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Issue
Brief

Model Legislation to Modernize Anti- KKK Masking Laws for Intimidating Protesters

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The Policy Problem

Just as Ku Klux Klan members used white hoods to conceal their identities and terrorize their targets, modern activists are using keffiyehs, Guy Fawkes masks, balaclavas, and other inherently intimidating face coverings. Indeed, face-masking is pervasive among participants in demonstrations that are growing in frequency and disruptiveness.

Most recently, the pro-Hamas “protests” that have proliferated across college campuses and city streets involve activists who cover their faces explicitly for the purpose of making it impossible to determine who is engaged in violence, intimidation, and property destruction. Just as masks emboldened KKK activity a century ago, they are a central feature in the 360% surge in antisemitic incidents since Hamas’s attack on Israel last year.¹ New York City experienced about 2,000 protests in the half-year following October 7—including incidents involving more than 10,000 participants illegally blocking bridges and major infrastructure.² Cities across the country seem to be struggling to maintain order and check the growing number of attacks associated with these events on Jewish-owned businesses and other institutions.

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There is an obvious and simple answer to protesters' growing aggressiveness, an answer that proved effective against their forebears in the KKK: denying intimidating and violent protesters the right to conceal their identities via face coverings. Hamas supporters, Antifa, Patriot Front, and others act boldly so long as they can remain anonymous. Stripped of this anonymity and the intimidating power of the keffiyeh and black bandanna, they will be far less likely to engage in criminal behavior.

Legal Background

Anti-masking laws are critical tools for maintaining public safety and accountability, which is why the U.S. has a long history of such laws. They originated at a time when the KKK, using the anonymity provided by masks, engaged in acts of violence and intimidation against blacks, Catholics, and other minority groups.³ The intention behind these laws was clear: to dismantle the Klan's ability to operate unseen and unpunished. States like Alabama, Florida, and Virginia, among others, implemented these laws specifically to counter the Klan's activities, to stem the tide of violence, and to maintain public order. Such regulations greatly contributed to reducing the Klan's influence and enhancing the ability of law enforcement to identify and prosecute perpetrators of hate crimes and public disorder.

That purpose is relevant today, when anonymity shields unlawful and disorderly behavior and enhances its power of intimidation. But the relevance of anti-masking laws extends beyond their original context. In an age of facial recognition technology and other modern surveillance tools, masks can still be used to evade legal accountability. By mandating visibility, anti-mask laws help ensure that individuals cannot hide behind anonymity to engage in criminal activities, terrorize, or otherwise disturb the peace. This is particularly important during public demonstrations, when the potential for violence can escalate quickly and when knowing the identity of those involved becomes crucial for law enforcement.

The constitutionality of these laws has been repeatedly upheld, affirming that the public's right to safety and the state's ability to enforce its laws can supersede individual rights to anonymity and anonymous expression in certain circumstances.⁴ As recently as 2004, the U.S. Court of Appeals for the Second Circuit upheld New York's anti-mask law.⁵ Notably, symbolic messages can be conveyed with clothing and costumes that do not cover the face, while content-based restrictions—like allowing a mask for a Halloween celebration or masquerade ball, but not for other purposes—are categorical, not viewpoint-based, and so pass constitutional muster.

Examples in State Law

Some long-standing laws that could be used to prosecute those who have participated in recent antisemitic mobs and other public disturbances include:

Alabama: Alabama Code [§ 13A-11-9](#) makes it illegal to wear a mask or hood in public places, with a few exceptions, such as for holiday costumes or occupational safety gear.

California: California Penal Code [§ 185](#) makes it illegal to wear a mask or disguise to evade police detection while committing a public offense.



Florida: Florida Statute § 876.12 prohibits wearing a mask or hood in public places and on public roads.

Georgia: Georgia Code § 16-11-38 makes it unlawful for any person to wear a mask in public places or on private property without the owner’s permission, unless for work safety, theatrical productions, or emergency protection.

Louisiana: Louisiana RS § 14:313 prohibits the wearing of masks in public with the intent to conceal one’s identity, except for religious purposes, safety in occupations, or traditional holiday costumes like Mardi Gras.

Michigan: MCL § 750.396 prohibits people from wearing a mask or any type of face covering that conceals their identity during the commission of a crime.

North Carolina: North Carolina General Statute § 14-12.8 bans wearing masks in public spaces, aimed at preventing individuals from concealing their identities.

Virginia: Virginia Code § 18.2-422 prohibits any person over 16 years old from wearing a mask with the intent to conceal his or her identity in public spaces or on private property without written permission from the property owner.

For an example of a recently repealed anti-mask law, see:

New York: New York Penal Law § 240.35(4) prohibited two or more people from congregating in public while wearing masks or disguises that obscure their identities. This two-century-old law was repealed during the Covid-19 pandemic.⁶

In sum, anti-masking laws are essential to preserving the First Amendment right to assemble, petition for redress of grievances, and otherwise express ourselves, while preventing intimidation and harassment and maintaining a society where individuals are accountable for their conduct. The model legislative language below aims to curb the activities of those who cloak their identities not to express their protected freedoms, but as a means to terrorize others.

Model Statutory Language

“No person shall wear a mask or any other facial obscurant or disguise with an intent to conceal the identity of the wearer while congregating in a public place with other people who are also masked or disguised—except that such conduct is not unlawful when it occurs in connection with a Halloween or masquerade party or similar celebration. Violation of this statute shall be punishable by not more than [15 days] imprisonment and a fine of not more than [\$10,000], in addition to any penalties arising from concurrent criminal acts and civil violations.”

Prosecutorial Guidance

Elements of this guidance, particularly points 1–3 below, could be included in the statute.

1. Definitions of Essential Terms

Mask or Any Other Facial Obscurant or Disguise: Includes any form of headgear, mask, or other articles worn to conceal the identity of the wearer.



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Facial Obscurant: Items such as paint, veils, scarves, or other coverings that obscure any part of the face to prevent recognition by human or enhanced and technological means.

Congregate: To be in the same place as others, whether stationary or moving (parading).

Intent to Conceal the Identity of the Wearer: Excludes those masking for health, occupational, religious, or weather reasons.

2. Legal Framework

Statute Summary: The law prohibits people from obscuring their faces in public spaces so as to prevent identification.

Relevant Offenses: This statute may intersect with laws regarding public safety, disorderly conduct, conspiracy, harassment, and specific misdemeanors or felonies committed concurrently.

3. Case Assessment Criteria

Evidence Requirements: Prosecutors should ensure evidence that:

Disguises or facial obscurants were used during the commission of the act.

There was no plausible or sincere reason to mask, other than to conceal one's identity or intimidate. For example, someone who wears a mask for health reasons probably should not be congregating in large groups of people—and members of large groups will not all have respiratory illnesses at the same time.

Public Interest Considerations:

Severity of the menacing or intimidating behavior of those masked

Impact on general community safety

Impact on particular victims or the larger victim community

4. Decision-Making Processes

Review and Approval: All cases under this statute should be reviewed by a senior prosecutor before charges are filed, to ensure compliance with legal and ethical standards.

Alternative Resolutions: Consider alternative resolutions, such as mediation or community service, when such resolutions align with the public interest.

5. Procedural Guidelines

Charging Decisions: Document the evidence supporting the use of a disguise and the intent to conceal one's identity.

Pretrial Preparations: Prepare comprehensive case files including witness statements, surveillance footage, and any confiscated disguises or images capturing disguises.

6. Victim and Witness Support

Safety and Privacy: Ensure the safety and privacy of victims and witnesses.



Support Services: Provide access to counseling and legal advice for victims, as needed.

7. Coordination with Other Agencies

Law-Enforcement Collaboration: Work closely with police and other governmental agencies (e.g., university disciplinary officers) to gather robust evidence, especially during the identification of disguised individuals.

Interagency Communication: Maintain regular communication with other relevant agencies to ensure coordinated and effective responses.

8. Special Considerations

High-Profile Cases: In cases attracting significant public or media attention, handle communications carefully to avoid prejudicing legal proceedings.

Minors: Apply special protocols when dealing with minors who are charged as minors.

9. Training and Resources

Regular Training: Provide ongoing training to prosecutors on the legal and practical aspects of prosecuting under this statute, including updates on relevant case law.

Resource Allocation: Ensure that adequate resources are available for complex cases involving extensive investigations or multiple defendants.

10. Monitoring and Evaluation

Case Review Meetings: Hold regular meetings to review ongoing cases and discuss any challenges or emerging trends with this type of prosecution.

Feedback Mechanisms: Implement mechanisms for receiving feedback from law enforcement, the judiciary, and the public to improve prosecutorial practices.

Endnotes

- ¹ “U.S. Antisemitic Incidents Skyrocketed 360% in Aftermath of Attack in Israel, According to Latest ADL Data,” Anti-Defamation League, Jan. 17, 2024.
- ² New York City Council, “Watch ‘FY25 Preliminary Budget Hearing,’ Hosted by the Committee on Public Safety,” Budget and Oversight Hearing, YouTube, Mar. 20, 2024.
- ³ See, e.g., Rob Kahn, “The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers,” *Journal of Law and Policy* 28, no. 1 (December 2019).
- ⁴ See, e.g., Stephen J. Simoni, “‘Who Goes There?’—Proposing a Model Anti-Mask Act,” *Fordham Law Review* 61, no. 1 (1992).
- ⁵ *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).
- ⁶ “Attorney General James Applauds Repeal of Law Criminalizing Group Mask Use in Public,” Office of the New York State Attorney General, press release, May 28, 2020.