmen and other ‘hate’ organizations.”²²³ Finally, *Miller* quoted from Judge Osgood Williams, the legislative sponsor of the 1951 mask law, justifying the ban by arguing that fear makes it harder for people to register to vote or take part in political activities, and the presence of fear is more likely when mask-wearing is permissible.²²⁴

There is surely an element of truth in what *Miller* says about the Klan,²²⁵ but in an age in which we are told that Antifa is the new

demonstration upon the private property of another unless he shall have first obtained the written permission of the owner and the occupant of such property.

S.C. CODE ANN. § 16-7-110 (2019).

²¹⁹ WARD, *supra* note 55, at 130–31.

²²⁰ At the time Talmadge banned the Klan, he was facing a local desegregation suit and, following the lead of Byrnes, embarked on an “ambitious [school] equalization campaign of his own.” *Id.* at 131.

²²¹ *Id.* at 136. The columnist answered his own question, observing that the Governor “was smart enough to know that unless there is compliance with U.S. Supreme Court rulings about equalization of racial facilities, integration will come.” *Id.*

²²² *State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Miller* also quoted a passage from Judge Williams in which, to make his case, he referred to a March 1949 Atlanta Constitution headline that read: “Klan

Klan, we must be cautious of the way courts like that in *Miller* use the evils of the Klan to justify potentially broad mask bans. To be clear, *Miller* did not quite do this. As we shall see in Part III,²²⁶ the Georgia Supreme Court there instead reined in the statute Governor Talmadge enacted so that it would apply only to “mask-wearing conduct that is intended to conceal the wearer’s identity and that the wearer knows, or reasonably should know, gives rise to a reasonable apprehension of intimidation, threats or impending violence.”²²⁷ That said, *Miller*’s use of the Klan’s horrific acts to justify the state’s anti-mask law raises concerns for freedom of speech and association.²²⁸ If the story of New York State’s mask ban is about a nervous state overstepping its bounds, producing a ban that covers a threat that—strictly speaking—no longer exists, the story surrounding anti-Klan mask bans is too often about making symbolic statements about the Klan’s nefarious role in American history. This becomes problematic to the extent mask bans no longer are used exclusively, or primarily, against the Klan.²²⁹

III. THE ROAD FROM SKOKIE: WHAT WENT WRONG?

With an understanding of the history of mask bans, we can now explore how over the past forty years mask law doctrine has moved so decisively from a moment protecting mask wearers to another justifying mask bans. The extent of the doctrinal shift is breathtaking. In 1978, the same year the Seventh Circuit and Illinois

Parades in Wrightsville Election Eve 400 Registered Negroes Fail to Vote.” *Id.* (quoting Judge Williams).

²²⁶ See *infra* pp. 112–17.

²²⁷ *Miller*, 398 S.E.2d at 553. In *Daniels*, the Georgia Supreme Court further narrowed the scope of the law, holding that the wearer must, in addition to intending to conceal his identity, “either intend[] to threaten, intimidate, or provoke the apprehension of violence, or act[] with reckless disregard for the consequences of his conduct or a heedless indifference to the rights and safety of others, with reasonable foresight that injury would probably result.” *Daniels v. State*, 448 S.E.2d 185, 189 (Ga. 1994).

²²⁸ See *Miller*, 398 S.E.2d at 550–51.

²²⁹ This largely distinguishes mask wearing from cross burning which, since *Virginia v. Black*, 538 U.S. 343, 347 (2003), has been punishable when done with the intent to intimidate. *Id.* Simply put, it is hard to imagine a situation in which anyone but a Klan member would burn a cross to intimidate someone else.

Supreme Court were wrestling with the Nazi march in Skokie, two courts upheld the right of Iranian students to protest the Shah while wearing masks.²³⁰ They did so despite the potential to side with the protection against fears like those of New York State in fighting masked anti-renters, or the opportunity to rely on the history of masks in countering the activities of the Ku Klux Klan. *Aryan v. Mackey* and *Ghafari v. Municipal Court* reflect *Brandenburg v. Ohio*²³¹ where the United States Supreme Court crafted the broad incitement to an imminent lawless action test in a case involving the Ku Klux Klan,²³² as well as *Collin v. Smith*²³³ where the Seventh Circuit spoke eloquently about how defending the right of Nazis to march in Skokie, Illinois did not mean that the court supported Nazism.²³⁴ Taken together, these cases showed a trend toward courts expressing non-endorsement of Klan-related activities and beliefs, but issuing rulings in favor of free speech and expression.²³⁵

The year after Skokie, Aryeh Neier wrote *Defending My Enemy: American Nazis in Skokie, Illinois, and the Risks of Freedom*, a classic work in which he, as Executive Director of the American Civil Liberties Union during the 1970s, describes the efforts of the ACLU in defending the freedom of speech and assembly rights of the Klan and neo-Nazi groups.²³⁶ This is much in keeping with the

²³⁰ *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978); *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813, 819 (Cal. Ct. App. 1978).

²³¹ 395 U.S. 444, 449 (1969) (limiting restrictions to speech that incites to imminent violence); *Aryan*, 462 F. Supp. 90; *Ghafari*, 150 Cal. Rptr. 813.

²³² In describing the Klan meeting, the per curiam opinion went so far as to quote a speaker who used racially explicit language. *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

²³³ 578 F.2d 1197 (7th Cir. 1978).

²³⁴ *Id.* at 1210 (expressing “extreme regret that after several thousand years of attempting to strengthen the often-thin coating of civilization . . . there would still be those who resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs”). For a comparative context, see Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. MIAMI INT’L & COMP. L. REV. 151, 159–63, 172–77 (2009) (comparing U.S. rhetoric of libertarian regret to anti-totalitarian ethos prevalent in Europe).

²³⁵ See, e.g., *Brandenburg*, 395 U.S. at 449; *Collin*, 578 F.2d 1197.

²³⁶ See generally ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS IN SKOKIE, ILLINOIS, AND THE RISKS OF FREEDOM* (1979) (summarizing the

argument, raised by ACLU director during the 1990s Nadine Strossen, that hate speech bans are most likely to be used against those they are intended to protect.²³⁷ While these arguments reflect the mainstream position of courts²³⁸ and American legal academics²³⁹ with respect to First Amendment protection of hate speech, this is not the position courts and some law reviews take with regard to mask bans.²⁴⁰ The purpose of this Part is to understand why this is the case, or, from a civil libertarian perspective, to ask: what went wrong?

As noted in the Introduction, there were three turning points in mask law doctrine.²⁴¹ The first one—the failure of the *State v. Robinson* overbreadth approach to “strong” mask bans to take hold in other courts—is akin to the dog of Sherlock Holmes that did not bark.²⁴² The robust defense of the Georgia mask law on anti-Klan grounds in *State v. Miller* played a role in that failure for overbreadth challenges to spread. We will discuss both cases in Section III.A.²⁴³

American Civil Liberties Union (“ACLU”) efforts to protect the Ku Klux Klan and neo-Nazi groups’ constitutional right).

²³⁷ Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 482, 555–57 (1990).

²³⁸ See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 861–68 (E.D. Mich. 1989) (invalidating University of Michigan hate speech code as overbroad).

²³⁹ See Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) (opposing bans on hate speech in public discourse); Strossen, *supra* note 237. For more on Post, see Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 568–84 (2013).

²⁴⁰ See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205–09, (2d Cir. 2004) (upholding New York’s mask law); *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990) (narrowing but upholding Georgia’s mask law); Allen, *supra* note 20, at 859 (defending mask bans as constitutional).

²⁴¹ See *supra* Section I.B.

²⁴² See *infra* Section III.A.; The phrase emphasizes the importance of noting absence and not only presence. It comes from Holmes’s short story “The Adventure of Silver Blaze,” wherein a racehorse disappears, and Holmes is able to identify the individual behind the disappearance because a normally vocal dog at the horse’s stable did not bark on the night of the disappearance. For more, see Maria Konnikova, *Lessons from Sherlock Holmes, Pt. I, Paying Attention to What Isn’t There*, BIG THINK (July 21, 2011), <https://bigthink.com/artful-choice/lessons-from-sherlock-holmes-pti-paying-attention-to-what-isnt-there>.

²⁴³ See *infra* Section III.A.

Section III.B turns to *State v. Berrill*.²⁴⁴ *Berrill* is an odd case. It did not involve a Klan or a protest group at all, but rather, as we have seen, an angry parent who “pranced” about at a school board meeting dressed in a devil’s mask.²⁴⁵ The holding for the state of West Virginia was expected, but its rationale was not. Instead of focusing solely on the safety concerns raised by the defendant’s devil mask, *Berrill* chipped away at the symbolic speech protections of mask wearers by giving the *Spence v. Washington* test real teeth.²⁴⁶ This Section asks: what led the West Virginia Supreme Court to take this step?

Finally, Section III.C turns to the Second Circuit opinion in *Church of American Knights of the Ku Klux Klan v. Kerik* which, as we have seen, not only closed the door to most anonymous speech and symbolic speech claims of mask wearers, but embarked on an extended discussion of the history behind the passage of New York’s anti-mask act.²⁴⁷ Section III.C explores the doctrinal moves made by the *Kerik* court and discusses why it chose to discuss the history of New York’s mask ban.²⁴⁸

A. *Robinson, Miller and the Failed Overbreadth Challenge to Mask Bans*

In 1981, the Florida Supreme Court in *Robinson* voided Florida’s mask ban as overbroad and vague.²⁴⁹ The decision was quite short—it only runs a page in the Southern Reporter.²⁵⁰ Clearly, the court did not treat the statute at issue (or Florida’s anti-mask law as a reflection of the state’s position on the Ku Klux Klan) as something worthy of extended discussion.²⁵¹ Instead, the court

²⁴⁴ *State v. Berrill*, 474 S.E.2d 508, 516 (W. Va. 1996); see *infra* Section III.B.

²⁴⁵ *Berrill*, 474 S.E.2d at 510.

²⁴⁶ *Id.* at 514–16.

²⁴⁷ See *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 204–05, 208–10 (2d Cir. 2004).

²⁴⁸ See *infra* Section III.C.

²⁴⁹ *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980).

²⁵⁰ See *id.* at 1076–77 (issuing a decision spanning approximately one page).

²⁵¹ See *id.* (lacking an in-depth discussion of Florida’s anti-mask law).

proceeded matter-of-factly.²⁵² *Robinson* quoted the Florida law in full—which punished mask wearing so as “to conceal the identity of the wearer” on public property.²⁵³

While the defendant raised a variety of challenges based on freedom of speech, freedom of association and equal protection, the court did not consider these because it found that the statute was overbroad.²⁵⁴ In reaching this conclusion, the court declined to speculate on “whether the statute [wa]s intended to apply to any core activities which the legislature has an interest in preventing” but instead concluded that the mask law was “susceptible of application to entirely innocent activities.”²⁵⁵ This, in turn, would “create prohibitions that completely lack any rational basis.”²⁵⁶ The court then noted that the exceptions to the Section 876.13 mask ban contained in Section 876.16²⁵⁷ were “not sufficient to cure this fatal overbreadth” and rejected a request by the state to provide a “limiting instruction.”²⁵⁸

At first glance, *Robinson* might not seem altogether unusual. In 1978, two courts had upheld the right of Iranian students to protest the Shah while masked.²⁵⁹ Indeed, in *Ghafari*, a state appeals court struck down California’s mask ban as vague and overbroad.²⁶⁰ What

²⁵² *Id.* (providing considerably concise language to come to its conclusion).

²⁵³ *Id.* at 1076 (quoting FLA. STAT. § 876.13 (2019)). Florida has a series of laws covering mask wearing. Section 876.12 prohibits mask wearing on a road or public way; Section 876.14 penalizes entering or demanding admission to the home of another while masked. *See* §§ 876.13–14. Finally, Section 876.15 prohibits masked demonstrations on the property of another without consent. *See Nicol v. State*, 939 So. 2d 231, 233 n.2 (Fla. Dist. Ct. App. 2006).

²⁵⁴ *Robinson*, 393 So. 2d at 1077.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ The exceptions contained in the Florida law are quite similar to those in Alabama and Georgia. *See supra* note 31. Section 876.16 exempts holiday costumes, masks used for a variety of professional setting, masks worn in theatrical productions, and gas masks used in emergency drills. FLA. STAT. § 876.16.

²⁵⁸ *Robinson*, 393 So. 2d at 1077.

²⁵⁹ *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978); *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813, 819 (Cal. Ct. App. 1978).

²⁶⁰ *Ghafari*, 150 Cal. Rptr. at 813–19.

distinguishes *Robinson* is how sparse and direct the opinion is.²⁶¹ What took the California Court of Appeals six pages to discuss, the Florida Supreme Court handled in six paragraphs.²⁶² While the opinions of *Ghafari* and *Aryan* described the circumstances in which the mask bans were applied,²⁶³ the *Robinson* court said nothing about the underlying facts of the case. Finally, unlike *Aryan* or *Ghafari*, which involved a university policy and California's anti-mask law respectively,²⁶⁴ *Robinson* struck down a mask ban enacted in 1951 in Florida in response to the Ku Klux Klan.²⁶⁵

Most importantly, however, *Robinson* raises the question of whether there might be objections to mask bans that go beyond concerns about speech and expression.²⁶⁶ Thus the opinion speaks of “entirely innocent activities” and “prohibitions that lack any rational basis,”²⁶⁷ appealing to the classic disapproval of discriminatory and arbitrary enforcement of criminal statutes. These “innocent activities” and irrational “prohibitions,” moreover, fall outside the already fairly generous exceptions encompassed in Section 876.16.²⁶⁸ Read broadly, *Robinson* appears to suggest that

²⁶¹ *Robinson*, 393 So. 2d at 1076–77 (invalidating Florida's mask ban in a brief, vague opinion).

²⁶² See *Ghafari*, 150 Cal. Rptr. at 813–19 (providing six pages to explain the court's decision); *Robinson*, 393 So. 2d at 1076–77 (explaining the court's decision in six paragraphs).

²⁶³ *Aryan*, 462 F. Supp. at 91 (describing the plan of Iranian students to wear masks at a proposed march); *Ghafari*, 150 Cal. Rptr. at 814 (describing how defendant was arrested while picketing outside the Iranian Consulate in San Francisco while covering his face with a leaflet).

²⁶⁴ *Aryan*, 492 F. Supp. at 91; *Ghafari*, 150 Cal. Rptr. at 814. Neither *Aryan* nor *Ghafari* referred to the Klan; however, *Ghafari* did note that the participants in the Boston Tea Party wore disguises. *Ghafari*, 150 Cal. Rptr. at 819 n.6.

²⁶⁵ See CHALMERS, *supra* note 182, at 340 (describing passage of the Florida law); Swertfeger, *supra* note 58, at 186.

²⁶⁶ *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980) (“[The statute] is susceptible of being applied as to create prohibitions that completely lack any rational basis . . . [A]lthough the law is overbroad in its sweep and lacks a rational basis, its language is very specific.”)

²⁶⁷ *Robinson*, 393 So. 2d at 1077.

²⁶⁸ “The exceptions provided by section 876.16, Florida Statutes (1977), are not sufficient to cure this fatal overbreadth.” *Id.* (citing to FLA. STAT. § 876.16 (2019)); FLA. STAT. § 876.16 (2019) (providing exemptions to those: “[1]) wearing traditional holiday costumes,” (2) “engaged in trades and employment,”

the state has no business with an individual's wearing a mask while playing catch in a public park, even if he cannot show that his motivation for wearing the mask was self-protection or anonymity.²⁶⁹ The rationale of *Robinson* and the distaste toward the potential for discriminatory enforcement also would seem to apply to cases of cross-dressing which were prosecuted under mask bans, such as in *People v. Archibald*²⁷⁰—simply put, a man dressing as a woman (or vice versa) is the type of activity that ought to be exempt from a mask ban, irrespective of whether it is protected by the First Amendment.²⁷¹

Mere months after *Robinson*, the Florida State Legislature enacted Section 876.155.²⁷² This provision restricts liability under Florida's mask laws to instances in which the wearer intends to

(3) "using masks in theatrical productions," and (4) "wearing gas masks prescribed in emergency management drills and exercises.")).

²⁶⁹ See *Robinson*, 393 So. 2d at 1077.

²⁷⁰ 296 N.Y.S.2d 834 (N.Y. App. Div. 1968). In *Archibald*, a defendant appealed his conviction of the offense of vagrancy in the code of criminal procedure under Section 887, subdivision 7, "impersonating a female." *Id.* at 835. The statute provided that a vagrant is an individual who "[has] his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified." *Id.* The dissent explained that in setting aside the appellant's conviction and dismissing the complaint, the majority and the lower court erred in their interpretation of their mask ban's intent, noting that the penal law at issue seeks to regulate public "*congregation of persons*" who are masked. *Id.* at 840 (Markowitz, J., dissenting) (emphasis added). "The statute at most attempts to regulate public group conduct and not the wearing of female attire and use of facial makeup per se by a single male individual." *Id.*

²⁷¹ Dissenting in *Archibald*, Justice Markowitz related the history of the anti-riot riots, conceding that some men "wore women's calico dresses to further conceal their identities" and that this attire "was used in furtherance of a scheme of murder and insurrection." *Id.* at 837. While Justice Markowitz took a fairly harsh view of the anti-rioters, he nevertheless made the fairly obvious point that "males dressed in female attire for purposes other than discussed above [i.e., murder and insurrection] were not even considered by the Legislature [in] adopting the section." *Id.*; see also *Garcia v. State*, 443 S.W.2d 847, 848 (Tex. Crim. App. 1969) (tossing conviction of a man dressed as a woman under Texas law banning disguises because "the arresting officer testified that he had no difficulty in identifying appellant's face either with or without the wig and other sartorial embellishments").

²⁷² The statute was enacted in 1981, presumably immediately after the *Robinson* case, which was decided in 1980.

deprive another of equal protection;²⁷³ intends to deprive another from exercising a right granted under federal state or local law;²⁷⁴ intends to “intimidate, threaten, abuse, or harass any other person;”²⁷⁵ or uses a mask to avoid identification while engaging in conduct “that could reasonably lead to the institution of a civil or criminal proceeding.”²⁷⁶ By adding an intent requirement to the mask ban, the state legislature crafted a law which—while still covering a fair amount of conduct²⁷⁷—no longer applies to someone playing Frisbee in a public park. This protection of “innocent activity” moreover, came without much fanfare. For instance, when discussing a 2013 case in which a police officer was charged with violating the mask law for wearing a *V for Vendetta* mask, the head of the Broward County Public Defender’s office described the Florida mask laws as “intended to stop the KKK and bank robbers—not peaceful protesters.”²⁷⁸

Taken as a whole, *Robinson* was a positive development in mask law doctrine. Through a combination of judicial and legislative action, a “strong” (strict liability) mask ban was replaced with a “weak” (intent-based and narrowly targeted) one. Moreover, this series of events occurred in a southern state that passed its mask law in response to the Klan. Given all of this, why didn’t *Robinson* become a model for mask bans nationwide? The answer to this question turns on *Miller*, a case that, like *Robinson*, led to the narrowing of a state anti-mask law²⁷⁹ but did so in a way that sent a powerful anti-Klan message which, over time, would lead mask law

²⁷³ FLA. STAT. § 876.155(1) (2019).

²⁷⁴ § 876.155(2).

²⁷⁵ § 876.155(3).

²⁷⁶ § 876.155(4).

²⁷⁷ For example, a Florida Court briefly cited Section 876.55 to make the point that the police likely had reasonable suspicion to stop masked men furtively walking outside a 7-Eleven in the early morning hours. *Nicol v. State*, 939 So. 2d 231, 233 n.2 (Fla. Dist. Ct. App. 2006).

²⁷⁸ See Lisa J. Huriash, *Arrest of South Florida Officer Brings Attention to Anti-Mask Law*, S. FLA. SUN SENTINEL (Dec. 10, 2013), <https://www.sun-sentinel.com/news/fl-xpm-2013-12-10-fl-cop-protest-mask-anonymous-20131203-story.html>. Huriash notes that mask arrests have been rare in South Florida, and less than half the arrests were actually prosecuted. *Id.*

²⁷⁹ Compare *State v. Miller*, 398 S.E.2d 547, 547 (Ga. 1990), with *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981).

doctrine away from its civil libertarian heyday of the 1970s and 1980s.

On one level, the reason for *Miller*'s anti-Klan message is easy to understand. Unlike the unspecified mask-wearer at issue in *Robinson*, *Miller* featured a defendant who appeared in public wearing a Klan mask and hood.²⁸⁰ As we have seen, the *Miller* majority responded to this fact by writing about the passage of Georgia's anti-Klan act at length, with an emphasis on the Klan's crimes of "violence and intimidation," including "beatings and lynchings."²⁸¹ By arguing that the "interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate governmental activity,"²⁸² the opinion sent the message that the Supreme Court of Georgia recognized the evils of the Klan.

On the other hand, the actual holding of *Miller* was not that different from what the *Robinson* court and state legislature collectively came up with in Florida.²⁸³ In response to the *Miller* defendant's argument that the anti-mask law was overbroad and "criminalize[d] a substantial amount of innocent behavior, such as wearing a ski-mask in mid-winter, wearing sunglasses on a sunny day, or wearing a mask to make a political point,"²⁸⁴ the majority referred to a Statement of Public Policy enacted in 1951,²⁸⁵ which highlighted equal protection of the laws, protection against intimidation and physical violence, and threats.²⁸⁶ Given this purpose, the anti-mask law was "easily susceptible to a narrowing construction," which the court then provided.²⁸⁷ In light of the official public policy statement, the Georgia mask ban would be interpreted narrowly to apply only where a defendant intended to conceal his or her identity and did so knowing that "the conduct provokes reasonable apprehension of intimidation, threats or violence."²⁸⁸

²⁸⁰ *Miller*, 398 S.E.2d at 549.

²⁸¹ *Id.* at 550.

²⁸² *Id.* at 551.

²⁸³ *Compare id.* at 553, with *Robinson*, 393 So. 2d at 1077.

²⁸⁴ *Miller*, 398 S.E.2d at 551.

²⁸⁵ *Id.* at 549 (citing GA. L. 1951, p. 9 §1).

²⁸⁶ *Id.*

²⁸⁷ *Miller*, 398 S.E.2d at 552.

²⁸⁸ *Id.* at 552–53 (restating the test in slightly different language).

Had this been the full extent of the *Miller* case, it may not have had that great an impact in the development of mask doctrine. What made the case more noteworthy was an impassioned dissent by Presiding Justice Smith, who argued that “the true legislative intent [behind the anti-mask law] was to unmask a dissident group.”²⁸⁹ Justice Smith noted that, according to Judge Osgood Williams, the same person who drafted the statute and then sat as a superior court judge for twenty years, “not one person who committed an armed robbery . . . was charged under the anti-mask statute.”²⁹⁰ Justice Smith also quoted Judge Williams’s view that “probably a goodly number of Klansmen . . . are nonviolent” and fear identification, in part because, given the “open society that we have and the news media we have, it’s become tremendously unpopular to be a member of the Ku Klux Klan.”²⁹¹

According to the dissent, “[t]he Klan’s white robes, hats, and masks may all express the idea of a threat, but ideas are protected.”²⁹² To that end, Justice Smith described how, in October 1990, he met with 200 high school students and noted with relish that, after discussing *Brandenburg* and *Collin*, the students agreed by an “overwhelming majority” that freedom of speech should include “the right of Nazi and other radical groups to advocate political ideas that are contrary to society’s basic beliefs and offensive to large [groups of people].”²⁹³

The debate between the majority and the dissent over the meaning of the Klan obscured doctrinal areas of agreement.²⁹⁴ Chief Justice Clarke, writing for the majority, acknowledged the possibility of bringing an *NAACP v. Alabama* anonymity claim but found no evidence of injury or job loss.²⁹⁵ For his part, Presiding

²⁸⁹ *Id.* at 554 (Smith, P.J., dissenting).

²⁹⁰ *Id.* at 554–55 (Smith, P.J., dissenting).

²⁹¹ *Id.* at 554 n.8 (quoting Judge Osgood Williams). To that end, Justice Smith added that defendant, who was the only person in Klan regalia, feared that “his identification as a Klan member could create danger for himself and his family.” *Id.* at 555 (Smith, P.J., dissenting).

²⁹² *Id.* at 557 (Smith, P.J., dissenting).

²⁹³ *Id.* 557 n.13 (Smith, P.J., dissenting).

²⁹⁴ See Allen, *supra* note 20, at 842–43.

²⁹⁵ *Miller*, 398 S.E.2d at 553.

Justice Smith agreed with a concurring opinion by Justice Hunt²⁹⁶ which called for requiring that the defendant have “actual intent” to intimidate, rather than the reasonable apprehension standard favored by the majority²⁹⁷—a statement showing the dissent’s willingness to support some version of an anti-mask law.²⁹⁸

Justices Clarke and Smith’s disagreement was not over the mask ban, but over the Klan and its role in Georgia.²⁹⁹ This, in turn, spawned a series of law review articles that, faced with choosing between opposing mask laws and repudiating the Klan, generally chose the latter.³⁰⁰ For example, Wayne Allen, writing in the *University of Georgia Law Review*, noted that while some “civil libertarians” supported the defendant in *Miller*, “prosecutors and civil rights groups” hailed the ruling.³⁰¹ Investigating the “vitality and validity” of mask bans, Allen focused on their role in curbing “the violent activities of the various orders of the Ku Klux Klan.”³⁰² To that end, he described the wave of mask bans in the 1940s and 1950s as a response to “[t]erroristic acts by masked Klansmen.”³⁰³ At the same time, he faulted *Miller* for protecting too much behavior—all a state should need to show is an intent to conceal one’s identity.³⁰⁴

In justifying this position, Allen argued that masks “enable criminals to commit terroristic, violent and deadly acts with impunity.”³⁰⁵ This reality, determined by legislatures “based on historical evidence”—presumably the Klan experience—means that “intentionally concealing [one’s] identity in public places is conduct

²⁹⁶ *Id.* at 553–54 (Hunt, J., concurring).

²⁹⁷ *Id.* at 556 (Smith, P.J., dissenting).

²⁹⁸ Three years later, the court shifted the intent standard to “reckless disregard”—a nod in Justice Smith’s direction. *See Daniels v. State*, 448 S.E.2d 185, 189 (Ga. 1994).

²⁹⁹ *Miller*, 398 S.E.2d at 547, 554 (majority opinion and Smith, P.J., dissenting).

³⁰⁰ *See* Allen, *supra* note 20; *see, e.g.*, Stephen J. Simoni, “*Who Goes There?*” — *Proposing a Model Anti-Mask Act*, 61 *FORDHAM L. REV.* 241 (1992).

³⁰¹ Allen, *supra* note 20, at 820.

³⁰² *Id.* at 820–21.

³⁰³ *Id.* at 827.

³⁰⁴ *Id.* at 858.

³⁰⁵ *Id.* at 859.

which generally poses a risk or danger to others that society is not willing to tolerate.”³⁰⁶ To that end, Allen took issue with *Aryan* and *Ghafari* on doctrinal grounds³⁰⁷ but made no distinction between the threat posed by a group of masked Klan members and other, less violent mask wearers. Instead, Allen laid the masked terror of the Klan on the shoulders of the Iranian students protesting the Shah.³⁰⁸

Steven J. Simoni, proposing a model anti-mask law in the *Fordham Law Review* a year later, took what initially looks like a more nuanced view, faulting the *Miller* majority for minimizing the evidence of harassment³⁰⁹ and suggesting that “the court rendered the ruling that it did for political reasons.”³¹⁰ Indeed, he expressed concern that *Miller* had engaged in “ideology based judicial reasoning,” especially given that the lower court had upheld the defendant’s right to wear a mask.³¹¹ At the same time, however, Simoni proposed a model mask ban that punished mask wearing when done “with intent to conceal [one’s] physical identity.”³¹² Simoni defended his proposed mask law as “an effective prophylactic crime-fighting device”³¹³ without explaining why either the mask ban or his chosen intent standard was necessary.

In the end, *Miller* and the debate that followed changed the tone of the discussion over mask bans. The focus shifted away from a concern that mask laws would reach “innocent activity” to concerns about the Klan, terrorism and judge made politics. It is difficult to avoid laying some blame at the feet of Presiding Justice Smith. As

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 851, 55–56 (criticizing *Aryan* and *Ghafari*).

³⁰⁸ For instance, just before describing *Aryan*, Allen describes how banning masks “aids the apprehension of criminals and discourages the commission of violent crimes.” *Id.* at 851. While this might apply to Klan activity, it seems an odd way to characterize the anti-Shah protesters in *Aryan*. See *Aryan v. Mackey*, 462 F. Supp. 90, 91 (N.D. Tex. 1978) (describing the students’ request “to hold a peaceful demonstration”).

³⁰⁹ Simoni, *supra* note 300, at 264–65 n.157.

³¹⁰ *Id.* at 264–65 n.157.

³¹¹ *Id.* at 266 n.163.

³¹² *Id.* at 268, 272. While the mask law is subject to a lengthy list of exceptions, including one for First Amendment activity, the exception depends on the discretion of the police in determining whether mask wearers are engaged in activity protected by the First Amendment. *Id.* at 272.

³¹³ *Id.* at 273.

Ronald Dworkin once put it, liberty involves making sacrifices that really hurt.³¹⁴ In the context of protecting the First Amendment rights of hate speakers, this means more than simply acknowledging that the group in question is unpopular,³¹⁵ discussing First Amendment cases with high school students,³¹⁶ or stating—as the lower court did in *Miller*—that Klan members in Georgia were as threatened as the Iranians in *Ghafari* or African Americans in *NAACP*.³¹⁷ Had Justice Smith felt compelled, as Circuit Judge Pell had been in *Collin*, to “express [his] repugnance at the doctrines which the appellees desire[d] to profess publicly,”³¹⁸ perhaps Chief Justice Clarke would have tempered his own anti-Klan rhetoric and the move of mask law doctrine toward greater restriction would have unfolded more slowly.

B. *Berrill and the Vanishing Message of the Mask*

While on a cultural plane *Miller* departed considerably from Lee Bollinger’s tolerant society model encapsulated by the Skokie affair which protects even the speech of hateful racists in the name promoting societal tolerance,³¹⁹ *Miller*’s practical impact was unclear. Instead of banning all mask wearing, save for a few exceptions, *Miller* required intent,³²⁰ a standard which held out some hope that the “innocent activities” identified by *Robinson* might still be protected.³²¹ Both the promise and limits of the *Miller* approach in protecting ordinary, day-to-day mask wearing were on display in *Daniels v. State*.³²² On the one hand, the Georgia Supreme Court in *Daniels* held that a middle-aged African American man who wore a mask to play with neighborhood children may have known that his

³¹⁴ Ronald Dworkin, *The Unbearable Cost of Liberty*, in 3 INDEX ON CENSORSHIP 43, 46 (1995).

³¹⁵ *State v. Miller*, 398 S.E.2d 547, 555 (Ga. 1990) (Smith, P.J., dissenting).

³¹⁶ *Id.* at 557 n.13.

³¹⁷ *State v. Miller*, No. 90D-929-2, slip. Op. (Ga. Super. Ct. May, 25, 1990) *rev’d on other grounds*, 398 S.E.2d 547 (Ga. 1990).

³¹⁸ *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

³¹⁹ BOLLINGER, *supra* note 2; *see supra* note 23 and accompanying text.

³²⁰ *Miller*, 398 S.E.2d at 553.

³²¹ *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980).

³²² 448 S.E.2d 185 (Ga. 1994).

behavior ran the risk of scaring them, but he did not act with “reckless disregard” or “heedless indifference” as to the consequences of his actions, especially since his intent was to “entertain the children.”³²³ Moreover, the court reached this opinion in a case where the defendant did not wear a mask to protect his anonymity or to make a symbolic statement, aside from being funny.³²⁴

At the same time, some aspects of *Daniels* are troubling from a civil liberties perspective. The case only made it to court because a police officer saw the masked defendant while patrolling in his squad car.³²⁵ The arrest turned on the officer’s subjective opinion that one of the girls privy to the interaction, who had turned back to look at the defendant and officer, “appeared to be uneasy.”³²⁶ Moreover, the Georgia Court of Appeals, which upheld the charges,³²⁷ took a broader view of intent. The court conceded that even if that defendant’s “motive may have been to have fun,” this did “not remove or exclude the offensive intent or manner of achieving the pleasure,” particularly in a case of “[a] man following ten or twelve-year-old girls.”³²⁸ The defendant’s conviction for violating the Anti-Mask Act³²⁹ was reversed when the Georgia Supreme Court found that the defendant was only trying to “playfully ‘scare’” and not frighten or intimidate the children; that his actions were similar to those of a person on Halloween, and such actions are exempted from those covered by the Act; and that the defendant did not act with the “‘reckless disregard of consequences’ or ‘heedless indifference to the rights and safety of’ the children

³²³ *Id.* at 186, 189.

³²⁴ *See Daniels*, 448 S.E.2d at 189 (“[W]e find the evidence insufficient to show that Daniels acted with the reckless disregard of consequences or the heedless indifference to the rights and safety of the children in this case necessary for conviction.” (internal quotations and citation omitted)). *See generally id.* (failing to address the issue of symbolic speech or anonymity).

³²⁵ *Id.* at 186.

³²⁶ *Id.*

³²⁷ *Daniels v. State*, 438 S.E.2d 99, 102 (Ga. Ct. App. 1993), *rev’d*, 448 S.E.2d 185 (Ga. 1994).

³²⁸ *Id.*

³²⁹ GA. CODE ANN. § 16-11-38 (West 2019).

necessary to sustain a conviction.”³³⁰ While his conviction was overturned, Mr. Daniels was put through an arguably absurd series of proceedings for what seems like innocent conduct.

While intent standards can be read narrowly in the spirit of lenity to protect mask wearers, the ruling in the Georgia Court of Appeals reminds that this does not always happen. Moreover, the intent requirements established in Georgia and Florida were not emulated elsewhere. Given this reality, the intent standard—potentially a great way to protect “innocent” mask wearing—has not risen up to its potential. This makes the question of First Amendment arguments, be they based on symbolic speech or anonymity, all the more important. In the mid-1990s there were still some grounds for hope. While *Miller* ruled against the symbolic speech and anonymity claims of the Klansman before the court, it did not do so in a doctrinally definitive way.³³¹

This would change in 1996 with *Berrill*,³³² which narrowed the scope for symbolic speech claims. To understand *Berrill*’s impact,³³³ consider the basic structure of First Amendment symbolic speech claims. First, the party seeking First Amendment protection must show that the activity in question is expressive in nature—i.e. that “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”³³⁴ Second, if the speech or act is expressive, a court will apply the four part test from *United States v. O’Brien*.³³⁵ Under *O’Brien*, a restriction on symbolic speech is justified if:

³³⁰ *Daniels*, 448 S.E.2d at 185–89.

³³¹ Instead, it rejected the evidence of harassment as insufficient to justify mask wearing while conceding, for argument’s sake, that the mask satisfied the *Spence* test. *See State v. Miller*, 398 S.E.2d 547, 550, 553 (Ga. 1990).

³³² *State v. Berrill*, 474 S.E.2d 508 (W. Va. 1996).

³³³ *Id.* at 515 (upholding the application of West Virginia’s mask ban to the wearer of a devil mask).

³³⁴ *Id.* at 516 (quoting *Spence v. State of Wash.*, 418 U.S. 405, 410–11 (1974)).

³³⁵ 391 U.S. 367 (1968) (holding that the Universal Military Training and Service Act prohibiting the burning of a draft card does not violate the First Amendment).

[i]) it is within constitutional power of the Government; [ii]) if it furthers an important or substantial governmental interest; [iii]) if the governmental interest is unrelated to the suppression of free expression; and [iv]) if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.³³⁶

Symbolic speech claims naturally raise the theme of a balancing of interests. How does the threat posed by a mask-wearing protester compare to the governmental interest in maintaining order and security? This question is encapsulated in the *O'Brien* test, the test most early mask cases relied on, regardless of their outcomes.³³⁷ From the mask wearer's perspective, the test has the benefit of forcing the state to justify why a given mask ban is necessary. It reflects the reality that, while state restrictions on mask wearing are sometimes related to important security concerns (a perspective that is one way of looking at New York's 1845 mask ban),³³⁸ they sometimes are not.

Of course, the *O'Brien* test only comes into play if the mask wearer satisfies the *Spence v. Washington* expressive conduct test—otherwise there is no constitutional claim available aside from overbreadth.³³⁹ In early mask cases, however, the *Spence* test was a fairly low hurdle to overcome. *Aryan* did not mention *Spence* at all,

³³⁶ *Id.* at 377. As we shall see, *Berrill* did not discuss the *O'Brien* elements in depth because it did not find that the devil mask was expressive. *Berrill*, 474 S.E.2d at 514–15.

³³⁷ See, e.g., *Aryan v. Mackey*, 462 F. Supp. 90, 93–94 (N.D. Tex. 1978) (applying the *O'Brien* test to uphold the right of Iranian students to wear masks while protesting on campus); cf. *Robinson v. State*, 393 So. 2d 1076, 1076–77 (Fla. 1980) (not reaching the *O'Brien* test because the court found the subject mask law overbroad). But see *State v. Miller*, 398 S.E.2d 547, 550–51 (Ga. 1990) (applying the test to uphold the right of the state to prevent a Klan member from appearing in public while wearing his mask).

³³⁸ N.Y. PENAL LAW § 240.35(4) (McKinney 2019).

³³⁹ *Berrill*, 474 S.E.2d at 516.

while *Miller* conceded the issue for purposes of argument.³⁴⁰ This was not the approach taken by the court in *Berrill*.³⁴¹

Instead the West Virginia Supreme Court in *Berrill* began its opinion by quoting from the statute which prohibits mask wearing when “any portion of the face is so covered as to conceal the identity of the wearer.”³⁴² Describing the governmental interest supported by the statute, the court quoted at length from *Miller*’s discussion of the Klan, although it did not mention the Klan by name.³⁴³ *Berrill* added that “it does not matter what message, if any, is to be conveyed by wearing a mask.”³⁴⁴ While this language was likely intended to defend the West Virginia statute against charges of content discrimination, it also carried the message that, although *Miller* involved the Klan and the *Berrill* defendant dressed as the devil to oppose a high school mascot, the logic behind *Miller* would still apply.

The West Virginia Supreme Court then applied the *O’Brien* test, noting that attendees of the school board meeting “were frightened by Mr. Berrill’s behavior” and were concerned “for their own safety, as well as the safety of the children present.”³⁴⁵ As it was concluding its analysis, the court added that it rejected the defendant’s First Amendment claim “for an additional, persuasive reason”—namely that the defendant failed to show that he intended to convey a particularized message his audience was likely to understand.³⁴⁶

To appreciate the novelty of *Berrill*’s approach, consider the court’s own description of the defendant’s expressive purpose. In the court’s view, Mr. Berrill “sought to convey his concern about the use by a high school of a devil image as the school mascot and to persuade the school to employ another mascot image.”³⁴⁷ Indeed,

³⁴⁰ See *Miller*, 398 S.E.2d at 550 n.2; *Aryan*, 462 F. Supp. at 90.

³⁴¹ See *Berrill*, 474 S.E.2d at 516 (W. Va. 1996) (applying the *Spence* test to determine whether the defendant’s “intended message was completely misunderstood” by the board).

³⁴² *Id.* at 514 (quoting W VA. CODE § 61-6-22 (2019)) (internal quotations omitted).

³⁴³ *Id.* (quoting *Miller*, 398 S.E.2d at 551).

³⁴⁴ *Id.* at 514–15.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 515–16.

³⁴⁷ *Id.* at 516.

he had written a series of letters to school board members, as well as an unpublished letter to the editor to a local newspaper on the subject. To the defendant, the devil mask was “a critical part of his message . . . to graphically portray the image he felt the [devil] mascot represented.”³⁴⁸ In particular, “the mask was intended to conjure the horrific image of the master of hell, as distinguished from the almost cherubic aspect of the actual mascot.”³⁴⁹

Faced with this evidence, the West Virginia Supreme Court conceded that the defendant “may have demonstrated an intent to convey a particularized message” but concluded that any such message Mr. Berrill may have conveyed was “completely misunderstood.”³⁵⁰ In reaching this conclusion, the *Berrill* court noted that the defendant spoke before his turn, “pranced” around the meeting room (which had only one exit), and scared the attendees, who included children.³⁵¹ Given these circumstances, defendant’s “conduct”—which presumably included the mask wearing—“was more likely to create confusion than convey an understandable message.”³⁵²

In effect, *Berrill* reduced the expressive content of the defendant’s mask to the fear that it produced. While the United States Supreme Court stated in *Chaplinsky v. New Hampshire* that the punishment of certain classes of speech including “fighting words” does not present a “constitutional problem,”³⁵³ the Court did not go so far as to claim that such words did not contain an expressive message.³⁵⁴ Moreover, to the extent the *Spence* test incorporates an objective element, the evidence is fairly strong that the school board attendees were aware that the defendant was upset

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

³⁵⁴ To the contrary, the Court placed such words outside the First Amendment ambit precisely because of the likelihood others would understand the expressive intent of the speaker, noting that “[s]uch words, as ordinary men know, are likely to cause a fight.” *Id.* at 573.

about the school mascot and knew he was wearing a devil's mask to make his point.³⁵⁵

In *Berrill's* defense, the conduct by the defendant—speaking before his turn and prancing around the meeting room—make the ultimate decision to uphold the mask ban understandable,³⁵⁶ and surely any future defendant accused of violating a state mask law in a similar setting, without terrifying his audience, would do well to distinguish *Berrill* on its facts. And, fortunately for mask ban opponents, *Berrill* has had relatively little traction so far. It was not cited in *Kerik*, and (unlike *Miller*) it was not cited by any other mask law case. That said, *Berrill* marked an important doctrinal step away from the protection of mask wearing in the 1970s and 1980s. The *Berrill* opinion could have decided the case entirely under the *O'Brien* test, as the Georgia Supreme Court had in *Miller*, but this was not the path taken by the West Virginia Supreme Court.

Instead, *Berrill* opened the door to the argument that all threatening mask wearing is *per se* non-expressive.³⁵⁷ To see the danger inherent to this approach, consider what would have happened had the middle-aged mask-wearing defendant in *Daniels*³⁵⁸ been tried in a state that had a “strong” mask law—one that bans all mask wearing. The defendant would most likely have had to argue that, when he donned his mask, he had an expressive purpose of entertaining the neighborhood children. Under *Berrill*, the state would be able to counter this argument by showing that one of the children found his mask threatening.³⁵⁹ If the threat was serious enough, the case would be over. To put it another way, *Berrill* leaves a cause of action to mask wearers—but only well-behaved ones.

³⁵⁵ At least, this is all we can surmise from the evidence presented by the court. Also, Mr. Berrill's task would become easier to the extent the requirement in *Spence* is not that the audience understand the “exact” message the speaker intended, but that they would interpret the message in a “similar” fashion. See Housley, *supra* note 37, at 672 (arguing for a “similar message” standard).

³⁵⁶ See *Berrill*, 474 S.E.2d at 516.

³⁵⁷ See *id.* (arguing that Mr. Berrill's message in wearing his mask was not understood by his intended audience).

³⁵⁸ *Daniels v. State*, 448 S.E.2d 186 (Ga. 1994).

³⁵⁹ *Berrill*, 474 S.E.2d at 516 (describing the threat Mr. Berrill's mask posed to children).

C. *Kerik—Banishing Masks as a Matter of Law*

As noted above, *Berrill* has not gained much traction,³⁶⁰ and in the late 1990s, the First Amendment protection of mask wearing saw something of a revival before the bottom fell out with the 2004 Second Circuit opinion in *Kerik*.³⁶¹ For example, in the 1999 case *American Knights of the Ku Klux Klan v. City of Goshen*,³⁶² a district court in Indiana used the anonymous speech principle from *NAACP*³⁶³ to uphold the right of the American Knights of the Ku Klux Klan to march masked.³⁶⁴ While the New York Court of Appeals upheld a mask ban prosecution in *People v. Aboaf* in 2001,³⁶⁵ the next year Judge Baer of the Southern District of New York defended the right of masked Klan members to march in New York City.³⁶⁶ By 2003, there was a pair of recent cases³⁶⁷—and several older ones³⁶⁸—that seemed to hold hope for mask wearers.

This opening was slammed shut when in 2004 the Second Circuit in *Kerik* reversed Judge Baer's decision in the lower court.³⁶⁹ As we have seen, *Kerik* did not simply expand on *Berrill* by arguing that the Klan mask does not convey a message not already conveyed

³⁶⁰ See *supra* Section III.B.

³⁶¹ See generally *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004) (upholding New York's anti-mask law and finding such did not invoke any First Amendment rights).

³⁶² 50 F. Supp. 2d 835 (N.D. Ind. 1999).

³⁶³ *NAACP v. Alabama*, 357 U.S. 449 (1957).

³⁶⁴ *Am. Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 840 (N.D. Ind. 1999). In reaching this conclusion, *Goshen* relied not only on *Aryan* and *Ghafari* but also on evidence that the Klan members faced harassment. *Id.* at 840–41.

³⁶⁵ *People v. Aboaf*, 721 N.Y.S.2d 725 (N.Y. Crim. Ct. 2001) (disagreeing with defendant's challenge to New York's mask ban as facially overbroad).

³⁶⁶ *Church of Am. Knights of Ku Klux Klan v. Kerik*, 232 F. Supp. 2d 205 (S.D.N.Y. 2002).

³⁶⁷ *Goshen*, 50 F. Supp. 2d at 845; *Kerik* 232 F. Supp. 2d at 216–17.

³⁶⁸ See, e.g., *Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978); *Ghafari v. Mun. Court for S.F. Judicial Dist. S.F.*, 150 Cal. Rptr. 813, 819 (Cal. Ct. App. 1978).

³⁶⁹ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 211 (2d Cir. 2004).

by the robe and hood³⁷⁰—a problematic holding for anyone wearing a mask as part of a larger costume. It also held that the *NAACP* theory of anonymous speech does not apply to masks.³⁷¹ The Second Circuit’s discussion in *Kerik* anchored its holding to a historical account of the origins of New York’s mask act which, as we have seen, tended to exaggerate the threat posed by the anti-renter movement to the state.³⁷² What accounts for the narrow rulings and history lesson?

The doctrinal discussion in *Kerik* is not particularly rich, especially on the subject of symbolic speech. Instead, the Second Circuit spent several paragraphs repeating the idea “that the mask does not communicate any message that the robe and hood do not.”³⁷³ After quoting Klan members, who conceded that the mask and hood contain “no message” beyond identifying one as a Klan member, the court stated that “the mask adds no expressive force to the message portrayed by the rest of the outfit.”³⁷⁴ So that there would be no misunderstanding, the court added that a witness to the proposed rally “would not . . . be more likely to understand that association [with the Klan] if the demonstrators were also wearing masks.”³⁷⁵ While “mindful” of the difficult task of analyzing “the expressive quality of conduct,” the court concluded that the First Amendment is not implicated by elements of a uniform that “ha[ve] no independent or incremental expressive value.”³⁷⁶

Nor was the anonymous speech discussion much more detailed. To be sure, *Kerik* described a series of Supreme Court precedents—from *NAACP*³⁷⁷ to *Buckley v. American Constitutional Law*

³⁷⁰ *Id.* at 205–08.

³⁷¹ *Kerik*, 356 F.3d at 209.

³⁷² *See supra* Section II.A.

³⁷³ *Kerik*, 356 F.3d at 206.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 206–07.

³⁷⁶ *Id.* at 207–08.

³⁷⁷ *NAACP v. Alabama*, 357 U.S. 449, 462 (1957).

*Foundation*³⁷⁸—noting that none involved masks.³⁷⁹ It made the pithy weight of authority argument, quoted in the Introduction,³⁸⁰ that neither the Supreme Court nor the circuit courts have previously applied the *NAACP* test to masks.³⁸¹ However, *Kerik* failed to cite *Aryan* and *Goshen*, both of which discussed the *NAACP* test in the context of masks,³⁸² and it said very little about why unmasking is different from the compelled disclosure of names. Instead, *Kerik* spoke in generalities about how the First Amendment was not implicated “every time a law makes someone—including a member of a politically unpopular group—less willing to exercise his or her free speech rights.”³⁸³

To the extent *Kerik* offered anything of substance, it rested on security concerns. The First Amendment “does not guarantee ideal conditions” for communicating viewpoints because an “individual’s right to speech must always be balanced against the state’s interest in safety, and its right to regulate conduct that it considers potentially dangerous.”³⁸⁴ *Kerik*, however, never described the specific security risk posed by the Klan members who, in 1999, petitioned for the right to protest while wearing their masks in downtown New York.³⁸⁵

In this regard, *Kerik* marked a step along the path blazed by *Berrill*, which implied that threatening mask wearing cannot have an expressive purpose because it scares people.³⁸⁶ But at least the West Virginia Supreme Court there relied on an argument that was

³⁷⁸ 525 U.S. 182, 200 (1999) (finding that requiring identification badges for persons circulating petitions for ballot initiatives violates the First Amendment). See generally *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (reviewing a ban on distributing anonymous campaign literature); *Buckley v. Valeo*, 424 U.S. 1 (1976) (reviewing a compelled disclosure issue); *Talley v. Cal.*, 362 U.S. 60 (1960) (involving the distribution of handbills); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (concerning distribution of names to tax officials).

³⁷⁹ *Kerik*, 356 F.3d at 208–09.

³⁸⁰ See *supra* notes 4–6 and accompanying text.

³⁸¹ *Kerik*, 356 F.3d at 209.

³⁸² *Am. Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 840 (N.D. Ind. 1999); *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978).

³⁸³ *Kerik*, 356 F.3d at 209.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 201–02.

³⁸⁶ *State v. Berrill*, 474 S.E.2d 508, 516 (W. Va. 1996).

factually specific (i.e., not all mask wearing is threatening). In using security concerns to cabin off the *NAACP* argument to mask wearers, *Kerik* took the *a priori* position that mask wearing, in all instances, falls outside the ambit of the First Amendment. In this regard, the Second Circuit followed Wayne Allen who, writing in the aftermath of *Miller*, argued that because masks “enable criminals to commit terroristic, violent, and deadly acts,” legislatures were justified, “based on historical evidence,” in exempting all mask wearers—Klan or not—from the First Amendment protections of speech and assembly.³⁸⁷

The Second Circuit’s history lesson, however, provides some insight into *Kerik*’s motives. As noted in Part II,³⁸⁸ *Kerik* relied on Reeve Huston’s book *Land and Freedom*, which offers a generally sympathetic account of the anti-renter movement (as well as of the masked “Indians”), to paint a picture of threat. From the Second Circuit’s accounting, “armed insurrections” are thwarted by the mask ban,³⁸⁹ as are the “intimidation” and “tarring and feathering” that resulted in three deaths.³⁹⁰ To be sure, a similar lesson was offered before by a dissenting Justice in *Archibald*,³⁹¹ which described the Renters’ War as involving “insurrection” and “murder” to make the broader point that a law enacted for these purposes should not extend to prosecuting a man dressed as a woman.³⁹² By contrast, *Kerik* used the 1845 “insurrections” to insulate the anti-mask law from all challenges, including those of men who dress as women (and vice versa).

On the whole, *Kerik*’s anti-mask stridency is hard to understand. Let me suggest two possibilities to untangling its intricacies. First, one possible key to unravelling this mystery reveals itself in the post-9/11 context. In the aftermath of the 2001 attacks on the Twin Towers, tensions were running high, and security concerns were paramount. One sees this with cases interpreting New York’s incitement to riot law, which punishes urging a group of ten or more

³⁸⁷ HUSTON, *supra* note 106; *see supra* Section II.A.

³⁸⁸ *See supra* Section II.A.

³⁸⁹ *Kerik*, 356 F.3d at 203.

³⁹⁰ *Id.* at 204.

³⁹¹ *People v. Archibald*, 296 N.Y.S.2d 834, 837 (N.Y. App. Div. 1968) (Markowitz, J., dissenting).

³⁹² *Id.*

people to “engage in tumultuous or violent conduct of a kind likely to create public alarm.”³⁹³ Before 9/11, New York courts took a fact-specific and sometimes stingy approach to riot incitement cases.

For example, in the 1987 case *People v. Mighty*,³⁹⁴ the city court of Rochester threw out charges against organizers of a house party broken up by the police even though the host asked his guests to remain in place and “treated the officers to a barrage of abusive language, name calling and accusations of racism.”³⁹⁵ The court exerted leniency because the host had not urged his guests “to carry the message of defiance into the streets.”³⁹⁶ On the other hand, in 1994 case *People v. Tolia*,³⁹⁷ the Appellate Division of New York upheld charges of inciting a riot against organizers of a concert in Tompkins Square Park after police tried to enforce the terms of the group’s permit, which forbade the use of amplifiers after 9:00 PM.³⁹⁸ The court upheld the charges, noting that at the moment of the arrests, the “highly agitated” crowd had already thrown a bottle at the police and was surging forward.³⁹⁹ Despite this, concert organizers continued to call on the crowd to “resist.”⁴⁰⁰ Taken together, *Mighty* and *Tolia* show that courts analyze charges of riot incitement in a fact-specific manner,⁴⁰¹ the way one would hope a court would analyze violations of mask bans.

People v. Upshaw,⁴⁰² decided in 2002, was rather different. *Upshaw* involved a group of five speakers who, standing in Times Square shortly after 9/11, told the crowd that it was “good that the World Trade Center was bombed,” that “more cops and firemen should have died” and that “more bombs should have been dropped

³⁹³ N.Y. PENAL LAW, § 240.08 (2019). Because the incitement law is read in light of *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), the state must also show that the defendant intended to create a “clear and present danger” of public alarm. *People v. Tolia*, 631 N.Y.S.2d 632, 636 (N.Y. App. Div. 1994).

³⁹⁴ 535 N.Y.S.2d 944 (Cty. Ct. Rochester 1987).

³⁹⁵ *Id.* at 945.

³⁹⁶ *Id.* at 946.

³⁹⁷ *Tolia*, 631 N.Y.S.2d at 632.

³⁹⁸ *Id.* at 635–37.

³⁹⁹ *Id.* at 636.

⁴⁰⁰ *Id.* at 633–35.

⁴⁰¹ See *supra* notes 395–401 and accompanying text.

⁴⁰² 741 N.Y.S. 2d 664 (N.Y. Crim. Ct. 2002).

and more people should have died.”⁴⁰³ They warned the crowd of approximately fifty people, “We’ve got something for your asses.”⁴⁰⁴ While the speakers occasionally approached crowd members and yelled in their faces, and arguments ensued between speakers and crowd members,⁴⁰⁵ there was no violence or calls upon the crowd to resist police orders once law enforcement intervened—even though the speakers themselves did not obey police requests to stop.⁴⁰⁶

Upholding the charges, the court noted that the speeches came “only days after one of the greatest catastrophes this nation has suffered,” a time when “many New Yorkers were still grieving for the loss of loved ones”⁴⁰⁷ and “all Americans[] held their collective breath at what, at the time, appeared to be the likelihood, if not the inevitability, of additional terrorist attacks.”⁴⁰⁸ Under these circumstances, the statements were more than simply “a vile and morally reprehensible diatribe[;]” they were an attempt to incite the crowd, especially since they were made at “point blank range.”⁴⁰⁹ In reaching this conclusion, the court noted that “[t]he talismanic phrase ‘freedom of speech’ does not cloak all utterances in legality.”⁴¹⁰

Was something similar going on in *Kerik*? While the Second Circuit did not mention the attack on the World Trade Center, it used similar language to that of *Upshaw* in arguing that, because of “the state’s interest in safety,” the First Amendment does not “guarantee ideal conditions” for expression.⁴¹¹ Later, when describing why the 1845 law was facially valid,⁴¹² the *Kerik* opinion expressed that it was not the court’s place “to second-guess the New York

⁴⁰³ *Id.* at 667.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 668.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004).

⁴¹² The Second Circuit was explaining why the exception for masks worn for entertainment purposes did not invalidate the statute. *Id.* at 210.

legislature's determination during the Anti-Rent era that mask wearing by groups poses a threat to the peace, undermining the efforts of law enforcement officers to identify wrongdoers and thus protect the public."⁴¹³ Reading *Kerik* today, almost twenty years after 9/11, perhaps the court was projecting its understanding of trauma from the terror attacks and the accompanying heightened security concerns onto an earlier time.⁴¹⁴

Second, *Kerik* may have been influenced by developments in United States Supreme Court case law involving cross burning. In the 1992 *R.A.V. v. St. Paul* case,⁴¹⁵ the Court held that an ordinance prohibiting the "place[ment] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional because it violated the First Amendment prohibition on content discrimination.⁴¹⁶ At the time, *R.A.V.* was seen as proof of American free speech "absolutism"—freedom of speech provided even to the benefit of the Ku Klux Klan.⁴¹⁷ Some commentators welcomed this change; others did not.⁴¹⁸ Either way, for a decade there was serious doubt as to whether the state could punish cross burning at all.⁴¹⁹

⁴¹³ *Id.*

⁴¹⁴ The 9/11 context helps explain the length of the *Kerik* court's discussion of the Renters' War as well as how the court used Huston's largely sympathetic account of the masked tenant farmers of the Hudson Valley to present a picture of an "armed insurrection." *Kerik*, 356 F.3d at 203–05; see also HUSTON, *supra* note 106, at 217 (describing how the anti-rent movement ushered in a "new, triumphant ideology of 'free labor'").

⁴¹⁵ 505 U.S. 377 (1992).

⁴¹⁶ *Id.* at 380, 391 (quoting *St. Paul, Minnesota, Bias-Motivated Crime Ordinance*).

⁴¹⁷ See Kahn, *Cross-Burning*, *supra* note 70, at 164, 171.

⁴¹⁸ For instance, Samuel Walker viewed *R.A.V.* as a triumph for civil liberties. See WALKER, *supra* note 2, at 158, while Owen Fiss thought that the Court overlooked the reality that sometimes courts had to "curtail speech" to allow "the less powerful to be heard." OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 111 (1996).

⁴¹⁹ Neither the supporters nor the critics of *R.A.V.* noted the partial nature of the ruling. It struck down *St. Paul's* cross burning statute on content discrimination grounds and left open the possibility of a content neutral law that

This changed in 2003 with *Virginia v. Black*, wherein the Court allowed states to prosecute cross burning when done with an intent to intimidate.⁴²⁰ In addition to reversing the impression created by *R.A.V.* that the First Amendment left states powerless to combat the Klan, the question of whether cross burning by its very nature intimidates others led to an extended colloquy between Justices O'Connor and Thomas over the meaning of cross burning in American history.⁴²¹ While Justice O'Connor, in the interests of justifying her "intent to intimidate" standard, provided instances of cross burning done without an apparent intimidatory intent (such as a cross burned at a 1939 wedding between a Nazi party member and a Klansman),⁴²² Justice Thomas argued that cross-burning has "almost invariably meant lawlessness and understandably instills in its victims well-founded fear of physical violence."⁴²³

The shift from *R.A.V.* to *Virginia* was quite dramatic. In the span of eleven years, the Court went from questioning whether the state could punish cross burning in any capacity⁴²⁴ to whether the state could punish all cross burning—even when done for "innocent" reasons (although Justice Thomas would dispute this characterization).⁴²⁵ Is it possible this shift, and the excitement it

might pass constitutional muster. See Kahn, *Cross-Burning*, *supra* note 70, at 172–73. That this conversation could take place without consideration of *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), in which the Georgia Supreme Court upheld a content neutral mask ban enacted with the motive of opposing the Klan, shows the extent of the disconnect between debate over hate speech in the 1990s and the increasing protection for mask bans taking place at the same time.

⁴²⁰ *Virginia v. Black*, 538 U.S. 347, 363 (2004).

⁴²¹ Justice O'Connor expressed her views as the author of the majority opinion, *id.* at 347–68, while Justice Thomas expressed his views in dissent, *id.* at 388–401 (Thomas, J., dissenting). For more, see Kahn, *Cross-Burning*, *supra* note 70, at 177–81; 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, 75–90 (Austin Sarat ed. 2006).

⁴²² *Black*, 538 U.S. at 356–57.

⁴²³ *Id.* at 391 (Thomas, J., dissenting). In reaching the conclusion that cross burning is not expressive, Justice Thomas argued that "[i]t strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch a segregationist message." *Id.* at 394.

⁴²⁴ See *R.A.V. v. St. Paul*, 505 U.S. 377, 379–80 (1992).

⁴²⁵ *Black*, 538 U.S. at 398–400 (Thomas, J., dissenting).

generated, accounts in part for the hard line on mask laws taken by the Second Circuit in *Kerik*?

There are some reasons for thinking this might be the case. First, the Second Circuit opinion in *Kerik* offered its own brief history of the Klan—one that relied heavily on *Virginia*.⁴²⁶ The Second Circuit noted that “[m]ask wearing was part of the Klan’s activities from the start”⁴²⁷ and described the passage of the Ku Klux Klan acts and the deployment of troops (including the Seventh Cavalry of Little Big Horn fame)⁴²⁸ to combat the Klan.⁴²⁹ Turning to the Second Klan, the court recounted the murder of Leo Frank by a lynch mob in 1915 and the political successes of the Klan in the 1920s, including in Indiana where the governor and both senators were Klansmen.⁴³⁰ On the other hand, *Kerik* had less to say about more recent incarnations of the Klan. The Second Circuit noted that the Klan “revived after the Second World War” but remained splintered after 1949.⁴³¹ Aside from the one reference quoted earlier in this paragraph, *Kerik*’s Klan-footnote did not mention mask wearing at all.⁴³²

Second, *Kerik*’s discussion of masks bears some affinities with Justice Thomas’s dissent in *Virginia*.⁴³³ Like the act of intimidatory cross burning, which Thomas distinguished from “racist expression,”⁴³⁴ the Ku Klux Klan mask, so the Second Circuit argued, had no expressive component apart from the robe and

⁴²⁶ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 200 n.2 (2d Cir. 2004).

⁴²⁷ *Id.*

⁴²⁸ The Seventh Cavalry played an important role in the Indian wars in the American West during the second half of the nineteenth century. See PETER COZZENS, *THE EARTH IS WEEPING: THE EPIC STORY OF THE INDIAN WARS FOR THE AMERICAN WEST* 243–68, 446–58 (2016) (describing defeat of the Seventh Cavalry at the 1876 Battle of Little Big Horn and its involvement in the 1890 massacre at Wounded Knee). The focus on the Seventh Cavalry’s role in enforcing Reconstruction is an interesting choice for a court fixated on the use of the 1845 mask law against anti-renter “Indians.”

⁴²⁹ *Kerik*, 356 F.3d at 200 n.2.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 200 n.2 (only mentioning mask wearing twice in a three-paragraph long footnote about the Klan).

⁴³³ *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting).

⁴³⁴ *Id.* at 394.

hood.⁴³⁵ But while Justice Thomas was able to support his interpretation with a series of examples of Ku Klux Klan cross burnings that intimidated victims,⁴³⁶ the *Kerik* court contented itself with a generic statement that the Klan wore masks.⁴³⁷ Instead of analyzing the Klan's actual use of masks, the Second Circuit turned to the Renters' War for its historical account of threatening mask wearing.⁴³⁸

In the end, the Second Circuit had little choice. While cross burning laws clearly demarcate Ku Klux Klan activity (even if all cross burnings are not intended to intimidate), mask bans by their very nature encompass a wide range of non-Klan members in their grasp. The focus on the Renters' War at least had the advantage of putting the justification of New York's mask ban on a broader footing. At the same time, however, the doctrinal solution arrived at in *Kerik*—that *NAACP* never protects masks and that a mask does not carry an independent meaning beyond that of an accompanying costume⁴³⁹—fits poorly for the many people who disguise their identities for “innocent purposes” such as peaceful protest, following the dictates of religion, dressing as another gender, or entertaining neighborhood children.⁴⁴⁰

In the process, mask law doctrine has travelled a long way from its origins in *Aryan*, *Ghafari* and *Robinson*.⁴⁴¹ Where once First Amendment doctrine about masks was hard to distinguish from other forms of speech, by 2004 a large abyss had opened up. One sees the extent of this gap in *Snyder v. Phelps*, where Westboro Baptist Church founder and his family members picketed a military serviceman's funeral, displaying homophobic, anti-Catholic and

⁴³⁵ *Kerik*, 356 F.3d at 206.

⁴³⁶ For instance, Justice Thomas describes a woman terrified months later after a cross was burned on her lawn. *Black*, 538 U.S. at 390 (Thomas, J., dissenting).

⁴³⁷ *Kerik*, 356 F.3d at 200 n.2.

⁴³⁸ *Id.* at 203–05.

⁴³⁹ *Id.* at 206.

⁴⁴⁰ See *Daniels v. State*, 448 S.E.2d 185, 189 (Ga. 1994) (dismissing guilty verdict against a man who wore a mask to entertain neighborhood children).

⁴⁴¹ See *Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978); *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813 (Cal. Ct. App. 1978); *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980).

anti-military messages.⁴⁴² The Court upheld the Fourth's Circuit decision that the protesters' speech was protected under the First Amendment.⁴⁴³ Acknowledging that the statements at issue in *Snyder* have the potential to cause great pain,⁴⁴⁴ Justice Roberts, writing for eight members of the Court, explained that "we cannot react to that pain by punishing the speaker."⁴⁴⁵ Once a speaker dons a mask, however, the ability of a state to punish grows immeasurably, even in many routine, harmless instances, and even when there is no "pain" at all.

IV. MASK BANS FOR EVERYONE?

In 2004, one could perhaps be forgiven for wondering whether the decision in *Church of the American Knights of the Ku Klux Klan v. Kerik* was significant. While there were some troubling factual situations, like the mask-wearing entertainer of children in *Daniels v. State*,⁴⁴⁶ most cases have involved the Klan,⁴⁴⁷ anarchists⁴⁴⁸ or people like the mascot opponent in *State v. Berrill*,⁴⁴⁹ all of whom might be viewed as dangerous or threatening in some way. Moreover, outcomes like that in *Daniels* can be reached by applying routine criminal law principles, such as by requiring a criminal intent standard of intimidation⁴⁵⁰ rather than by relying on First Amendment claims of anonymous or symbolic speech. So even if *Kerik* were wrongly decided,⁴⁵¹ the concern about state punishment of innocent mask wearing would not seem pressing.

Today, nearly fifteen years later, things have changed. Section IV.A discusses the growth of surveillance technology and how modern circumstances are such that wearing a mask (or other

⁴⁴² 562 U.S. 443, 448 (2011).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 460–61.

⁴⁴⁵ *Id.* at 461.

⁴⁴⁶ 448 S.E.2d 185 (Ga. 1994).

⁴⁴⁷ *See, e.g., Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *State v. Miller*, 398 S.E.2d 547 (Ga. 1990).

⁴⁴⁸ *People v. Aboaf*, 721 N.Y.S.2d 725 (N.Y. Crim. Ct. 2001).

⁴⁴⁹ *State v. Berrill*, 474 S.E.2d 508, 510 (W. Va. 1996).

⁴⁵⁰ *Daniels*, 448 S.E.2d at 189.

⁴⁵¹ *See supra* Section III.C.

disguise) has become a rational response to the conditions of the digital age. It also discusses another noteworthy development of our time: an increase in the use of mask bans in non-Klan contexts. Taken together, these parallel developments suggest the need for a vibrant First Amendment approach to mask wearing.

Unfortunately, the one major case decided since *Kerik* was not encouraging for the protections of mask wearers. In 2018, the Eleventh Circuit in *Gates v. Khokhar* granted qualified immunity to a police officer to arrest a man for wearing a mask during a peaceful demonstration.⁴⁵² The court in *Gates* chipped away at Georgia's mask doctrine when it concluded that *State v. Miller* had not, despite all appearances, limited Georgia's mask ban to situations where the mask wearer intends to intimidate, or acts with reckless disregard of intimidation.⁴⁵³ In so concluding, *Gates* eroded one of the few remaining protections of mask wearers: the intent standards of "weak" mask laws.⁴⁵⁴ It would be wrong to end this Article without hope. And, indeed, there are grounds for hope. Dissenting in *Gates*, Judge Kathleen A. Williams not only offered a persuasive counter to the *Gates* majority,⁴⁵⁵ but she also offered a pitch-perfect rebuttal of the current trend of mask law doctrine by rejecting the embrace of fear and symbolic politics that has characterized our national conversation on mask bans over the past several decades.

A. Masks, Cameras and Antifa

As noted in the Introduction, mask bans predate the smartphone.⁴⁵⁶ When 200,000 people gathered in Washington D.C. to hear Martin Luther King Jr.'s "I have a dream" speech in 1963, they did not worry about smartphone cameras;⁴⁵⁷ the same was true

⁴⁵² *Gates v. Khokhar*, 884 F.3d 1290, 1294 (11th Cir. 2018).

⁴⁵³ *Id.* at 1301–02.

⁴⁵⁴ See Swertfeger, *supra* note 58, at 188 (distinguishing between strong and weak mask bans based on the presence of an intent requirement).

⁴⁵⁵ *Gates*, 884 F.3d at 1305 (Williams, J., dissenting).

⁴⁵⁶ See *supra* Section I.D.

⁴⁵⁷ For an overview of the 1963 March on Washington, see King Encyclopedia, *March on Washington for Jobs and Freedom*, STAN. U. (Aug. 28, 1963), <https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom>.

of the million who marched in the same place in 1969 calling for a “moratorium” against the War in Vietnam.⁴⁵⁸ Today, things are different. While some mask bans target only mask wearing (as opposed to other protest activity),⁴⁵⁹ all people risk having their lives taped. Films will be seen not only by fellow marchers but, if the taped subjects are unlucky, by millions of people. When this occurs, the consequences can be devastating. People might be fired from their jobs⁴⁶⁰ or receive harassing messages on social media⁴⁶¹—precisely the kind of harassment the Supreme Court had in mind when it held in *NAACP v. Alabama* that the First Amendment prohibits compelled disclosure.⁴⁶²

One might counter that technology brings transparency, something mask wearing inhibits. Perhaps, for policy reasons, we are better off knowing the identities of all hidden Communists, pro-

⁴⁵⁸ On October 15, 1969, 250,000 people marched on Washington D.C. to call for a moratorium to the Vietnam War. See *This Day in History – 1969 Millions March in US Vietnam Moratorium*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/15/newsid_2533000/2533131.stm (last visited Oct. 26, 2019).

⁴⁵⁹ In January 2019, a teenager from a Catholic School in Covington, Kentucky was in Washington D.C. to protest *Roe v. Wade*. A video that appeared to show him confronting a Native American went viral and led to death threats. Nick Visser, *New Video Complicates Uproar Over Incident Between Student and Native American Man*, HUFFINGTON POST (Jan. 21, 2019), https://www.huffingtonpost.com/entry/native-american-make-america-great-again-student_us_5c455270e4b0bfa693c4d1e1. After the 2017 protests in Charlottesville, Virginia, right-wing participants were identified by photos and targeted. See, e.g., Judkis, *supra* note 80; Richard Perez-Pena, *University of Missouri Fires Melissa Click, Who Tried to Block Journalist at Protest*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/us/university-of-missouri-fires-melissa-click-who-tried-to-block-journalist-at-protest.html>.

⁴⁶⁰ For instance, the tiki marcher was fired from his job at a hot dog stand, as was the college professor. See Judkis, *supra* note 80; Perez-Pena, *supra* note 459.

⁴⁶¹ This is why the safari sponsoring the couple caught kissing after killing a lion had to disable its Facebook page. See O’Kane, *supra* note 81.

⁴⁶² *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958) (noting how disclosure of “the identity of rank-and-file members exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”). Yet, as we have seen, *Kerik* distinguished disclosing names from exposing faces. *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004).

Lifers, Trump supporters and politically correct social justice warriors in our lives. But not all people react to learning about the politics of their barista, hairdresser, neighbor, colleague, school teacher or cousin in the same way.⁴⁶³ It is for this very reason that advice columnists counsel readers not to discuss religion or politics at social gatherings.⁴⁶⁴ While some argue that masks stand in the way of authenticity,⁴⁶⁵ this discussion relates largely to metaphorical masks (i.e., personas);⁴⁶⁶ moreover, even at a metaphorical level, masks allow the wearer to avoid feelings of shame that might otherwise prevent them from being their authentic selves.⁴⁶⁷

Another issue necessitating a stronger mask doctrine, however, concerns the growth of technology and its increasing invasiveness. It is one thing to worry that your picture at the “Save the Whales” rally will appear on your friend, co-worker or employer’s Facebook feed; it is quite another for your publicly-available images to be used to draw conclusions about your character and your propensity to commit criminal acts, as some proponents of facial recognition

⁴⁶³ At least this seems to be the case when it comes to Thanksgiving meals. See Tom Jacobs, *Political Polarization Shortened Thanksgiving Dinners*, PAC. STANDARD (May 31, 2018), <https://psmag.com/news/bickering-on-thanksgiving-is-fowl-play> (describing how in 2017 family members with different political preferences for president spent thirty to fifty minutes fewer together than the average 4.3 hours spent during Thanksgiving dinner).

⁴⁶⁴ Ruth Umoh, *These 8 Simple Phrases Can Help You Avoid Awkward Political Conversations at Work*, CNBC: MAKE IT (Nov. 7 2018, 11:47 AM), <https://www.cnbc.com/2018/11/07/8-phrases-that-help-you-avoid-awkward-political-conversations-at-work.html>.

⁴⁶⁵ See Tina Williamson, *The Five Masks We Wear and Why We Should Take Them Off*, HUFFPOST (July 13, 2016, 5:46 PM), https://www.huffpost.com/entry/5-masks-we-wear-and-why-w_b_7786922.

⁴⁶⁶ For instance, among the five masks Williamson lists are the June Cleaver positive persona and the Arnold Schwarzenegger “over-contrived strength” persona. See *id.*

⁴⁶⁷ See John Steiner, *Seeing and Being Seen: Narcissistic Pride and Narcissistic Humiliation*, 87 INT’L J. PSYCHOANALYSIS 939, 939–42 (2006); see also Rosie Leizrowice, *Maskenfreiheit: The Freedom That Comes with Wearing a Mask*, ROSIE LEIZROWICE BLOG (Apr. 18, 2018), <https://www.rosieleizrowice.com/blog/masks> (arguing that masks “surface parts of the personality [one] might otherwise hide,” but also noting that mask wearing can be “dehumanizing” and making the interesting connection between road rage and the relative anonymity one has while driving a car).

technology advocate.⁴⁶⁸ In this atmosphere, it is hard to disagree with Scott Skinner-Thompson that privacy-enhancing clothes, such as hoodies and masks, are “a form of expressive resistance.”⁴⁶⁹ Indeed, Skinner-Thompson makes the point that masks appear threatening to the state precisely because they prevent it from engaging in surveillance,⁴⁷⁰ especially surveillance of African Americans, who “are disproportionately subjected to surveillance and structural oppression.”⁴⁷¹ While the concerns African Americans had about being watched and followed were present long before 2004 when *Kerik* was decided,⁴⁷² the growth of surveillance technology makes these concerns much more pressing.

At the same time that mask wearing has become more reasonable, mask bans have crossed into the mainstream. Once primarily an anti-Klan measure, today’s mask bans are increasingly used against people of color⁴⁷³ and groups like Antifa, which have, in effect, become the twenty-first century target of mask bans, replacing the Klan. For example, in August 2017, Arizona state representative Jay Lawrence announced on Facebook that he was drafting a bill that would punish mask wearing during political protests.⁴⁷⁴ He came to this stance after a rally against a visit by President Trump to Phoenix was met by masked protesters.⁴⁷⁵ In justifying his proposal, which eventually became law in a greatly reduced form, Lawrence compared the protesters to the Ku Klux

⁴⁶⁸ See Chinoy, *supra* note 82 (describing how Chinese researchers in a “much-contested” article from 2016 claimed to be able to distinguish “criminal” portraits from “non-criminal ones”). While these efforts are full of “fallacies” and harken back to “Nazi ‘race science,’” *id.*, this might make little difference to someone branded a potential criminal.

⁴⁶⁹ Skinner-Thompson, *supra* note 85, at 1701.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 1700–01 (discussing the killing of Trayvon Martin who was wearing a hoodie the day he was followed, shot and killed by George Zimmerman).

⁴⁷² In this regard, consider the lyrics of En Vogue’s 1992 song “Free Your Mind”—“I can’t look without being watched, no / you rang my buy before I made up my mind.” *Free Your Mind Lyrics*, GENIUS, <https://genius.com/En-vogue-free-your-mind-lyrics> (last visited Oct. 26, 2019).

⁴⁷³ See Skinner-Thompson, *supra* note 85, at 1701.

⁴⁷⁴ Giles, *supra* note 14.

⁴⁷⁵ *Id.*

Klan, adding in a nod of reassurance: “Now, there are no hangings of people, yet.”⁴⁷⁶ To take another example, the language of H.R. 6045, the “Unmasking Antifa Act of 2018” which provides a fifteen-year felony sentence for mask wearing, tracks the language of the 1870 Enforcement Act and its mask ban provision.⁴⁷⁷

While there are mask bans that do not directly target other activity,⁴⁷⁸ the counter-Antifa mask bans raise a broader concern in a society still not completely comfortable with the legacy of white supremacy⁴⁷⁹ which, as Justice Clarence Thomas noted acidly in *Virginia v. Black*, involved more than the extreme violence and intimidation of the Ku Klux Klan.⁴⁸⁰ Antifa plays an important symbolic role by establishing the Klan as a benchmark of racial injustice, while at the same time relativizing the history of the Klan by suggesting that there may be a force on the “Left” that is just as bad. For instance, within the space of eight days, Texas Senator Ted Cruz criticized the Republican governor of Tennessee for celebrating Confederate leader and Ku Klux Klan founder Nathan

⁴⁷⁶ *Id.* (internal quotes omitted). The final version of the bill made mask wearing an aggravating factor if a mask is worn during the commission of a crime. See Dustin Gardiner, *Proposal to Ban Masks at Protests Gutted*, ARIZ. CENT. (Mar. 8, 2018, 5:01 PM MT), <https://www.azcentral.com/story/news/politics/arizona/2018/03/08/lawmakers-gut-arizona-bill-ban-masks-political-protests-jay-lawrence-bob-worsley/407281002/>.

⁴⁷⁷ Compare Unmasking Antifa Act of 2018, H.R. 6054 (2018), with 18 U.S.C. § 241 (2018).

⁴⁷⁸ For example, in 2017 after a series of protests over pipelines, North Dakota passed a ban punishing mask wearing when done to intimidate or conceal one’s identity during or after the commission of a criminal offense. N.D. CENT. CODE ANN. § 12.1-31-15 (West 2019); see Nick Smith, *Bill Would Ban Protesters from Using Face Masks*, BISMARCK TRIB. (Jan. 17, 2017), https://bismarcktribune.com/news/local/govt-and-politics/bill-would-ban-protesters-from-using-face-masks/article_ca53a54e-3251-5c43-b213-91ce02d269dd.html (linking mask ban to pipeline protests).

⁴⁷⁹ See Nick J. Sciullo, *The Ghosts of White Supremacy: Trayvon Martin, Michael Brown, and the Specters of Black Criminality*, 117 W. VA. L. REV. 1397–99 (2015). See generally Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 2–4 (2018) (describing how post-racialism and colorblindness hide white supremacy).

⁴⁸⁰ *Virginia v. Black*, 538 U.S. 343, 393–94 (2003) (Thomas, J., dissenting) (describing the “litany” of segregationist measures adopted by Virginia).

Bedford Forrest⁴⁸¹ and introduced a resolution declaring Antifa a terrorist organization.⁴⁸²

This argument serves two purposes. On the one hand, it leaves President Trump and his red-cap-wearing supporters free to assert that they are not violent actors⁴⁸³ since they do not dress up in hoods and masks.⁴⁸⁴ At the same time, it creates an atmosphere wherein, instead of enacting and applying mask bans based on intimidation or violence, an entire organization is targeted. Part of the difficulty is that the word “Antifa” describes a political view—anti-fascist—rather than a specific group. As a result, a proposal to ban Antifa from wearing masks, in addition to posing the same content discrimination issues as would a law that specifically banned Klan masks,⁴⁸⁵ would face the definitional challenge of determining who counts as an Antifa member. Here, Senator Cruz’s Resolution is instructive.⁴⁸⁶ While the Preamble mentions “Rose City Antifa,”⁴⁸⁷ which was founded in the Portland, Oregon area and has been operational since 2007,⁴⁸⁸ the Resolution offers no definition of Antifa. While there may be good reasons to worry about some of the

⁴⁸¹ See Brett Kellman, *Ted Cruz Denounces Nathan Bedford Forrest Day: ‘This is WRONG.’*, TENNESSEAN (July 13, 2019), <https://www.tennessean.com/story/news/2019/07/13/ted-cruz-denounces-nathan-bedford-forrest-tennessee-governor-bill-lee-proclamation/1722704001/>; see *Ted Cruz Fast Facts*, CNN (Mar. 20, 2019, 12:21 PM ET), <https://www.cnn.com/2015/03/26/us/ted-cruz-fast-facts/index.html>.

⁴⁸² Mary Papenfuss, *As Far Right Violence Surges, Ted Cruz Seeks to Brand Antifa a Terrorist Organization*, HUFFPOST (July 21, 2019, 9:14 AM ET), https://www.huffpost.com/entry/antifa-right-wing-violence-ted-cruz-bill-cassidy-resolution_n_5d33c982e4b0419fd32de46b.

⁴⁸³ In July 2019, this issue reemerged after President Trump tweeted that four Democratic Congresswomen should go back to the countries they came from. See Jordan Fabian, *Trump: I Don’t Have a Racist Bone in My Body*, THE HILL (July 16, 2019), <https://thehill.com/homenews/administration/453253-trump-i-dont-have-a-racist-bone-in-my-body>.

⁴⁸⁴ One wonders what the debate over mask wearing in the United States would look like if the “Make America Great Again” message came in masks as well as hats.

⁴⁸⁵ See *State v. Miller*, 398 S.E.2d 547, 551 n.3 (Ga. 1990) (denying that the Georgia law was intended to unmask the Klan).

⁴⁸⁶ S. Res. 279, 116th Cong. (2019–2020).

⁴⁸⁷ *Id.* at 2.

⁴⁸⁸ *Id.*

tactics of masked protesters during conflicts between white supremacists and anti-fascist protesters, the easier solution—and one more consistent with the First Amendment—is to ban mask wearing based on conduct (like intimidation and violence), rather than to single out a specific group.⁴⁸⁹ On the other hand, this type of approach would give up the rhetorical point behind the Antifa laws which is to show, without much evidence, that the violence committed by Antifa is as bad, if not worse, than that committed by Klan and its supporters.⁴⁹⁰

When one combines the growth of social media and surveillance technology with the explosion of anti-mask legislation, it is clear that we no longer live in the pre-*Kerik* era, in which mask laws were present and increasingly constitutional, but rarely used. How have the courts responded to this new, more challenging era? As we shall see, the answer to this question is, at first glance, not overwhelmingly positive.

B. *A Funeral for Mask Wearing? Gates v. Khokhar*

In November 2014, immediately after the Ferguson, Missouri grand jury refused to bring charges against Officer Darren Wilson for the killing of Michael Brown, a large crowd gathered in downtown Atlanta to protest.⁴⁹¹ Among the crowd was plaintiff Austin Gates, who, when he arrived, “was given a ‘V for Vendetta’ mask by a [fellow] protester.”⁴⁹² At 9:15 PM, Officer Whitmire called on the protesters to remove their masks; the request, which

⁴⁸⁹ Let me be clear, I am still quite skeptical about mask bans. That said, there is a world of difference between a ban that narrowly focuses on violent behavior and a ban that targets all mask wearing. As Sarah Armstrong of the Oregon ACLU said of Portland’s proposed mask ban, “Behavior is the issue, not the mask.” Elinson, *supra* note 12.

⁴⁹⁰ These claims are hard to make given the evidence. According to a report by the Anti-Defamation League, while right-wing extremists “have murdered hundreds of people in this country over the last ten years alone To date, there have not been any Antifa-related murders.” Papenfuss, *supra* note 482 (quoting the Anti-Defamation League).

⁴⁹¹ *Gates v. Khokhar*, 884 F.3d 1290, 1295 (11th Cir. 2018). Because the defendants moved to dismiss, the court was obliged to treat the plaintiff’s allegations as true. *See id.* at 1305 n.1 (Williams, J., dissenting).

⁴⁹² *Id.* at 1295 (majority opinion).

was repeated several times over loudspeakers, was not related to any evidence of violence on the protesters' part.⁴⁹³ The plaintiff, who did not hear the request, kept his mask on and, as a result, was arrested by police in riot gear at 10:00 PM.⁴⁹⁴ The arrest report mentioned plaintiff's *V for Vendetta* mask—and the plaintiff's failure to take it off despite repeated requests—but gave no indication that the plaintiff behaved in a threatening way or that the mask itself was threatening.⁴⁹⁵

The plaintiff filed a Section 1983 claim objecting to his arrest and the police conduct during it.⁴⁹⁶ In response, the defendants moved to dismiss based on qualified immunity, which requires that the alleged violations of constitutional standards by defendants were “beyond debate” and “clearly established” at the time of the violation.⁴⁹⁷ The qualified immunity standard is a difficult one for plaintiffs to surmount,⁴⁹⁸ especially in an arrest context where all the officers need to establish is “arguable probable cause,” a fairly low standard.⁴⁹⁹ So, as with many mask law cases, the concern is less the result reached by the court (in this instance, the Eleventh Circuit granted the officers qualified immunity and dismissed the charges against them)⁵⁰⁰ than with the way the court reached that conclusion.

To begin with, the Eleventh Circuit, while relying on the “arguable probable cause” standard, also said that officers had actual probable cause to arrest the plaintiff.⁵⁰¹ While recognizing that the Georgia Supreme Court in *State v. Miller* and *Daniels v. State*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 1300.

⁴⁹⁵ *Id.* at 1309 (Williams, J., dissenting).

⁴⁹⁶ Plaintiff alleged that the police pulled him by his backpack, did not explain why he was being arrested and shoved him into a police car. *Id.* at 1295.

⁴⁹⁷ *Id.* at 1295–96.

⁴⁹⁸ See generally Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773 (2016) (noting that qualified immunity generally favors the government over private citizens).

⁴⁹⁹ *Gates*, 884 F.3d at 1298, 1300. For instance, the officer need not be able to prove each element of the crime, nor is it necessary for the officer to have specific knowledge of the arrestee's “subjective intent.” *Id.* at 1300.

⁵⁰⁰ *Id.* at 1305.

⁵⁰¹ *Id.* at 1298.

amended Georgia's mask law to require an intent element,⁵⁰² the *Gates* majority held that the intent standard was met because the protest took place at night and the plaintiff failed to remove his mask.⁵⁰³ Quoting *Miller*'s recognition that a "nameless, faceless figure strikes terror in the human heart,"⁵⁰⁴ the court held that the officers had the right to mistake the plaintiff's failure to hear the unmasking request as defiance and intimidation.⁵⁰⁵ Here, the *Gates* majority echoed Skinner-Thompson's argument that, to the state, concealing one's identity is, by its very nature, intimidating.⁵⁰⁶ By construing the intent language from *Miller* and *Daniels* in such a broad manner, *Gates* stripped mask wearers of one of their few remaining protections.

Moreover, *Gates* made two additional arguments that further limited the rights of mask wearers. First, the majority, while conceding that the point was not "outcome-determinative," took issue with the plaintiff's choice of mask.⁵⁰⁷ According to an article attached by the plaintiff to his complaint⁵⁰⁸ and quoted by the *Gates* majority, Guy Fawkes—the person whose face appeared on defendant's mask—was "[an] infamous insurgent who tried to blow up the British Parliament in 1605."⁵⁰⁹ The majority added that the mask's other symbolic association with the graphic novel and film *V for Vendetta* did not help the plaintiff, since the story "centers on a vigilante's efforts to destroy an authoritarian government in a dystopian future United Kingdom."⁵¹⁰ These negative connotations

⁵⁰² *Daniels v. State*, 448 S.E.2d 185, 189 (Ga. 1994); *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990).

⁵⁰³ *Gates*, 884 F.3d at 1301.

⁵⁰⁴ *Miller*, 398 S.E.2d at 550.

⁵⁰⁵ *Gates*, 884 F.3d at 1301–02.

⁵⁰⁶ Skinner-Thompson, *supra* note 85, at 1701–02.

⁵⁰⁷ *Gates*, 884 F.3d at 1302.

⁵⁰⁸ Monica Nickelsburg, *A Brief History of the Guy Fawkes Mask*, THE WEEK (July 3, 2013), <https://theweek.com/articles/463151/brief-history-guy-fawkes-mask>; see *Gates*, 884 F.3d at 1302 (Williams, J., dissenting) (describing how the article came to the court's attention).

⁵⁰⁹ *Gates*, 884 F.3d at 1302 (quoting Nickelsburg, *supra* note 508).

⁵¹⁰ *Id.* at 1302 n.4 (quoting Nickelsburg, *supra* note 508).

carried by the mask allowed a reasonable officer to conclude that the plaintiff “intended to threaten and intimidate the police.”⁵¹¹

With this argument, *Gates* went further than *Miller*, which discussed the anti-Klan motivations of the Georgia legislature in enacting its mask law,⁵¹² and even *Kerik*, which used the Renters’ War of the 1840s to justify insulating New York’s mask ban from most free speech challenges.⁵¹³ The argument *Gates* relies on attaches to the *mask*, not the mask law. One wonders just what sorts of masks would not betray an intent “to threaten and intimidate the police.”⁵¹⁴ What about a Frankenstein mask—he was a pretty bad guy, wasn’t he? Or what about a Luke Skywalker mask—wouldn’t this be representative of “a vigilante’s efforts to destroy an authoritarian government in a dystopian future?”⁵¹⁵ Although the “not outcome-determinative” language⁵¹⁶ offers some reassurance, the approach *Gates* takes leaves a great deal of discretion in the hands of the police.

Second, *Gates* dismissed a sentence in *Miller* in which the Georgia Supreme Court, in defending the application of the mask ban against charges of content discrimination, argued that “[i]t would be absurd to interpret the statute to prevent non-threatening political mask-wearing, or to condone threatening mask-wearing conduct on a holiday.”⁵¹⁷ Instead of treating this language as shaping what types of mask wearing are (or are not) intimidating, *Gates* held that the “it would be absurd” passage from *Miller* did not establish a rule of the type that would put the officers on notice.⁵¹⁸

Once again, the concern is less with the outcome—as the majority notes, the “arguable probable cause” standard gives the

⁵¹¹ *Id.* at 1302.

⁵¹² *State v. Miller*, 398 S.E.2d 547, 550–51 (Ga. 1990).

⁵¹³ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203–05, 208–09 (2d Cir. 2004).

⁵¹⁴ *Gates*, 884 F.3d at 1302.

⁵¹⁵ *Id.* at 1302 n.4; see *Luke Skywalker*, STAR WARS, <https://www.starwars.com/databank/luke-skywalker> (last visited Oct. 26, 2019) (describing the character Luke Skywalker’s “battle with the Evil Empire”).

⁵¹⁶ *Gates*, 884 F.3d at 1302.

⁵¹⁷ *Gates*, 884 F.3d at 1303 n.5; *Miller*, 398 S.E.2d at 553.

⁵¹⁸ *Gates*, 884 F.3d at 1303 n.5.

police a great deal of leeway⁵¹⁹—as much as with the assumption that *Miller*'s statement that Georgia's mask ban allows for peaceful masked protests is not part of the case's holding.⁵²⁰ At a time when state and federal courts treat First Amendment speech and association claims of mask wearers with skepticism,⁵²¹ the statutory language of the mask bans themselves (as interpreted by state courts)⁵²² constitutes the mask wearers' last line of defense. Chipping away at this language only exacerbates the challenges we all face in an age of increased surveillance and mask bans.

C. *A Return to Skokie? The Gates Dissent*

So is there any hope at all? Hope may be naïve, or an illusion, but in times of troubles it is also a necessity.⁵²³ Fortunately, there are hopeful signs of a renewed concern about mask bans. For instance, ACLU chapters have been active in opposing and restricting mask bans.⁵²⁴ The efforts to ban Antifa ironically have helped in this process to the extent they have led those who support the goals of anti-racism to question the wisdom of using mask laws and other speech restrictions, even against groups like the Klan.⁵²⁵

⁵¹⁹ *Id.* at 1298.

⁵²⁰ *Id.* at 1303 n.5.

⁵²¹ See *infra* Part III.

⁵²² See, e.g., *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994) (using narrowed language to set aside verdict of mask wearer); *State v. Miller*, 398 S.E.2d 547, 674 (Ga. 1990) (adding narrowing language to the Georgia mask ban).

⁵²³ See Sciullo, *supra* note 479, at 1406 (arguing that “what legal scholars must do is engage in [a] politics of hope, because hope sustains a critical orientation to the world”).

⁵²⁴ See Elinson, *supra* note 12 (describing Sarah Armstrong's objections to Portland, Oregon's mask ban).

⁵²⁵ I count myself as one of these people. Some of my change in opinion comes from what I have just described. Another source has been my work over the past two years with scholars such as Nikolay Koposov and Uladzislau Belavusau who have written passionately about the dangers posed by memory laws in Eastern Europe. See, e.g., NIKOLAY KOPOSOV, *MEMORY LAW, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA* (2017); LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017).

At the same time, there is hope of a more practical sort, stemming from Judge Kathleen Williams who offered a vigorous, helpful dissent in *Gates*.⁵²⁶ In this regard, it is worth remembering that not all dissents are alike. While Presiding Justice Smith was likely well intentioned when he appeared to react with glee that the high school students he spoke with about *Brandenburg v. Ohio* and *Collin v. Smith* understood that Nazis had the right to freedom of speech,⁵²⁷ his dissent probably did not achieve its desired end. While the future is uncertain, the prospects for the dissent of Judge Williams in *Gates* appear far more promising.⁵²⁸

There are several reasons for this. First, the dissent is clear, well organized and persuasive. Judge Williams repeatedly highlighted the peaceful nature of the protest⁵²⁹ and treated the language from *Miller* about it being “absurd” to ban masks at peaceful protests⁵³⁰ as an essential part of that court’s holding, one a reasonable police officer would definitely know about.⁵³¹ She also pointed out that the arresting officer did not explicitly describe the plaintiff’s behavior or his mask as intimidating;⁵³² that protesting at night did not necessarily impose a greater threat;⁵³³ and that inferring intent from the failure to obey a police order to remove one’s mask was not intimidating because at the time the mask removal request was made, the crowd was peaceful and obedient, which meant that the officers had no reason to make the request in the first place.⁵³⁴

In addition, Judge Williams did a great job rebutting the majority’s efforts to rely on the history of Guy Fawkes to justify an intent to intimidate.⁵³⁵ To that end, she quoted from *Miller* with regard to the history of the Klan, a history that included “numerous

⁵²⁶ *Gates v. Khokhar*, 884 F.3d 1290, 1305 (11th Cir. 2018) (Williams, J., dissenting).

⁵²⁷ *State v. Miller*, 398 S.E.2d 545, 557 n.13 (Ga. 1990) (Smith, P.J., dissenting).

⁵²⁸ *Gates*, 884 F.3d at 1305 (Williams, J., dissenting).

⁵²⁹ *Id.*

⁵³⁰ *Miller*, 398 S.E.2d at 553.

⁵³¹ *Gates*, 884 F.3d at 1306 (Williams, J., dissenting).

⁵³² *Id.* at 1307.

⁵³³ *Id.* at 1308.

⁵³⁴ *Id.* at 1309.

⁵³⁵ *Id.* at 1308 n.5.

beatings and lynchings,”⁵³⁶ before pointing out that “the admittedly peaceful protest” at issue in *Gates* did not “bear any resemblance to the Klan’s vast legacy of domestic terror, which the *Miller* court discussed at length in its opinion and found to be clearly articulated by the Klan mask, whether worn by one or many in daytime or at night.”⁵³⁷ With this language, Judge Williams began to roll back Georgia’s mask law to its narrow anti-Klan origins while implicitly critiquing those who sought to draw parallels between the Klan and groups like Antifa.⁵³⁸

But the most important—and hopefully lasting—contribution to mask law doctrine offered by Judge Williams’s dissent is the way she reincorporated masks into the First Amendment mainstream.⁵³⁹ This was most evident when she discussed the question of intimidation.⁵⁴⁰ This issue is difficult for proponents of mask wearers because, as Scott Skinner-Thompson points out, in an age of surveillance, the very act of putting on a mask can seem intrinsically intimidating to the state,⁵⁴¹ a position with which *Kerik* (the most recent mask law case) seemed to agree.⁵⁴² Judge Williams deftly maneuvered around these issues by comparing the intimidating nature of wearing a mask at night to *Edwards v. South Carolina*,⁵⁴³ in which the Supreme Court upheld the right of a crowd “engaging in ‘boisterous,’ ‘loud’ and ‘flamboyant’ conduct” to demonstrate on the South Carolina statehouse grounds.⁵⁴⁴

The doctrinal shift here is significant because it points to a way out of the box in which mask wearers find themselves. Most of the mask law cases uphold the mask bans, especially the more recent

⁵³⁶ *Id.* (quoting *State v. Miller*, 398 S.E.2d 545, 550 (Ga. 1990)).

⁵³⁷ *Id.* at 1308 n.5 (citing *Miller*, 398 S.E.2d at 550–51).

⁵³⁸ *See id.* at 1308–09.

⁵³⁹ *Id.* at 1306–07, 1309.

⁵⁴⁰ *Id.* at 1307 n.4.

⁵⁴¹ Skinner-Thompson, *supra* note 85, at 1701–02.

⁵⁴² *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004) (rejecting freedom of association claims because of security concerns posed by masks).

⁵⁴³ 372 U.S. 229 (1963).

⁵⁴⁴ *Gates*, 884 F.3d at 1307 n.4 (Williams, J., dissenting) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 233–35 (1963)).

ones such as *Miller*, *Berrill* and *Kerik*.⁵⁴⁵ While no legal doctrine is set in stone and most federal courts have yet to decide a mask case—suggesting there is some hope for doctrinal movement in the future—the cases that have been decided offer little for mask ban opponents to go on.⁵⁴⁶ By turning to the broader free speech universe—in this instance through *Edwards*⁵⁴⁷—the Williams dissent in *Gates* points the way toward reinvigorating mask law doctrine,⁵⁴⁸ especially when it comes to interpreting the mask laws themselves.

V. CONCLUSION: RESTORING THE FIRST AMENDMENT TO MASK WEARING

While there are grounds for hope, the road back to Skokie will be a long one. Over the past forty years, courts have moved steadily toward allowing more restrictions on mask wearing. In part, this reflects the nature of masks and mask laws in American history—and the stories courts tell about them. In the case of New York, a protest by rather sympathetic renters in the Hudson River Valley in the 1840s gave rise to a mask ban that is now presented as a necessary measure against murder and insurrection.⁵⁴⁹ The situation with the anti-Klan mask bans is even more challenging. While one can theoretically distinguish the security rationale behind New York's mask ban,⁵⁵⁰ the opinion in *State v. Miller*—and especially the *Miller* dissent—shows how hard it is to oppose an anti-Klan mask law without appearing to support the Klan.⁵⁵¹

⁵⁴⁵ See, e.g., *Kerik*, 356 F.3d at 205–09; *State v. Miller*, 398 S.E.2d 547, 671–76 (Ga. 1990); *State v. Berrill*, 474 S.E.2d 508, 514–16 (W. Va. 1996).

⁵⁴⁶ See, e.g., *Kerik*, 356 F.3d at 205–09 (rejecting symbolic speech and anonymity claims of mask wearers); *Berrill*, 478 S.E.2d at 514–16 (same); cf. *Gates*, 884 F.3d at 1300–02 (holding that a police officer had arguable probable cause to arrest a mask wearer at a peaceful protest).

⁵⁴⁷ *Edwards*, 372 U.S. at 229.

⁵⁴⁸ *Gates*, 884 F.3d at 1306–09 (Williams, J., dissenting).

⁵⁴⁹ *Kerik*, 356 F.3d at 203–05.

⁵⁵⁰ See *People v. Archibald*, 296 N.Y.S.2d 834, 837 (N.Y. App. Div. 1968) (Markowitz, J., dissenting) (noting that nothing in the history of the Renters' War suggested that cross-dressing was a problem posed by masks).

⁵⁵¹ See *infra* Section III.B.

Nor have doctrinal developments been encouraging. In the space of little more than a generation, mask law doctrine has gone from cases like *Aryan v. Mackey*⁵⁵² and *Robinson v. State*,⁵⁵³ which upheld objections to mask bans in short, relatively uncomplicated rulings, to the Second Circuit's holding in *Church of the American Knights of the Ku Klux Klan v. Kerik* which slammed the door on symbolic speech and freedom of association claims of mask wearers.⁵⁵⁴ Worse still, in an age of increasing surveillance—and a torrent of proposals to restrict mask wearing—the one recent case to take up mask bans, *Gates v. Khokhar*, followed in the footsteps of *Kerik* and indeed went further by suggesting that a police officer could find intent to intimidate by examining the history of a figure depicted on a mask.⁵⁵⁵ Reading *Kerik* and *Gates* together can place a mask wearer in a potential Catch-22.⁵⁵⁶ If the mask has no symbolic reference, a court is likely to find the mask “non-expressive” under *Kerik*, thus gutting any symbolic speech claim the wearer might have;⁵⁵⁷ but should the poor wearer choose the wrong historical or fictional character—Tarzan, Conan the Barbarian or Julius Caesar (after all, he conquered Gaul)—the mask might be judged intimidating under *Gates*.⁵⁵⁸ Perhaps we will be seeing a surge of masked Easter Bunnies in the future.

Despite this, I am hopeful. In part, it is a hope reminiscent of classical Marxism according to which each successive means of production holds the seeds of its own destruction.⁵⁵⁹ In a similar way, the rise of surveillance technology and those willing to use it, along with the explosion of mask laws, has created a situation in

⁵⁵² 462 F. Supp. 90 (N.D. Tex. 1978).

⁵⁵³ 393 So. 2d 1076, 1077 (Fla. 1980).

⁵⁵⁴ *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205–10 (2d Cir. 2004).

⁵⁵⁵ *Gates v. Khokhar*, 884 F.3d 1290, 1302 (11th Cir. 2018).

⁵⁵⁶ Compare *Gates*, 884 F.3d at 1302 (some expressive masks can be threatening), with *Kerik*, 356 F.3d at 205–08 (mask wearing is usually not expressive).

⁵⁵⁷ *Kerik*, 356 F.3d. at 205–08.

⁵⁵⁸ *Gates*, 884 F.3d at 1302.

⁵⁵⁹ See Karl Marx, *Preface to A Contribution to a Critique of Political Economy*, in ROBERT E. TUCKER, *THE MARX-ENGELS READER* 3, 3–7 (2d ed. 1977).

which those once content—perhaps too willingly—to ignore the doctrinal shift away from mask wearing as something only of concern to the Klan and its supporters, now know better.⁵⁶⁰ The ACLU (and others) have been active in opposing the recent spate of mask bans,⁵⁶¹ and Judge Williams, with her lucid, passionate dissent in *Gates*,⁵⁶² points the way forward on the long road to reintegrating mask wearers into the fabric of the First Amendment. For those willing to reimagine a First Amendment that protects masks, there is a world to be won.

⁵⁶⁰ One motive for writing this paper, and my larger project, which also addresses laws restricting other ways people conceal their appearance—such as bans in Europe on niqabs and burqas—is as a *mea culpa* for some of my earlier work on the subject. While I still appreciate why restricting hate speech (and masks) can be appealing in some situations, I am now more wary of how speech restrictions can be used against the groups they intended to protect—something they share with some restrictions of Islamic clothing.

⁵⁶¹ See Elinson, *supra* note 12 (describing opposition of the Oregon ACLU to Portland’s proposed mask ban).

⁵⁶² *Gates*, 884 F.3d at 1305 (Williams, J., dissenting).