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ARTICLE

MASKS, CULTURE WARS, AND PUBLIC HEALTH EXPERTISE: CONFESSIONS OF A MASK “EXPERT”

ROB KAHN*

The arrival of COVID-19 has created a sea of change in how we view masks. As the author of an encyclopedia entry and law review article on anti-mask laws, I know this well. Over the past three months, reporters have been asking me about masks, the reluctance of Americans to wear them, and the red versus blue culture wars. This paper outlines my experiences and thoughts. After briefly describing the *volte face* in attitudes towards masks, I take up the argument that, in the COVID-19 context, the mask is not a symbol but merely a tool to fight the virus. Then I look at masks and the culture wars, focusing particularly on the argument masking is less common in red states for political reasons. Finally, I look at how to create a culture of masking. Here, I look at how public health officials have, at times, undercut their position by (1) relying too heavily on law enforcement solutions to masking and (2) treating questions, such as whether to protest, as a medical issue rather than a political one. I conclude with a plea to treat mask wearers or abstainers as persons, rather than targets of law enforcement or subjects of medical study.

KEY WORDS: Masks, freedom, culture wars, public health expertise, coronavirus.

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I. INTRODUCTION

In 2009, I wrote an encyclopedia entry on mask bans in the United States.¹ Nine years later, I received a call from a reporter in Alabama about the use of that state's mask ban against an African American civil rights leader objecting to a police involved shooting.² In response, I wrote a law review article calling for courts to protect mask wearing the same way they protect other First Amendment activities.³ The following year, drawing on my previous work on hijab and burqa bans,⁴ I turned to Europe, where the leading human rights court justified face veil bans with the argument that showing one's face was a necessary part of "living together."⁵ With a colleague, Zuzana Menzlova, I began to examine Austria, which not only enacted a mask ban, but broadly enforced it.⁶

Then COVID-19 struck. Masks had made an appearance during the 1918–19 pandemic and remained a fixture in many East Asian societies.⁷ The COVID-19 crisis led to a resurgence—even in the United States where in early April the CDC issued guidance strongly recommending mask wearing.⁸ As the author of a decade old entry on mask wearing, I received a call from the *Washington Post* on my home phone.⁹ I spent forty minutes talking to the *Post* reporter about masks, their history during the Ku Klux Klan era, and their role as symbols. I also pointed out, in discussing symbols, that people in blue and red states might interpret the mask differently. I meant this as an example of one of the many symbols masks could represent.

1. See Robert A. Kahn, *Anti-Mask Laws*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1169/anti-mask-laws> (last visited Apr. 14, 2021).

2. 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> (quoting me).

3. Rob Kahn, *The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers*, 28 BROOK. J. L. & SOC. POL'Y 71 (2019); *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004).

4. See, e.g., Robert A. Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT'L L. 567 (2011) (discussing burqa bans); Robert A. Kahn, *The Headscarf as Threat: A Comparison of German and American Legal Discourses*, 40 VAND. J. TRANSNAT'L L. 417 (2007) (discussing restrictions on hijab and niqabs).

5. *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 293; Rob Kahn, *Mask Bans, the Klan and Hiding White Supremacy: Lessons from Belgium*, Loyola Constitutional Law Colloquium, Nov. 2019 (conference presentation).

6. See Philip Oltermann, *Austrian Full-Face Veil Ban Condemned as a Failure by Police*, GUARDIAN (Mar. 27, 2018), <https://www.theguardian.com/world/2018/mar/27/austrian-full-face-veil-ban-condemned-failure-police-integration-smog-masks-animal-costumes> (describing over-enforcement of Austria's face veil ban).

7. Mitsutoshi Horii, *Why Do the Japanese Wear Masks*, 14 ELEC. J. CONTEMP. JAPANESE STUD. (July 29, 2014), <https://www.japanesestudies.org.uk/ejcs/vol14/iss2/horii.html> (describing Japanese masking culture); Christos Lynteris, *Plague Masks: The Visual Emergence of Anti-Epidemic Personal Protection Equipment*, 37 MED. ANTHROPOLOGY 442 (2018) (tracing rise of masks in response to the 1910 Manchurian epidemic as a symbol of medical modernity).

8. *CDC Recommends Masks, U.S. Deaths Rise by More Than 1,000 in a Day*, NBC NEWS (Apr. 4, 2020, 12:40 AM CDT), <https://www.nbcnews.com/health/health-news/live-blog/2020-04-03-coronavirus-news-n1175641>.

9. Conversation with Marc Fisher, Senior Editor, Wash. Post (Apr. 15, 2020).

What appeared in the *Post* was the following: “For Trump’s supporters, declining to wear a mask is a visible way to demonstrate ‘that ‘I’m a Republican,’ or ‘I want businesses to start up again,’ or ‘I support the president.’”¹⁰ Overnight, I became an “expert” on why Americans mask or refuse to do so. The *Washington Post* article was widely reprinted,¹¹ I appeared on Texas Public Radio,¹² and eventually President Trump retweeted a link to an article in *The Federalist*¹³ discussing my *Washington Post* quote.¹⁴

This was exciting. As time went on, the scope of my expertise expanded. A reporter from AARP asked me about masks and the elderly;¹⁵ another reporter from the AAA asked about hotels and masking.¹⁶ Television and radio outlets in Minnesota and California asked me about pending legislation.¹⁷ This was more attention than my work on hate speech, Islamophobic dress codes, and Holocaust denial had ever received.¹⁸ The

10. Marc Fisher, Clarence Williams & Lori Rozsa, *Will Americans Wear Masks to Prevent Coronavirus Spread? Politics, History, Race and Crime Figure Into Tough Decision*, WASH. POST (Apr. 18, 2020), <https://www.msn.com/en-us/news/us/will-americans-wear-masks-to-prevent-coronavirus-spread-politics-history-race-and-crime-factor-into-tough-decision/ar-BB12QayS?li=BBnbfL> (I was quoted accurately. What I learned was that, in a 40-minute interview, it is hard to recall everything one said).

11. See, e.g., *Across America, Masks are the Latest Political, Cultural Divide*, INDIANAPOLIS BUS. J. (Apr. 20, 2020), <https://www.ibj.com/articles/across-america-masks-are-the-latest-political-cultural-divide> (reprinting *Washington Post* article); Ed Kilgore, *Are Masks Just for Liberals?*, N.Y.C. MAG. (Apr. 20, 2020), <https://nymag.com/intelligencer/2020/04/are-masks-just-for-liberals.html> (quoting me in the *Washington Post* article); Katie Shepard, *Masks Become a Flash Point for Protests and Fights as Businesses, Beaches and Parks Reopen*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/nation/2020/05/05/masks-protests-coronavirus/> (the *Washington Post* did a second article based on the interview).

12. Kim Johnson & Dallas Williams, *Texas’ Pandemic Response is Tangled Up in Culture Wars (and No One is Surprised)*, TEX. PUB. RADIO (May 12, 2020, 7:36 PM CDT), <https://www.tpr.org/show/the-source/2020-05-12/texas-pandemic-response-is-tangled-up-in-culture-wars-and-no-one-is-surprised>.

13. Molly McCann, *Mandatory Masks Aren’t About Safety, They’re About Social Control*, FEDERALIST (May 27, 2020), <https://thefederalist.com/2020/05/27/mandatory-masks-arent-about-safety-theyre-about-social-control>.

14. See Caleb Howe, *Trump Shares Post Arguing Face Masks Represent ‘Social Control’ and ‘Slavery,’* MEDIAITE (May 28, 2020, 9:05 AM), <https://www.mediaite.com/trump/trump-shares-post-arguing-face-masks-represent-social-control-and-slavery> (quoting tweet).

15. Eventually this made the AARP newsletter. See David Hochman, *The New Normal: What Comes After COVID-19?*, AARP (June 8, 2020), <https://www.aarp.org/health/conditions-treatments/info-2020/daily-life-after-pandemic-predictions.html>.

16. This never ran.

17. I interviewed with four TV stations in the Twin Cities. Only FOX ran the interview, which was subsequently taken off the air. I was more successful in California. See Jermaine Ong & Lindsey Peña, *Some San Diegans Push For End of San Diego County Face Mask Requirement*, ABC10 NEWS (June 16, 2020), <https://www.10news.com/news/coronavirus/some-san-diegans-push-for-end-of-san-diego-county-face-mask-requirement>.

18. See, e.g., 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 (2005–06) (hate speech); Kahn, *Are Muslims the New Catholics?*, *supra* note 4 (on Islamic clothing); ROBERT A. KAHN, *HOLocaust DENIAL AND THE LAW: A COMPARATIVE STUDY* (2004) (discussing Holocaust denial).

constant media contact, while exhilarating, was hectic. To keep up, I began a mask diary, in which I collected information about masks and reflected on it. Ironically, just as the mask diary was gathering steam, my career as a mask expert was nearing its end; by July 2020 I had returned to relative obscurity.¹⁹

What follows is a brief set of reflections as a mask “expert.” For three months, local and national media wanted to know my thoughts about masking, with a focus on a single, narrow question: what made masking a culture wars issue? In the moment, I struggled to provide answers on the fly; this essay is a more considered version of what I told them—one that hopefully benefits from the perspective relative obscurity provides. While the politicization of masking was likely inevitable, it was hastened by a tone-deaf public health response that ignored the variety of reactions ordinary people had about masks. My goal with this essay is to create a space to think about mask wearers or abstainers as persons with human dignity, not merely as symbols.²⁰

Part II describes the *volte face* in global attitudes toward masking.²¹ Until 2020, masks were worn by a series of social outcasts—criminals, Klan members, Islamists, and Antifa—to hide their faces. Today, masks are heroes in an unfolding public health crisis. In explaining this change, I explore what it is about the mask that makes it such a potent political symbol.

Part III addresses an objection: in a deadly pandemic, is not the mask simply a tool to keep us safe?²² Is not accepting the mask as a symbol dangerous? I respond by showing how masks can be enlisted as symbols in the fight against COVID-19, as well as suggesting that not all instances of mask refusal are symbolic rejections of the pandemic. Some refusal to mask is pragmatic. A humane response to the mask wars should recognize this.

Part IV turns directly to the red versus blue culture wars²³—where mask refusal is understood as an expression of the red state libertarianism. But is this the entire story? Some conservatives wear masks; some liberals dispense with them. Others wear masks according to the situation—jogging

19. While the debate over masks continued with full vigor, my role subsided. My last media contact was an interview on Wisconsin Public Radio in early July. See Bill Martens, *Can Governments Force People to Wear Masks*, WPR (June 2, 2020), <https://www.wpr.org/can-governments-force-people-wear-masks> (interviewing me).

20. Let me add some caveats. First, as noted above, the bulk of this essay was written in June 2020, as I was wrapping up my run as a mask “expert.” Much has occurred since then. The essay focuses on April–June 2020 because this is when the mapping of masks onto political distinctions was at its height. Second, while I am critical of the public health experts, I am not saying that I could do their job better—only that we need a better way of talking about the political limits of medical expertise, one grounded in the dignity of the human person. Finally, while I am sympathetic to how the culture war framing impoverishes both “sides,” my political proclivities lean in a blue (and green) direction.

21. *Infra* Part II. The Return of Masks.

22. *Infra* Part III. Masks as Tools.

23. *Infra* Part IV. Masks and the Culture Wars.

outside versus shopping. Reducing the mask debate to the culture wars hollows out the national conversation about masks while encouraging mask shaming.

Part V turns to mask norms.²⁴ During the 1918–19 pandemic, over-enforced laws made masking unpopular. The same is true today, with the added unpopularity of public health experts thrown into the mix. By June 2020, brought about in part by the national discussion about policing following the murder of George Floyd, we saw a growing understanding of the perils of over-enforcement and of medicalizing political issues.

I conclude on a positive note.²⁵ California’s June 2020 mask guidance contains a variety of exceptions that reflect the complexities of modern life. Perhaps we will see a world in which mask wearers—and abstainers—are treated as persons rather than symbols of good or evil.

II. THE RETURN OF MASKS

Mask bans have a robust history in the United States.²⁶ In the 1840s, renters in the Hudson Valley donned masks to confront sheriffs seeking back rent; New York responded with the nation’s first mask ban.²⁷ The waves of Klan activity in the years following the Civil War saw waves of mask bans.²⁸ Today mask bans target pipeline protesters and Antifa.²⁹ According to the courts, mask bans do not restrict symbolic or anonymous speech.³⁰ The popularity of bans rests on two sources. On the one hand, masking has been associated with criminal activity and loosening of inhibitions, while making it easier for the police to stop criminal, anti-social activity by isolating wrongdoers.³¹ On the other hand, anti-masking is associated with the repudiation of the Ku Klux Klan, its violence against African Americans, Jews, Catholics, and its penchant for secrecy, which opponents viewed as cowardice.³²

Masking has also become unpopular in Europe, albeit for different reasons. As late as 2000, masking was legal in most European countries. This changed as localities in Belgium and the Netherlands banned face coverings in response to concerns about Islamism.³³ In 2011, France became the first

24. *Infra* Part V: Enforcing Mask Norms.

25. *Infra* Conclusion: Masks and Human Dignity.

26. Kahn, *supra* note 3, at 88–104 (describing history of mask bans in United States).

27. *Id.* at 88–97 (describing passage of New York’s 1845 mask ban).

28. *Id.* at 97–104 (describing passage of anti-Klan mask bans).

29. *Id.* at 137–38 (describing mask bans targeting Antifa and pipeline protesters).

30. *See, e.g.*, *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205–09 (2d Cir. 2004) (holding that mask bans do not violate First Amendment protections of anonymous or expressive speech).

31. Kahn, *supra* note 3, at 114–15 (describing scholarly support for mask bans as crime-fighting measures).

32. *Id.* at 100 (describing repudiation of Klan lying and secrecy).

33. For a description of these early municipal and regional bans, see Marie Haspeslagh, *The Belgian Burqa Ban, Unveiled from a Human Rights Perspective* 8–12 (May 13, 2012) (unpub-

European country to ban face veils.³⁴ By 2019, such bans were widespread.³⁵ The early face veil bans were justified by a wide variety of arguments, some openly Islamophobic.³⁶ The European Court of Human Rights in *SAS v. France*, however, upheld France's face veil ban only on the argument that showing one's face is an essential part of "living together."³⁷ Faced with condemning Islam, *SAS* condemned the mask instead.³⁸ *SAS* provided a script for European countries to follow—blame the mask, even though the burqa is the real target.³⁹ Here, Austria showed good faith by applying its ban in an especially content-neutral manner by ticketing commercial hawkers dressed in animal costumes, cyclists, and, in one case, a leukemia patient.⁴⁰

By early 2020, a global consensus had emerged against masks, as protests in Hong Kong and Chile led to additional uses of and calls for mask bans.⁴¹ The pandemic changed all of this. By March, Europeans were instituting mask mandates;⁴² as noted, early the following month, the CDC changed its position on masking.⁴³

Soon thereafter, I received another call from Alabama asking whether the state's mask ban,⁴⁴ which does not have a health exception,⁴⁵ covered COVID-19 masks. Governor Kay Ivey quickly clarified that the state would

lished Master of Laws thesis, University of Ghent) (on file with the Ghent University Library, University of Ghent).

34. Stéphane Mechoulan, *The Case Against the Face-Veil: A European Perspective*, 16 INT'L J. CONST. L. 1267, 1269–70 (2018) (describing France's face veil ban).

35. *Id.* at 6 (noting the passage of bans in Bulgaria, Latvia, Austria and Denmark, political support for a face-veil ban in the United Kingdom, and German Chancellor Angela Merkel's call for a face-veil ban in Germany).

36. In reaching this conclusion, the ECHR rejected justifications for the ban based on public security, gender inequality and the role of the burqa as a symbol of "political Islam." *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 293.

37. *Id.* ¶ 142.

38. One way to see the transparency of the focus on seeing one's face is the burkini debate in France, which saw that Islam, rather than face-showing, was at the center of things. See Mechoulan, *supra* note 34, at 22–24 (describing debate over burkini).

39. See Oltermann, *supra* note 6 (describing critique of face veil ban by head of the Austrian police union).

40. *Id.* (describing instances of enforcement); see also Danyal Hussain, *Leukaemia Patient Wearing a Face Mask is Stopped by Police Under Austrian Laws Banning the Islamic Veil*, DAILY MAIL (Apr. 23, 2018, 16:41 EDT), <https://www.dailymail.co.uk/news/article-5648567/Leukaemia-patient-wearing-face-mask-stopped-police-austrian-laws-banning-islamic-veil.html>.

41. See Kahn, *supra* note 3, at 76 (describing use of mask ban against Hong Kong protesters); Camila Vegara, *To Crush Chile's Popular Uprising, Its Government is Taking a Page from the Fascist Playbook*, JACOBIN (Jan. 2, 2020), <https://www.jacobinmag.com/2020/01/chile-popular-uprising-face-mask-fascism> (describing proposed mask ban in Chile).

42. Francois Murphy, *Austria to Make Basic Face Masks Compulsory in Supermarkets*, REUTERS (Mar. 30, 2020, 4:34 AM), <https://www.reuters.com/article/us-health-coronavirus-austria/austria-to-make-basic-face-masks-compulsory-in-supermarkets-idUSKBN21H16A>.

43. See *supra* note 9 and accompanying text.

44. John Sharp, *Alabama Authorities Urge People to Ignore KKK-Era Anti-Masking Law*, AL.COM (Apr. 9, 2020), <https://www.al.com/news/2020/04/alabama-authorities-urge-people-to-ignore-kkk-era-anti-masking-law.html>.

not go after mask wearers.⁴⁶ New York went further and repealed its own mask ban.⁴⁷ Meanwhile, Austrian chancellor Sebastian Kurz had a long hard talk with the Austrian people about how the COVID-19 pandemic required them to rethink masking.⁴⁸ Once a facilitator of criminality, and a symbol of both the Ku Klux Klan and radical Islam, the mask received a reprieve.⁴⁹

This rapid change owes something to the nature of the mask itself. Masks are (1) highly visible (unlike other tools used to fight the pandemic, such as social distancing measures); (2) connected to a specific individual (unlike other symbols of political authority such as flags, buildings, and statues); and (3) easy to put on and remove.⁵⁰ This makes masks ideal symbols, but ambiguous ones. Seeing a masked face can be very scary,⁵¹ something Enlightenment era doctors recognized when they rejected the plague masks used since the Black Death.⁵² At the same time, masks—and

45. Some states do have health exceptions. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-12.11(a)(6) (allowing mask wearing “for the purpose of ensuring the physical health or safety of the wearer or others”).

46. *See Sharp, supra* note 44; Georgia also quietly amended its law, *see* Ga. Exec. Order 04.13.20.02 “Regarding the Use of Face Masks/Coverings to Help Prevent the Spread of COVID-19” (Apr. 13, 2020), <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>.

47. Michelle Young, *1845 Law Banning Use of Face Masks in New York Repealed*, UNTAPPED NEW YORK (May 29, 2020), <https://untappedcities.com/2020/05/29/1845-law-banning-use-of-face-masks-in-new-york-repealed>. In August 2020, Minnesota Republican lawmakers, facing a similar contradiction between an anti-mask law and Minnesota’s July 2020 statewide mask mandate, responded by challenging the mask mandate. *See* Jessie Van Berkel, *Lawsuit Aims to Block Mask Mandate at Polling Places*, STAR TRIB. (Aug. 4, 2020, 8:37 PM), <https://www.startribune.com/voter-suit-aims-to-block-mask-mandate-at-minnesota-polling-places/572006782>.

48. Michael Brendan Dougherty, *Masks for Coronavirus Will Not Last Long in the West*, NAT’L REV. (Mar. 30, 2020), <https://news.yahoo.com/masks-coronavirus-not-last-long-201245587.html> (Kurz admitted that he was “fully aware that masks are alien to our culture” and that masking “will require a big adjustment.”).

49. The New York repeal is particularly noteworthy, given the law’s use against a wide variety of protesters for almost 200 years, the loving defense of the statute, and the Anti-Rent War that brought it about, by Judge Cabranes in *Kerik*. *See* Kahn, *supra* note 3, at 89 (describing prior uses of the mask law); Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 203–05 (2d Cir. 2004) (describing the “threat” that made the 1845 statute necessary); for a critique of Judge Cabranes’ historiography, *see* Kahn, *supra* note 3, at 91–6.

50. For most people—some people struggle with masks. *See* Donna Spencer, *Masks Problematic for Asthmatic, Autistic, Deaf and Hard of Hearing: Health Advocates*, CTV NEWS (May 21, 2020, 2:34 PM EDT), <https://www.ctvnews.ca/health/coronavirus/masks-problematic-for-asthmatic-autistic-deaf-and-hard-of-hearing-health-advocates-1.4948802>.

51. Granted, they do so to a greater or lesser extent—which is one way of distinguishing COVID-19 masks from burqas, or Klan masks, which generally cover the entire face.

52. Lynteris, *supra* note 7 (The doctors argued that what killed during the plague was terror. Removing the mask sent the message that there was nothing to fear.); *Id.* at 450–51 (Lynteris sees the famous painting of Napoleon touching a plague victim in this light. The picture was not only about heroism; it was also intended to educate; because the victim was dead, there was no risk of plague transmission.); *Id.* at 451 (As we shall see, some current mask resistance draws on this Enlightenment mix of science and bravado.).

hoodies, like the one Trayvon Martin wore⁵³—protect the wearer’s privacy. They also prevent the spread of viruses like COVID-19.⁵⁴

Like anonymity in general,⁵⁵ the mask is Janus faced. Sometimes it brings good, sometimes harm. The mask’s dualistic nature, combined with its ease of use, created a perfect storm for controversies, especially in the United States.

III. MASKS AS TOOLS

Before turning to these controversies, let me address an objection to this entire line of argument. Writing in the *Atlantic*, Connor Friedersdorf asserted that COVID-19 masks are not a symbol but simply a tool to fight the virus.⁵⁶ There is some logic to this. The virus does not have a political party. It will equally infect Republicans and Democrats, burqa wearers, and insecure Austrian secularists. Especially in a pandemic, with the stakes so high, opposing (or supporting) mask wearing based on partisan loyalties is dangerous.⁵⁷

The masks-are-tools argument has two rejoinders. First, a contested object can serve two functions.⁵⁸ Masks are undoubtedly a useful tool against COVID-19, at least indoors; the scientific proof of this was well-established in April 2020 and has been growing since then.⁵⁹ But this does not mean that masks cannot also be symbols, or that some instances of COVID-19 mask wearing are largely symbolic in nature. Consider the fol-

53. Scott Skinner-Thompson, *Performative Privacy*, 50 UNIV. CAL. DAVIS L. REV. 1673, 1699 (2017) (viewing the hoodie as a form of “expressive resistance” to surveillance of African American bodies in the wake of the murder of Trayvon Martin).

54. This is the conclusion of a series of studies that came out in April 2020. For an overview, see Jeremy Howard et al., *Face Masks Against COVID-19: An Evidence Review*, PREPRINTS, <https://www.preprints.org/manuscript/202004.0203/v1> (last updated Nov. 2, 2020).

55. Hans Asenbaum, *Anonymity and Democracy: Absence as Presence in the Public Square*, 112 AM. POL. SCI. REV. 459 (Apr. 30, 2018) (noting the contradictory nature of the freedoms anonymity offers).

56. Connor Friedersdorf, *Masks Are a Tool, Not a Symbol*, ATLANTIC (May 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/masks-are-tool-not-symbol/611134>.

57. For Masha Gessen, writing in the *New Yorker*, the mask and lockdown protesters represent an emphasis on short term “logical thinking” (a term borrowed from Hannah Arendt) that is the absence of politics, and leads to totalitarianism. See Masha Gessen, *The Political Consequences of Loneliness and Isolation During the Pandemic*, NEW YORKER (May 5, 2020), <https://www.newyorker.com/news/our-columnists/the-political-consequences-of-loneliness-and-isolation-during-the-pandemic>.

58. To return to the 1970s, if New Shimmer can be both a floor wax and a dessert topping, why can’t masks be both tools and symbol? See *Saturday Night Live* (NBC television broadcast Jan. 10, 1976), <https://snltranscripts.jt.org/75/75ishimmer.phtml>.

59. Howard et al., *supra* note 54; there are, however, some dissenting voices. See Nicola Davis, *Report on Face Masks Effectiveness for Covid-19 Divides Scientists*, GUARDIAN (May 4, 2020), <https://www.theguardian.com/world/2020/may/04/scientists-disagree-over-face-masks-effect-on-covid-19> (noting that some scientists question the benefit of cloth face masks).

lowing example. President Trump long resisted wearing a mask.⁶⁰ He explained that masks are not “presidential” and that he could not wear a mask in front of world leaders.⁶¹ As COVID-19 cases spiked in June and July,⁶² the President had a change of heart and in July 2020 tweeted a picture of himself wearing a mask, with the comment that masks are “patriotic.”⁶³ Is his mask a tool or a symbol?

This is more complicated than it looks. On the one hand, assuming the President was alone when he took his selfie and tweeted it, the mask he wore did not directly prevent the spread of COVID-19. Even if he had staff nearby, the added safety from the President’s mask wearing was marginal. It is not why public health officials might applaud his decision. The mask in Trump’s tweet is a symbol as well as a tool. This is true even if the masked image of the President leads some followers to don masks.⁶⁴ These individuals—the ones influenced by the President—may be using the mask as a tool, but the President’s mask use is still symbolic.⁶⁵

Second, not everyone has responded to COVID-19 with a mask. In some instances, mask refusal likely reflects not symbolism, but a pragmatic judgment about the mask’s usefulness in a given situation. Consider the public health guidance on masks more closely. The studies, so influential in establishing the push to mask in March and April of 2020, are vague in their specific recommendations about *when* it is necessary to mask.⁶⁶ While they

60. John Fritze, *Trump: Won’t Wear a Coronavirus Mask Because It Would Interfere with Foreign Leader Meetings*, USA TODAY (Apr. 4, 2020, 11:35 AM ET), <https://www.usatoday.com/story/news/politics/2020/04/03/coronavirus-trump-wont-wear-mask-because-foreign-leader-meetings/2945378001>.

61. *Id.* (Explaining that he meets with “presidents, prime ministers, dictators, kings, queens,” President Trump said of masking: “somehow I don’t see it for myself.”).

62. See, e.g., Robin Foster & E.J. Mundell, *New Coronavirus Cases and Deaths Spike Across America*, US NEWS (July 13, 2020), <https://www.usnews.com/news/health-news/articles/2020-07-13/new-coronavirus-cases-and-deaths-spike-across-america>.

63. See Maegan Vazquez, Dana Bash & Kaitlin Collins, *Trump Tweets Image of Himself Wearing a Mask and Calls It “Patriotic,”* CNN (July 20, 2020, 8:35 PM ET), <https://www.cnn.com/2020/07/20/politics/donald-trump-mask-tweet/index.html>; President Trump first changed his tune in early July, wearing a mask during a visit to Walter Reade Hospital to check in on wounded soldiers. See Jonathan Lemire, *Trump Wears Mask in Public for First Time During Pandemic*, AP (July 11, 2020), <https://apnews.com/7651589ac439646e5cf873d021f1f4b6>.

64. Chris Cillizza, *Donald Trump Anti-Mask Campaign Picks Up Steam*, CNN (May 26, 2020, 3:49 PM ET), <https://www.cnn.com/2020/05/26/politics/donald-trump-mask-joe-biden/index.html> (quoting an Alabama man on the beach about President Trump’s refusal to wear a mask: “I mean, if he’s not wearing a mask, I’m not going to wear a mask. If he’s not worried, I’m not worried”).

65. Likewise, the President’s July 2020 mask wearing at Walter Reade Hospital was both instrumental and symbolic. While the mask helped restrict the spread of COVID-19 in the hospital, it also will send a signal (hopefully) for others to mask in similar situations.

66. See Jason Abaluck et al., *The Case for Universal Cloth Mask Adoption and Policies to Increase Supply of Medical Masks for Health Workers*, SSRN (Apr. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567438; Howard et al., *supra* note 54; De Kai et al., *Universal Masking is Urgent in the Covid-19 Pandemic: SEIR, Agent Based Models, Empirical Validation, Policy Recommendations* (Apr. 21, 2020), <https://arxiv.org/pdf/2004.13553.pdf>.

highlight the “urgent” need for “universal” masking,⁶⁷ the benchmarks they identify as success—generally 80 or 90 percent compliance with masking—fall short of zero tolerance.⁶⁸

This raises a question: must I wear a mask every time I leave the house? Even when walking across an empty field on a windy day? The early studies provided very little guidance. They discuss the importance of establishing a “culture of masking” in the United States and Europe—something identified with the East Asian countries that slowed their spread of COVID-19.⁶⁹ But they say next to nothing about *when* masking is necessary.⁷⁰ In the absence of a call for zero tolerance, or specific guidance indicating when mask wearing is essential, is it fair to dismiss *all* mask refusal as symbolic? Is every runner who does not see the need to mask on a lonely jog through the forest an enemy of public health? What about people with asthma or other nasal conditions who struggle with masks? Or a hearing-impaired person who needs to see others’ faces in order to lip read?⁷¹

If masking is a tool to fight COVID-19, and the goal of scientists and public health experts is to create a masking culture, then recognizing reasonable exceptions to mask wearing will help make mask mandates sustainable. If so, then a society sincerely committed to building a mask culture should accept that some mask refusal likely rests on judgments about the mask’s usefulness as a “tool,” rather than attempts to harness its symbolic power.

IV. MASKS AND THE CULTURE WARS

In an ideal world, states would enact reasonable mask mandates, and in a spirit of kindness and levity, citizens would try to abide by them. And, as we shall see, there has been some progress towards a mask culture with reasonable exceptions for mask refusal.⁷² But, as noted above, masks are

67. See Abaluck et al., *supra* note 66, at 1 (referring to the need to stop COVID-19 as “urgent”); The message of urgency is in the title of the De Kai study. See Kai et al., *supra* note 66.

68. Howard et al., *supra* note 54, at 6 (referring to a study finding that 80 percent adherence to masking “resulted in the elimination of the outbreak with most respiratory protective devices”).

69. See Abaluck et al., *supra* note 66, at 4–5 (singling out East Asian countries for their mask wearing norms); Kai et al., *supra* note 66, at 11–12 (same).

70. The Abaluck study comes the closest, suggesting in a footnote that, given the possibility that masking could make a sick person sicker, that “mask-wearing should be limited to circumstances in which the mask-wearer could otherwise contaminate others.” Abaluck et al., *supra* note 66, at 2.

71. Answers to some of these questions emerged, but not from the studies. For instance, Dr. Daniel Sulmasy, acting director of Georgetown University’s Kennedy Institute of Ethics, advised that for someone “running in a very uncrowded place or at a time of day when it will be easy to avoid coming within six feet of other persons . . . the risks of viral transmission are so exceedingly low that it would be ethically permissible not to wear a mask.” See Daniel P. Sulmasy, *Do I Have to Wear a Mask While Jogging? The Coronavirus Ethicist Has the Answer*, WASHINGTONIAN (May 7, 2020), <https://www.washingtonian.com/2020/05/07/do-i-have-to-wear-a-mask-while-jogging-the-coronavirus-ethicist-has-the-answer>.

72. *Infra* Conclusion: Masks and Human Dignity.

visible, attached to a person, and easy to put on and remove. As such they are a powerful vehicle for what passes as the culture wars between a conservative red America and a liberal blue one.⁷³ The press is very interested in this question, as I know from personal experience.⁷⁴ Are the journalists right? Has masking become the latest red versus blue issue?

The evidence here is mixed. On the one hand, many conservatives mask,⁷⁵ and the red/blue focus risks blinding us to the specific symbolic issues at play in the debate over COVID-19 masks—ones that relate more to the nature of epidemics than partisan politics. Consider the argument by Laura Ingraham and Rush Limbaugh that mask wearing sends the message that COVID-19 is a serious public health issue.⁷⁶ Minimization of risk was also part of the public health response to the 1918–19 pandemic.⁷⁷ Chicago Public Health Commissioner John Dill Robertson claimed that “worry kills more people than the epidemic.”⁷⁸ As Herman Randall, a local doctor, explained to the *Arizona Gazette*, those “who are most fearful are usually . . . the first ones to succumb to the disease.”⁷⁹ Whatever one thinks of Robertson and Randall, it is hard to see them as forerunners of the Tea Party.⁸⁰

Yet, the reporters are not entirely wrong. The mask debate does resonate with our current cultural conflicts. Some non-maskers base their opposition to masking on libertarian values associated with red-ness. The *Federalist* writer quoting me was primarily concerned with masks as a symbol of social control.⁸¹ Sometimes, this comes with an added concern about

73. The culture war frame of reference can be overstated. It is not the only political cleavage in the country, and it can be manufactured to serve the ends of the power elite. *See, e.g.,* Zack Beauchamp, *The Partisan Culture War Over Masks*, VOX (May 13, 2020, 1:50 PM EDT), <https://www.vox.com/2020/5/13/21257181/coronavirus-masks-trump-republicans-culture-war>; Adam Serwer, *It's Not the Greed – It's the Inequality*, ATLANTIC (Nov. 18, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/wealthy-democrats-are-denial-about-inequality/602164> (noting “how concentrations of wealth warp politics and society”). That said, the culture war is also real to people on the ground, at least in certain situations.

74. *See supra* Part III: Masks as Tools.

75. *See* Tom Pepinsky, “Yes, Wearing A Mask is Partisan Now,” TOM PEPINSKY (May 13, 2020), <https://tompepinsky.com/2020/05/13/yes-wearing-a-mask-is-partisan-now> (finding that, as of mid-May 75 percent of Democrats, and 53 percent of Republicans wear masks).

76. *See* Friedersdorf, *supra* note 56 (quoting Ingraham).

77. JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY*, 335–38 (Rev. Ed. 2018) (describing campaign to dispel fear of the influenza by minimizing the scope and mortality rate of the pandemic).

78. *Id.* at 337 (quoting Robertson).

79. *Id.* (quoting Randall).

80. Rather, their position reflects the Enlightenment idea that fear causes death. *See* Lynteris, *supra* note 7, at 450–51.

81. Indeed, she uses the phrase “social control” in her title. *See* McCann, *supra* note 13.

the excesses of the nanny state, as it did with the *Federalist* writer;⁸² sometimes, it does not.⁸³

If one theme resounds with mask abstainers, it is the sense that people should be trusted to do the right thing without the government telling them what to do. I felt this during my Texas Public Radio appearance, as well as in letters received from the public. Mask wearing or abstention can be situational.⁸⁴ Even explicitly political mask resisters, ones sympathizing with the libertarian impetus behind red politics, sometimes make decisions about masking for apolitical reasons. They do not want to be reduced to their political affiliations.⁸⁵

A critic might respond by noting the connection between mask abstention and denial of the seriousness of the pandemic. One can, indeed, connect COVID-19 denial and climate change denial.⁸⁶ In both instances, skeptics challenge the precautionary principle—the idea that, given scientific uncertainty, societies should act based on limited information to avoid a great harm.⁸⁷ But skepticism and denial are part and parcel of the human response to global disasters. Overstating risk, as when treating all outdoor masking as a public health emergency, can enhance denial.⁸⁸ This occurs not because the skeptics are Republicans, but because they are human.

The “bipartisan” nature of public health skepticism emerges more clearly when one turns to other issues. Perhaps mask skeptics lean Republican; is this true of those in the body positivity movement who question the public health war on obesity?⁸⁹ Or those who question the necessity of taking statins to reduce high cholesterol?⁹⁰ What motivates the skeptics is not

82. According to McCann: “Masks aren’t the endgame. The point of the masks is to teach the American people that if we want to get some sense of normal, we have to accept abnormality.” *Id.*

83. See Scottie Andrew, *The Psychology Behind Why Some People Won’t Wear Masks*, CNN (May 6, 2020), <https://www.cnn.com/2020/05/06/health/why-people-dont-wear-masks-wellness-trnd/index.html> (noting that “[p]eople naturally rebel when told what to do”).

84. For instance, one might be willing to mask in a crowded supermarket or urban area, but not in less crowded situations.

85. This might especially be true of someone not masking because of health reasons or because they do not trust the CDC guidance. See Andrew, *supra* note 83.

86. Dana Nuccitelli, *Coronavirus Doubters Follow the Climate Denial Playbook*, YALE CLIMATE CONNECTIONS (Apr. 14, 2020), <https://www.yaleclimateconnections.org/2020/04/coronavirus-doubters-follow-climate-denial-playbook>.

87. Howard et al., *supra* note 54, at 6–7; Joshua P. Howe, *On Earth Day, Grim Lessons for the Covid-19 Crisis*, SCI. AM. (Apr. 21, 2020), <https://blogs.scientificamerican.com/observations/on-earth-day-grim-lessons-for-the-covid-19-crisis> (relating the precautionary principle to climate change and COVID-19 denialism).

88. See Eliot Aronson, *Fear, Denial and Sensible Action in the Face of Disasters*, 75 SOC. RSCH. 855, 859 (2008).

89. Cf. Keith Devlin, *Top 10 Reasons Why the BMI is Bogus*, NPR (July 4, 2009, 8:00 AM), <https://www.npr.org/templates/story/story.php?storyId=106268439>.

90. Cf. Larry Husten, *The Lancet Versus BMJ: Dispatch from the Statin Wars*, CARDIO BRIEF (Sept. 15, 2016), <http://www.cardiobrief.org/2016/09/15/the-lancet-versus-bmj-dispatch-from-the-statin-wars> (describing call to retract two articles published in 2014 in the British Medical Journal critical of the use of statin drugs to treat borderline cases of high cholesterol).

primarily politics: it is a call for dignity and respect for the individual in an age when the general public has easy access to the same medical reports the experts use for their public health pronouncements.⁹¹ It comes when some public health policies, such as using body mass index to measure weight, are demonstrably false.⁹² To label this skepticism as red (or blue) obscures the nature of the legitimacy crisis facing public health officials in an information age as well as the underlying political landscape.

To be sure, masking is a public good. Masks are not individual protective devices; they are social ones.⁹³ This largely distinguishes masking from obesity and statin abstinence—things that, directly at least, harm no one else—and aligns it more closely with the anti-vaxxers, where the harm to others is obvious.⁹⁴ If masking is not quite as urgent as vaccinations, it certainly forces one to question the Enlightenment-era bravery mask resisters invoke when they are willing to “risk it” by going to crowded venues without masks.⁹⁵ It is not only your health you’re risking, it is also mine—and everyone else’s.

While most press discussion about masking and the culture wars focuses on red mask refusal, blue mask adherence is also an issue. In mid-May, Josh Marshall of the left-leaning blog *Talking Points Memo*, someone I greatly respect, ran an editorial entitled “Wear your damn mask.”⁹⁶ While the content of the article, largely a discussion of the mounting evidence in favor of masks (and calling on his readers to provide more), was quite reasonable, the title was hectoring. When should I wear my “damn” mask? When I go cycling? When I walk down my empty street? When I venture onto my front walk to fetch the morning paper?

91. See Ari Schulman, *The Coronavirus and the Right’s Scientific Counterrevolution*, NEW REPUBLIC (June 15, 2020), <https://newrepublic.com/article/158058/coronavirus-conservative-experts-scientific-counterrevolution> (concluding that “we need to reexamine how our culture talks about expertise”).

92. BMI doesn’t work for people who are muscular or large boned. Fat-shaming hasn’t been proven to improve health outcomes. See Charlotte Hilton Andersen, *The Science of Fat Shaming*, SHAPE (Nov. 24, 2015), <https://www.shape.com/lifestyle/mind-and-body/science-fat-shaming>. Nevertheless, states across the country sent schoolchildren home with their BMI levels for their parents to see. They did so for years. See Hannah R. Thompson & Kristine A. Madsen, *The Report Card on BMI Report Cards*, 6 CURRENT OBESITY REP. 163 (2017) (concluding that BMI reports “do not appear to positively impact student weight status”). One wonders why public health authorities have credibility issues.

93. See Horii, *supra* note 7.

94. *Face Masks Against Covid-19* draws an analogy between mask refusal and allowing exceptions to vaccine requirements. See Howard et al., *supra* note 54, at 7.

95. See, e.g., Bruce Selcraig, *Wearing a Mask – or Not – Becomes Political for Some Texans*, SAN ANTONIO EXPRESS-NEWS (May 26, 2020, 6:31 AM), <https://www.expressnews.com/news/local/article/Wearing-a-mask-or-not-becomes-political-15292340.php> (describing a 79-year-old retired engineer who, admitting that his “immune system may be compromised,” nevertheless does not want the government to “shame” him into wearing a mask).

96. Josh Marshall, *Wear Your Damn Mask*, TALKING POINTS MEMO (May 20, 2020, 3:32 PM), <https://talkingpointsmemo.com/edblogger/wear-your-damn-mask>.

As with the red libertarians, not every blue American is a mask authoritarian. And to be fair, Marshall is based in New York City, where the crowding is high and the impact of COVID-19 extreme. So, I am willing to cut him some slack; the same goes for residents of New York upset about people jogging without masks.⁹⁷ In crowded places, mask wearing becomes more urgent—even when outside.⁹⁸ This is why the New York and Massachusetts mask mandates require outdoor masking when social distancing is impossible.⁹⁹ On the other hand, some shaming of mask abstainers takes place in situations where the risk appears quite minimal, such as on a lightly used hiking trail.¹⁰⁰

The world is too complex to reduce to a red versus blue divide—even when it comes to as simple an issue as when to wear a mask. Moreover, the red/blue dichotomy, and the call for zero tolerance for mask refusal that goes with it, will likely backfire for two reasons. First, it silences situational maskers and those unable to mask—two key “swing voters” in the broader mask debate. Here the highly visible nature of the mask plays a role. When I enter a supermarket, I can tell at an instant *whether* someone is not wearing a mask, but it is much more difficult to know *why* they are not masking. Shame a situational mask wearer, or someone unable to mask, enough times and they may conclude: “Why bother with masking at all?”

Second, the zero-tolerance approach to mask wearing—and the shaming of mask refusers that goes with it—opens the door to red mask shaming of blue mask wearers. Indeed, there has been a fair amount of such shaming already. When I was on Texas Public Radio, a caller explained how she and her spouse—both high risk—were called “liberal dupes” by other family members for wearing masks.¹⁰¹ Johnny Cash’s granddaughter was similarly

97. Shannon Palus, *Stop Yelling at Runners for Not Wearing Masks!*, SLATE (Apr. 30, 2020, 6:58 PM), <https://slate.com/technology/2020/04/runners-masks-coronavirus.html> (describing a Tweet demanding that joggers mask, accompanied by a curse word).

98. On the other hand, as Palus notes, the spread of virus accompanying outdoor jogging will be fairly minimal. *Id.*

99. See Governor Charles D. Baker, Mass. COVID-19 Order No. 31, *Order Requiring Face Coverings in Public Places Where Social Distancing Not Possible* (May 1, 2020), <https://www.mass.gov/doc/may-1-2020-masks-and-face-coverings/download> (requiring masking when it is not possible to maintain six feet of distance, indoors or outdoors); Governor Andrew M. Cuomo, Exec. Order 202.17, *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (Apr. 15, 2020), <https://www.governor.ny.gov/news/no-20217-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (requiring masking when individual is “unable to maintain, or when not maintaining” social distance).

100. Tracey Ross, *To the Person Who Mask-Shamed Me on the Trail*, OUTSIDE (June 5, 2020), <https://www.outsideonline.com/2414424/outdoor-mask-shaming> (recounting being scolded after forgetting to wear a mask while hiking on a trail where she routinely hikes without encountering another person); Ross also highlighted the patronizing tone of mask shaming. See *id.*; A friend was shopping with a seven-year-old at a grocery store. A fellow shopper bent over and, ignoring the parent, said: “I’m going to need you to cover your whole face with your mask or you’ll get sick.” *Id.* These types of exchanges will not encourage masking or end the mask wars.

101. Johnson & Williams, *supra* note 12.

shamed while shopping at a Walgreens.¹⁰² Some mask opponents go a step further and ban masks in their business establishments.¹⁰³

As mask wearers and abstainers come together in hotels, fitness centers, and restaurants, there is a need for compassion and understanding—as well as common sense ground rules about respecting the other.¹⁰⁴ An oppressive culture of mandatory masking, with shaming of resisters, will not help build a masking culture. Indeed, as we shall see next, how a society decides to enforce mask norms can go a long way to determining whether they succeed.

V. ENFORCING MASK NORMS

Enforcing mask mandates has proven challenging. On the one hand, mask mandates reach fairly deep into life. At the same time, given the limited resources of the state, it is not possible to prosecute every mask abstainer. Who decides which mask wearing should be tolerated, and which should be punished? As we shall see, this has been a contested question, both during the 1918–19 influenza pandemic, as well as during the present pandemic, especially during the protests for social justice in the wake of the police murder of George Floyd.

A century ago, as influenza spread across the country, a number of cities adopted mask mandates, much like the ones we have today.¹⁰⁵ The story of Tucson, Arizona is instructive.¹⁰⁶ In November 1918, the Board of Health adopted a mask mandate, largely to assist in reopening, as the number of active cases were falling.¹⁰⁷ The mandate had some gaps—it did not cover schools.¹⁰⁸ But it was zealously enforced by the police, and fines were upheld by a local judge L.C. Cowan, who made no exceptions, even for momentary removals of the mask.¹⁰⁹

102. Melissa Roberto, *Johnny Cash's Granddaughter Heckled for Wearing Protective Mask to Grocery Store, Rosanne Cash says*, FOX NEWS (May 28, 2020), <https://www.foxnews.com/entertainment/johnny-cash-granddaughter-heckled-wearing-protective-mask>.

103. Brandon Mulder, 'Sorry, No Masks Allowed,' *Texas Bar Resists Coronavirus Guidance, Turns Away Mask Wearers*, USA TODAY (May 28, 2020, 5:23 PM), <https://www.usatoday.com/story/news/nation/2020/05/28/elgin-texas-restaurant-liberty-tree-tavern-says-no-masks-allowed/5273257002>.

104. A ban on mask shaming might be a good place to start.

105. Several cities adopted mask mandates, primarily in the West. See E. Thomas Ewing, *Flu Masks Failed in 1918, But We Need Them Now*, HEALTH AFFAIRS BLOG (May 12, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200508.769108/full>.

106. Bradford Luckingham, *To Mask or Not to Mask: A Note on the 1918 Spanish Influenza Pandemic in Tucson*, 25 J. OF ARIZ. HIST. 191, 191–204 (1984), <https://www.jstor.org/stable/41859568?seq=1>.

107. *Id.* at 194.

108. *Id.* at 195.

109. For instance, a window cleaner was not allowed to remove the mask for a moment to blow on the window to dry it. *Id.* at 198.

The law and resulting enforcement regime were not popular.¹¹⁰ In part, this stemmed from practical difficulties of mask wearing—it was hard to smoke while masking, and masks made one’s glasses fog up.¹¹¹ After a few weeks of this, a leading citizen challenged the mask mandate in court, and—four days before Christmas—the Arizona Court of Appeals threw the law out as “class legislation” because the mask ban exempted schools.¹¹² While it would have been easy, as a legal matter, for the city to reenact the ban, they chose not to, preferring instead to “strongly recommend” masking.¹¹³

In a 1920 article reflecting on what was seen as the failure of the San Francisco mask mandate to stem the spread of the influenza virus, Dr. W.H. Kellogg acknowledged the limitations of the mask mandates.¹¹⁴ Seeking to defend the credibility of masks, he alleged that some people were “wearing masks at improper times.”¹¹⁵ Masks were worn “in automobiles” to avoid arrest, but not “in private offices and small gatherings” where “social intercourse between friends and office associates” posed a greater threat than gatherings “in churches and theaters.”¹¹⁶ Kellogg worried the mask would become “permanently discredited” by these failures, and that its “uncontrolled application in influenza” would turn “critical and scientific minds against it.”¹¹⁷ As evidence of the impending danger, Kellogg noted the “many letters received from prominent sanitarians all over the country.”¹¹⁸

The lesson here is clear: over-enforcement of mask norms can backfire. This is true even if Dr. Kellogg was mistaken that the mask mandate had no effect in stopping the pandemic. As a trio of behavioral scientists wrote in the *New York Times* in late May 2020, efforts “to pass laws and punish infractions” backfired because “enforcing legal edicts” can “be difficult and costly” and, given the “widespread ambivalence” about masking, can “lead to backlash.”¹¹⁹ Instead, authorities should encourage mask wearing by: (1) making masks easy to obtain, (2) clearly stating why masking is necessary, and (3) using social norms to make mask wearing expected.¹²⁰

110. *Id.* at 199.

111. *Id.*

112. *Id.* at 199, 201.

113. Meanwhile, Judge Cowan hit his head while leaning outside of a streetcar to discipline a child trying to ride on the outside. The judge, who was wearing a mask, could not see the pole that hit him in the head because his glasses fogged up. *Id.* at 202.

114. W.H. Kellogg, *An Experimental Study of the Efficacy of Gauze Face Masks*, 10 AM. J. OF PUB. HEALTH 34 (1920), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1362677/pdf/amjphhealth00197-0050.pdf>.

115. *Id.* at 35.

116. *Id.*

117. *Id.* at 36.

118. *Id.*

119. Angela Duckworth et al., *There Are 3 Things We Have to Do to Get People Wearing Masks*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/opinion/coronavirus-masks.html>.

120. *Id.*

Recognizing error is the key to building scientific legitimacy and transcending the culture wars. An admission by public health officials that at the start of the pandemic “nobody could have known how important it [was] to wear a mask when you have no symptoms” would help people update their beliefs, an especially difficult task given the way “outdated news” continues “to ricochet in the echo chamber of social media.”¹²¹ In addition, high-status officials, like President Trump, should wear masks.¹²² Should this happen, a strong mask culture might yet emerge in the United States, since “the story of face masks in this country is still being written[.]”¹²³

Public health experts have struggled with the challenge of balancing law enforcement, modeling behavior, and social pressure to encourage mask wearing. The scientific articles, the same ones that helped convince the CDC to shift its policy on masks in early April 2020, set percentage benchmarks for mask compliance (typically 80 or 90 percent) yet called for universal, legally enforceable mask mandates.¹²⁴ As we have seen, there was little consideration of how a mask mandate might work in practice.¹²⁵

For instance, “Face Masks Against Covid 19,” perhaps the most sophisticated of the studies¹²⁶ was tone deaf on race. It noted that masking posed risks for African Americans,¹²⁷ but passed over the possibility that mask mandates might be discriminatorily enforced against African Americans and other people of color. This at a time when there were already reports of police interpreting other social distancing measures in a discriminatory manner.¹²⁸ Indeed, the June 2020 mask ban in Lincoln County, Ore-

121. *Id.*

122. *Id.*

123. *Id.*

124. Howard et al., *supra* note 54, at 5–6 (providing an 80 percent benchmark, but also citing Hong Kong where adherence was 97.5 percent); At another point, the article concludes that a 50 percent compliance with mask wearing might suffice. *Id.* at 6.

125. To be fair, these early studies focused on justifying mask wearing in general—rather than indicating specific instances where mask wearing is most important. *See, e.g., id.* at 4 (rebutting argument that masks should be saved for symptomatic patients); Abaluck et al., *supra* note 66, at 6 (same). On the other hand, the language used is striking. Abaluck et al. calls for “everyone” to mask. *Id.* at 2, while De Kai et al. calls for “universal” masking, enforced by a mandatory mask mandate. De Kai et al., *supra* note 66, at 12.

126. For instance, the study noted that “recommending universal mask wearing” could “serve as a visible signal and reminder of the pandemic” which, as such, could “increase compliance with other health measures . . . such as keeping distance and hand-washing.” Howard et al., *supra* note 54, at 5.

127. *Id.* (noting the reluctance of “black people . . . to wear masks . . . for fear of being mistaken as criminals”).

128. *See, e.g.,* Justin Jouvenal & Michael Brice-Saddler, *Social Distancing Enforcement is Ramping Up. So is Concern That Black and Latino Residents May Face Harsher Treatment.*, WASH. POST (May 10, 2020, 10:00 AM CDT), https://www.washingtonpost.com/local/public-safety/social-distancing-enforcement-is-ramping-up-so-is-concern-that-black-and-latino-residents-may-face-harsher-treatment/2020/05/10/b1bcf490-8fbd-11ea-9e23-6914ee410a5f_story.html; Chao Xiong, *Biker Gang, Underage Parties Are the Latest Busted for Violating Stay-at-Home Order*, STAR TRIB. (Apr. 22, 2020, 1:03 PM), <https://www.startribune.com/biker-gang-underage->

gon, explicitly exempts people of color from its scope for its mask mandate out of fear of discriminatory enforcement.¹²⁹

“Face Masks Against Covid 19” appeared before the murder of George Floyd. So, perhaps one can excuse the authors for ignoring the possibility that mask mandates, in addition to increasing profiling, also increased the risk of excessive force and murder by police officers.¹³⁰ On the other hand, Eric Garner’s death—among many others—should have provided some warning.¹³¹ The failure to pick up on profiling shows a lack of sophistication by the medical health experts who, in June 2020, would be calling racism and police brutality a public health emergency every bit as serious as COVID-19.¹³² Where were the experts in April 2020?

The strongly worded scientific articles, combined with the March/April 2020 surge of cases, hospitalizations, and deaths certainly makes the decision to enact mandates understandable. And the laws passed in New York and Massachusetts, largely represented reasonable compromises. In particular, both allowed mask removal outdoors if accompanied by social distancing.¹³³ In Massachusetts, the \$300 fine was only enforceable civilly.¹³⁴ While Boston Mayor Marty Walsh complained about millennials who avoided masking because they did not like the way masks look, Governor Charlie Baker did not expect the fine would be used.¹³⁵

parties-are-the-latest-busted-for-violating-stay-at-home-order/569825892 (noting police practice of adding social distancing violations to other charges).

129. See Victoria Albert, *People of Color Are Exempt from Oregon County’s Mandatory Mask Order*, CBS NEWS (June 25, 2020, 5:27 PM), <https://www.cbsnews.com/news/lincoln-county-oregon-exempts-people-of-color-from-mandatory-coronavirus-mask-policy> (exempting “[p]eople of color who have heightened concerns about racial profiling and harassment due to wearing face coverings in public”). I am not recommending this approach, only suggesting that Lincoln County at least addressed the problem.

130. Floyd was arrested for passing a 20-dollar counterfeit bill. See Sarah Jones, *We Are Asking the Police to Do Too Much*, N.Y. MAG. (June 2, 2020), <https://nymag.com/intelligencer/2020/06/killing-of-george-floyd-shows-our-over-reliance-on-police.html> (relating the decision of the Cup Foods store owner to call the police over a 20-dollar bill to the lack of alternatives to policing).

131. See John Schuppe, *From Eric Garner to George Floyd, Protests Have Revealed How Little Has Changed in Six Years*, NBC NEWS (May 31, 2020), <https://www.nbcnews.com/news/us-news/eric-garner-george-floyd-protests-reveal-how-little-has-changed-n1220501>.

132. See Julia Marcus & Gregg Gonsalves, *Public-Health Experts are Not Hypocrites*, ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/public-health-experts-are-not-hypocrites/612853> (describing letter signed by 1,200 public health experts calling the protests “vital to the national public health and to the threatened health specifically of black people in the United States”).

133. Cuomo, *supra* note 99; Baker, *supra* note 99.

134. Baker, *supra* note 99.

135. Matt Stout et al., *It’s ‘Common Sense’ for Us to Wear Masks in Public, Governor Baker Says. His Order About That Takes Effect Wednesday*, BOS. GLOBE, <https://www.bostonglobe.com/2020/05/01/nation/coronavirus-boston-massachusetts-may-1> (last updated May 1, 2020, 4:18 PM).

But it was not the same everywhere. In April 2020, towns and cities across Massachusetts enacted mask mandates.¹³⁶ Some mandates were tolerant; others were harsh. Several provided for criminal prosecution of mask violators; others mandated mask wearing while jogging.¹³⁷ A few had rules for the disposal of masks.¹³⁸ Some of the fines reached \$1,000.¹³⁹ One provision was accompanied by a note from the mayor that citizens should not be going outside in any event.¹⁴⁰

On one level it doesn't matter if these laws were ever enforced. Their very existence sends the message—in the heart of blue America—that the state knows what's best for us.¹⁴¹ Like the Tucson and San Francisco mandates of a century ago, over-reaching mask mandates run the risk of undermining the very goals they seek to further by creating a powerful backlash.

This was on display in California, where several local governments—including San Jose, and Orange County—enacted broad mask mandates, ones that mandated outdoor mask wearing.¹⁴² The restrictions were controversial and led to protests at the homes of the public health commissioners, reversal of the policies, and resignation of the public health commissioners.¹⁴³ In response to these policy reversals, California enacted state-level guidance requiring mask wearing in a more limited set of situations.¹⁴⁴

The mask mandate enacted by Minneapolis the Friday before George Floyd's murder has elements of the moderate and extreme approaches to mask mandates. On the one hand, the Minneapolis mask mandate exempts outdoor mask wearing where social distancing is possible and envisions office workers taking masks off when not in contact with the public.¹⁴⁵ In a recognition of racial equity, the mayor's lengthy preamble noted that COVID-19 has been ravaging communities of color.¹⁴⁶ So far, so good.

136. See Ainslie Cromar, *These Are the Mass. Towns Currently Mandating Face Coverings in Public*, BOSTON.COM, <https://www.boston.com/news/coronavirus/2020/04/30/these-are-the-mass-towns-are-currently-mandating-masks-in-public> (last updated Apr. 30, 2020). The statewide mandate supplements these laws, which remain in force.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *E.g., id.* Interestingly enough, the more liberal towns—Brookline and Cambridge—tended to have more lenient mask mandates. Meanwhile, the anti-paternalism of mask mandate objectors has deep roots; indeed, it shows up in libertarian arguments against mask bans. See Rob Port, *Anti-Mask Law Aimed at #NoDAPL Riots is Understandable but Still Silly*, SAYANYTHING-BLOG.COM (Jan. 13, 2017), <https://www.sayanythingblog.com/entry/anti-mask-law-aimed-nodapl-riots-understandable-still-silly> (arguing that mask ban supporters rely on the same “wrong-headed arguments” used by supporters of gun control).

142. See John Woolfolk, *The Battle of the Face Mask*, LEWISTON TRIB. (June 25, 2020), https://ltribune.com/a_and_e/the-battle-of-the-face-mask/article_478edca1-cb1d-56ea-88e0-be239aa763ba.html.

143. *Id.*

144. CAL. DEP'T OF PUB. HEALTH, GUIDANCE FOR THE USE OF FACE COVERINGS (2020).

145. JACOB FREY, EMERGENCY REGULATION NO. 2020-12 (2020).

146. *Id.*

On the other hand, Mayor Frey, of Minneapolis, saw fit to enforce the mask mandate with misdemeanor liability, despite the propensity of police, in Minnesota and elsewhere, to enforce mask mandates disproportionately against people of color.¹⁴⁷ Nor was he sympathetic to those who might violate the rule, accusing non-forgetful mask abstainers of “serious selfishness and flagrant disregard for the public health of our city.”¹⁴⁸

I am not sure how helpful it is to call out intentional mask abstainers as seriously selfish. People choose not to mask for a variety of reasons: confusion, discomfort with the mask, and deep-seated beliefs that,¹⁴⁹ for one reason or another, masking is wrong. By all means, make the scofflaw pay the fine. But how beneficial is moral judgment?¹⁵⁰ Will it lead to more masking, or simply reignite the mask wars?

George Floyd’s murder, the protests, and the police overreaction that followed¹⁵¹ initially deepened the legitimacy crisis over masking and social distancing more generally. For the first time since the pandemic began, people flooded into the streets.¹⁵² Public health experts, asked whether these protests would encourage the spread of COVID-19, responded by using the public health emergency faced by African Americans to justify the protests.¹⁵³ According to Johns Hopkins epidemiologist Jennifer Nuzzo: “We should always evaluate the risks and benefits of efforts to control the virus,” adding that today “the public health risks of not protesting to demand an end to systemic racism greatly exceed the harms of the virus.”¹⁵⁴

This response had some limits. First, it opened the experts to charges of double standards—hadn’t the same health experts criticized the anti-lockdown protests?¹⁵⁵ There were, however, some fairly easy answers to

147. *Id.*

148. Liz Navratil & Paul Walsh, *Minneapolis Mayor Frey Orders People to Wear Masks Inside Stores, Schools*, STAR TRIB. (May 22, 2020, 8:49 AM), <https://www.startribune.com/mps-mayor-frey-orders-people-to-wear-masks-in-stores-schools/570664042>.

149. See Andrew, *supra* note 83 (noting that some mask abstainers do not want to be told what to do, while others view masks as a sign of weakness).

150. For a skeptical view, see Rebecca Jennings, *The Scolding Is Not Working*, VOX (May 14, 2020, 7:00 AM), <https://www.vox.com/the-goods/2020/5/14/21257508/social-distancing-public-shaming-scolding-coronavirus>.

151. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (June 2, 2020, 4:10 PM), <https://web.archive.org/web/20200602235547/https://www.nytimes.com/article/george-floyd-protests-timeline.html> (archive of page as it appeared on June 2, 2020).

152. According to a recent study, six percent of adults participated in the protests. See German Lopez, *The Effect of Black Lives Matter Protests on Coronavirus Cases, Explained*, VOX (June 26, 2020, 11:50 AM), <https://www.vox.com/2020/6/26/21300636/coronavirus-pandemic-black-lives-matter-protests>.

153. Dan Diamond, *Suddenly, Public Health Officials Say Social Justice Matters More Than Social Distance*, POLITICO (June 4, 2020, 5:19 PM), <https://www.politico.com/news/magazine/2020/06/04/public-health-protests-301534>.

154. *Id.*

155. *Id.*

this objection.¹⁵⁶ For one thing, the George Floyd protests were outside, and many protesters wore masks. Moreover, the protests came in June, after cities and states started to reopen.¹⁵⁷ If I can go to my gym and hair salon, why can't I protest racial injustice?

Second, and more troublingly, the public health emergency argument medicalized dissent. Protesting police brutality becomes a therapeutic act, one done under the consultation of a doctor, rather than an innate human right. What if a given public health expert, for whatever reason, felt that fighting police brutality was not an important enough cause to justify flouting the social distancing norms? Would this render the George Floyd protests illegitimate? Should public health experts—whose expertise is not in policing, race relations and preserving the rule of law—be making *professional* judgments about what political activities merit exceptions to the social distancing rules?¹⁵⁸

As the police brutality crisis deepened, however, public health experts shifted their tone. On the one hand, they addressed the medical risks posed by the protests—the protests were outside,¹⁵⁹ most protesters were masking, etc.¹⁶⁰ At the same time, they called out the police for enhancing the risk¹⁶¹ and pleaded with the protesters to get tested.¹⁶² More than that, they recognized that the decision to protest was—as Tom Nichols, an anti-Trump Republican put it in *Politico*—“a political argument, not a scientific or medical argument.”¹⁶³ Not only is this a wise short-term political move for the public health experts, it respects the agency of the anti-racism protesters. As such, it points the way to a more measured deployment of public health expertise on a variety of issues, including masking.

156. On the other hand, Marcus & Gonsalves, *supra* note 132, defend public health experts against the charge of “allowing themselves to be sidetracked by politics,” but seem to have no problem allowing the national conversation around racial injustice to be sidetracked by doctors.

157. For instance, in Minnesota, the Stay Home order was replaced by a Stay Safe order in mid-May, and phase II of the state’s reopening plan—allowing outdoor dining, among other things—was set to begin on June 1. See William Bornhoft, *Phase II of Reopening Minnesota Starts June 1*, PATCH (May 20, 2020, 3:18 PM), <https://patch.com/minnesota/eagan/phase-ii-reopening-minnesota-starts-june-1>.

158. It is an entirely different matter for a public health expert to come out in favor of masking as a personal matter.

159. Molly Olmstead, *How Much Should You Be Worried About a Covid-19 Spike from the Protests?*, SLATE (June 5, 2020, 6:19 PM), <https://slate.com/news-and-politics/2020/06/coronavirus-spread-risk-protests.html>.

160. *Id.*

161. *Id.*

162. For example, appearing before Congress, Dr. Robert Redfield of the CDC called on protesters to “highly consider” getting tested. Colleen Stinchcombe, *When to Get Tested for Coronavirus If You’ve Been Protesting*, SELF (June 12, 2020), <https://www.self.com/story/coronavirus-testing-protests>.

163. Tina Nguyen, *Conservatives Charge Liberals with Social-Distancing Hypocrisy*, POLITICO (June 6, 2020, 7:00 AM EDT), <https://www.politico.com/news/2020/06/06/conservatives-charge-liberals-with-social-distancing-hypocrisy-304435>.

This is critical. Public health officials can raise the alarm. They can call for masking and set benchmarks (such as 90 percent masking). Reaching these benchmarks, however, is a political task. If a science is involved, it is behavioral science, not medical. My point here is narrow. Politicians cannot wish away COVID-19, nor does the virus have a soft-spot for social justice protesters. But decisions about what political causes justify protesting in the streets despite social distancing cannot *exclusively* be a medical issue.

In the end, masking is about risk management. Public health professionals can describe the level of risk and argue against risk taking in general. But it is not their place to tell us which risks are worth taking. When officials and experts do this, they undermine their own credibility on the more central issue of the efficacy of mask wearing in the fight against COVID-19.

VI. CONCLUSION: MASKS AND HUMAN DIGNITY

When it comes to masks, COVID-19, and our political culture, two points are beyond dispute: (1) the virus does not discriminate based on politics (even if political decisions may well expose different groups to increased risk)¹⁶⁴ and (2) while it is a powerful tool in the fight against COVID-19, the mask is also a highly potent symbol. Given the culture wars endemic to the nation, it is not surprising to see masking take on red and blue hues. Dazzling to look at, the hues obscure the deeper reality: mask wearing is situational as well as symbolic. Conservatives don masks when shopping; liberals remove them for long solitary walks. Red and blue are part of the mask story, but not the entire story.

Equally important is how mask norms are enforced. Medical science can't help us here; it can supply benchmarks, but after that, we are on our own. History shows that strictly enforced mask mandates can backfire. Behavioral science suggests leading by example might be a more productive way to maximize the number of people who actually wear masks. The protests in the wake of George Floyd's murder highlight the danger of over-enforcement while reminding us that some issues in life are too important to leave to the doctors.

Meanwhile, there are signs of hope. The June 2020 California mask guidelines contain a bevy of exceptions that reflect how a mask mandate

164. As Mayor Frey's order notes, COVID is more virulent in communities of color—perhaps for reasons of institutional racism. See FREY, *supra* note 145; see also *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last updated Feb. 12, 2021) (noting that, as of June 13, 2020, non-Hispanic African Americans have five times the hospitalization rate of non-Hispanic whites); Hispanics have hospitalization rates four times that of non-Hispanic whites. *Id.*

might actually operate in a modern society.¹⁶⁵ Hopefully, the California mandate, and the spirit of realism inspired by behavioral science that imbues it, will point us to a future where we are united, red and blue, to protect society against COVID-19.

This brings us back to masks. Until a year ago, it was mask wearers who posed the danger. Today the shoe is on the other foot. When the pandemic subsides, and masks recede into the background, I hope we emerge with a greater respect for why someone might choose to mask—or not mask.¹⁶⁶ In the process, I hope we can reach a point in which we view a mask wearer or abstainer as a human being, rather than merely the carrier of a socially potent symbol, or the subject to a public health directive.¹⁶⁷

Postscript: Since I finished this essay, COVID-19 cases surged, and the President hailed masks as “patriotic.”¹⁶⁸ At a time when testing, contact tracing, and public compliance with social distancing have encountered obstacles,¹⁶⁹ the mask has taken center stage. Yet one wonders. In early July 2020 the *New York Times* reported that 59 percent of Americans “always” wear masks when going outside¹⁷⁰—a higher figure than in some countries that have contained their COVID-19 outbreaks.¹⁷¹ Mask refusers, meanwhile, have become scapegoats. Consider the Colorado woman who claimed masks gave her panic attacks, went shopping without one, and was

165. CAL. DEP’T OF PUB. HEALTH, *supra* note 144.

166. This makes New York’s decision to revoke its 175-year-old mask law such a positive development. While it may have been done because of the pandemic, it will put an end of the law’s indiscriminate use against protesters.

167. More generally, I hope we emerge with a greater respect for individuals who, armed with medical knowledge, nevertheless choose to disregard their doctor’s advice to go on a diet, or take a given medication.

168. For his part, President Joe Biden on his first day in office signed an executive order requiring masks in federal settings. Exec. Order 13,991, 86 Fed. Reg. 7,045 (Jan. 20, 2021); At the same time, however, Biden has followed the lead of the behavioral scientists described in this article and proposed sending masks to all Americans—a measure that does not rely on coercion. See Monica Alba et al., *Biden Administration Weighs Plan to Directly Send Masks to All Americans*, NBC NEWS (Feb. 4, 2021, 4:00 AM), <https://www.nbcnews.com/politics/joe-biden/biden-administration-weighs-plan-directly-send-masks-all-americans-n1256681>.

169. See, e.g., *White House Seeks to Block Funding for CDC, Coronavirus Testing and Contact Tracing*, VOA NEWS (July 19, 2020, 5:17 AM), <https://www.voanews.com/covid-19-pandemic/white-house-seeks-block-funding-cdc-coronavirus-testing-and-contact-tracing>.

170. Josh Katz et al., *A Detailed Map of Who is Wearing Masks in the U.S.*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/interactive/2020/07/17/upshot/coronavirus-face-mask-map.html>.

171. For example, in Norway 4% of the public “always” wears masks, 79 percent do not, and the Covid rate has been flat since April. *Id.*; see *COVID-19 Coronavirus Pandemic*, WORLDOMETER, <https://www.worldometers.info/coronavirus> (last visited Apr. 5, 2021).

accosted by a fellow shopper.¹⁷² Will social shaming help restrict the spread of COVID-19?¹⁷³ Will it even lead to more mask wearing?¹⁷⁴ We shall see.

172. See, e.g., Brooke Seipel, *Colorado Woman in Viral Video Calls Store Employees Asking Her to Wear Mask 'Nazis'*, HILL (July 17, 2020, 5:41 PM), <https://thehill.com/homenews/state-watch/507895-colorado-woman-in-viral-video-calls-store-employees-asking-her-to-wear> (describing how shopper rammed a cart into a maskless woman). I am not saying that the woman was right, or that identifying genuine medical mask refusers is easy—only that the climate for mask refusers right now is very unforgiving.

173. See Tyler McCarthy, *Jennifer Aniston Shares Photo of Friend Hospitalized with COVID-19 to Encourage Fans to Wear a Mask*, FOX NEWS (July 20, 2020), <https://www.foxnews.com/entertainment/jennifer-aniston-photo-friend-hospitalized-covid-19-encourage-masks>. Why focus on masks? What about “#stay the heck home,” “#don’t go to the bar” or, to get political about this, “#vote in November”?

174. Based on the op-ed by the behavioral scientists that ran in the *New York Times* in late May, see Duckworth et al., *supra* note 119, the answer to both questions might well be no.