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"WHO GOES THERE?"—PROPOSING A MODEL ANTI-MASK ACT

STEPHEN J. SIMONI

INTRODUCTION

On a sunny day in Atlanta, women cover their faces with open umbrellas while entering an abortion clinic during an ongoing demonstration.¹ On the floor of the House of Representatives, Congressman James Nussle wears a paper bag over his head while expressing his belief that Congress is hiding from the issue of lawmakers having bounced checks at the House Bank.² At a New York City Council hearing, an individual wears a black hood while describing the violence and intimidation that merchants in the city's fish market have suffered.³ In publicly owned Shea Stadium, professional baseball player Charles O'Brien wears a catcher's mask during a game.⁴ At the trial of a doctor accused of providing his own sperm to patients instead of the anonymous sperm he promised, parents of children who had been so conceived wear wigs and makeup while testifying.⁵ And every year on October 31, individuals across the entire country wear masks as part of Halloween costumes.

Surprisingly, in fifteen states and the District of Columbia,⁶ "general" anti-mask laws would subject many of the above individuals to arrest and prosecution. Whereas "criminal" anti-mask laws prohibit mask-wearing

1. See *48 Hours: Abortion Battle* (CBS television broadcast, Oct. 20, 1988).

2. See *A Warning* (photograph), *USA Today*, Oct. 4-6, 1991, at 8A; *Lawmaker* (photograph), *id.* at 1A.

3. See *Abuses at Fish Market* (photograph), *N.Y. Times*, May 5, 1992, at A1; Selwyn Raab, *Fulton Panel Gets Details on Violence*, *id.* at B1.

4. See *Big Guys Look Little Again as Mets Lose to Cubs* (photograph), *N.Y. Times*, June 30, 1992, at B9.

5. See *Doctor Is Found Guilty in Fertility Case*, *N.Y. Times*, Mar. 5, 1992, at A14.

6. See Ala. Code § 13A-11-9(a)(4) (1982); Del. Code Ann. tit. 11, § 1301(1)(g) (1987 & Supp. 1990); D.C. Code Ann. § 22-3112.3 (1989); Fla. Stat. Ann. §§ 876.11-.16 (West 1976 & Supp. 1992); Ga. Code Ann. § 16-11-38 (1988 & Supp. 1991); La. Rev. Stat. Ann. § 14:313 (West 1986); Mich. Comp. Laws § 750.396 (1991); Minn. Stat. Ann. § 609.735 (West 1987); N.M. Stat. Ann. § 30-22-3 (Michie 1984); N.Y. Penal Law § 240.35(4) (McKinney 1989); N.C. Gen. Stat. §§ 14-12.7 to .11 (1986); Okla. Stat. Ann. tit. 21, § 1301 (West 1983); S.C. Code Ann. § 16-7-110 (Law. Co-op. 1976); Tenn. Code Ann. § 39-17-309(c) (1991); Va. Code Ann. § 18.2-422 (Michie 1988); W. Va. Code § 61-6-22 (1989).

In addition, a number of municipalities have enacted anti-mask laws, several of which have been judicially challenged. See, e.g., *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990) (ruling on challenge to Pulaski, Tennessee's anti-mask ordinance); *In re Martin*, 34 Cal. Rptr. 299 (Cal. Dist. Ct. App. 1963) (ruling on challenge to Los Angeles, California's anti-mask ordinance); *City of Pineville v. Marshall*, 299 S.W. 1072 (Ky. 1927) (ruling on challenge to Pineville, Kentucky's anti-mask ordinance). At least one county has also enacted an anti-mask law, see *P.G. Passes Anti-Klan Bills*, *Wash. Post*, Mar. 16, 1983, at C6 (reporting the enactment of an anti-mask law by Prince George's County of Maryland), as has a public university. The university's mask prohibition was subsequently challenged in court. See *Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978) (ruling on challenge to Texas Tech University's anti-mask policy).

during the commission of crimes,⁷ "general" anti-mask laws proscribe the simple concealment of physical identity in public,⁸ regardless of coexistent criminal activity. Individuals have been prosecuted under general anti-mask laws for wearing a Ku Klux Klan hood,⁹ for dressing in the clothing and wearing the makeup of the individual's opposite sex,¹⁰ and for placing a leaflet between the individual's face and eyeglasses.¹¹

The scope of general anti-mask laws varies greatly from state to state.¹² For example, many anti-mask statutes exempt entire categories of mask-wearing, such as wearing masks with holiday costumes, for theatrical productions and masquerade parties, and for occupational, safety,

7. See, e.g., 18 U.S.C. § 241 (1989) (banning mask-wearing when accompanied by a conspiracy to interfere with the federal rights of others); Cal. Penal Code § 185 (West 1988) (criminalizing mask-wearing during the commission of any public offense and for the purposes of "[c]oncealment, flight, or escape, when charged with, arrested for, or convicted of" any public offense). Such laws usually feature a penalty "enhancement," which provides a greater punishment than exists for committing the principal public offense without a mask. See, e.g., Ill. Rev. Stat. ch. 38, para. 10-2 (1989) (changing kidnapping from a class 2 felony to a class 1 felony when the kidnapper is masked); N.M. Stat. Ann. § 30-3-2 (Michie 1988) (changing assault from a petty misdemeanor to a fourth-degree felony when perpetrated by a masked individual). The constitutionality of such laws has never engendered significant debate and is not addressed in this Note.

8. Louisiana's law bans mask-wearing not only in "any public place," but also in "any open place in view thereof." La. Rev. Stat. Ann. § 14:313 (West 1986). Oklahoma's statute does not state whether it covers both public and private mask-wearing, but by specifically exempting certain public parades and "any meeting of any organization within any building or enclosure wholly within and under the control of said organization," it apparently criminalizes mask-wearing in both public and private places. See Okla. Stat. Ann. tit. 21, § 1301 (West 1983). This Note, however, addresses only the constitutionality of banning *public* mask-wearing.

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

10. See *People v. Gillespi*, 202 N.E.2d 565 (N.Y.), *modified*, 204 N.E.2d 211 (N.Y. 1964); *People v. Archibald*, 296 N.Y.S.2d 834 (N.Y. App. Term. 1968), *aff'd*, 260 N.E.2d 871 (N.Y. 1970); *Garcia v. State*, 443 S.W.2d 847 (Tex. Crim. App. 1969). In *Garcia*, the defendant, a male, was not convicted due to the arresting officer's testimony that the defendant was readily identifiable despite wearing women's clothing, including a brassiere with falsies, high heel shoes and a wig, with rouge and lipstick on his face. See *id.* at 848.

Laws that prohibit individuals from wearing the clothing of the opposite sex, when done to conceal the individual's sexual identity, have generally been upheld and are not addressed in this Note. See, e.g., *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980) (ruling that law prohibiting "cross-dressing" is only unconstitutional when applied to individuals who are dressing in the clothing of the opposite sex as part of their preparation for a sex-change operation); *Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (same).

11. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813 (Cal. Ct. App. 1978).

12. North Carolina's anti-mask statute explicitly bans concealment of identity effected by disguising one's voice. See N.C. Gen. Stat. §§ 14-12.7 to .11 (1986). The reach of such laws, however, does have its limits, as indicated in *Dale County v. Gunther*, 46 Ala. 118 (1871). *Gunther* ruled that the statutory language of being "in disguise" did not include the act of withdrawing oneself from the sight of another, such as while waiting to attack someone by surprise. See *id.* at 142-43. This case did not involve a prosecution under an anti-mask law, but rather the claim of the widow of a murdered individual against the county for a statutory award that was provided to heirs of certain individuals who had been killed by someone "in disguise." See *id.* at 119-21.

and health purposes;¹³ other states, meanwhile, provide less comprehensive exceptions.¹⁴ Moreover, three states have "narrow" anti-mask laws, which prohibit mask-wearing only when the wearer actually seeks the resulting anonymity.¹⁵ The narrow laws thereby permit all mask-wearing that incidentally conceals one's identity, such as ski masks worn on cold days and the protective masks worn by surgeons and welders.¹⁶ Finally, certain states specifically ban mask-wearing only when the wearer intends to commit specified unlawful acts,¹⁷ typically the interference with, and deprivation of, others' constitutional rights.¹⁸

In several recent lawsuits,¹⁹ the Ku Klux Klan has challenged the con-

13. See, e.g., W. Va. Code Ann. § 61-6-22 (1989). The relevant portions of the West Virginia law appear as follows:

- (b) The provisions of this [mask-wearing prohibition] do not apply to any person:
- (1) Under sixteen years of age;
 - (2) Wearing a traditional holiday costume;
 - (3) Engaged in a trade or employment where a mask, hood or device is worn for the purpose of ensuring the physical safety of the wearer;
 - (4) Using a mask, hood or device in theatrical productions, including use in mardi gras celebrations or similar masquerade balls;
 - (5) Wearing a mask, hood or device prescribed for civil defense drills, exercises or emergencies; or
 - (6) Wearing a mask, hood or device for the sole purpose of protection from the elements or while participating in a winter sport.

Id.

14. See, e.g., Minn. Stat. Ann. § 609.735 (West 1987) (exempting only that mask-wearing "incidental to amusement or entertainment").

15. Two anti-mask statutes were "narrowed" by courts adjudicating constitutional challenges to the original, broader anti-mask laws. See *State v. Miller*, 398 S.E.2d 547 (Ga. 1990) (narrowing Georgia's law); *Hernandez v. Commonwealth*, 406 S.E.2d 398 (Va. Ct. App. 1991) (narrowing Virginia's law). The Georgia Supreme Court further narrowed Georgia's anti-mask statute in *Miller* to prohibit only mask-wearing that the "wearer knows, or reasonably should know, gives rise to a reasonable apprehension of intimidation, threats or impending violence." *Miller*, 398 S.E.2d at 553.

The third narrow statute, however, contains the intent requirement in the statutory language itself. See La. Rev. Stat. Ann. § 14:313 (West 1986).

16. The narrow laws thus still prohibit mask-wearing by individuals such as movie stars venturing into the public arena, patients entering abortion clinics, and workers crossing picket lines, all of whom actively desire the anonymity provided by masks.

17. These laws, like the other general anti-mask laws, differ from criminal anti-mask laws in that they do not require probable cause of accompanying criminal activity. The mere *intent* to commit a crime is, of course, generally insufficient to constitute probable cause for a crime, or even the attempt of a crime. See Sanford H. Kadish et al., *Criminal Law and its Processes* 258 (4th ed. 1983) ("Criminality is said to be precluded in [this case] by the maxim *cogitationis poenam nemo patitur* (no one is punishable solely for his thoughts).").

18. See, e.g., Tenn. Code Ann. § 39-17-309 (1991) (banning mask-wearing when the wearer intends to "intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of [this] state . . . [or] because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of . . . [this] state").

19. See *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990); *State v. Miller*, 398 S.E.2d 547 (Ga. 1990); *Hernandez v. Commonwealth*, 406 S.E.2d 398 (Va. Ct. App. 1991).

stitutionality of general anti-mask laws that had been invoked to deny Klan members the right to publicly wear their traditional hood. Although the Klan cases have achieved the greatest notoriety,²⁰ individuals and groups have long sought to invalidate anti-mask laws on constitutional grounds.²¹ Generally, mask-wearers challenging the laws have alleged violations of free speech, free assembly, and substantive due process rights, while the government has cited the need for a prophylactic crime-fighting device as its interest in enacting and enforcing the laws. These cases have produced mixed results. While some courts have upheld anti-mask laws as constitutional, others have struck them down, citing both First and Fourteenth Amendment violations.

The conflicting court decisions, along with the varying scope of anti-mask laws themselves, reflect the uncertainty concerning when, if ever, the government can constitutionally ban public mask-wearing. Further complicating this area of the law is the apparent political bias of some of the courts that have ruled on the challenges. Society is therefore in need of an anti-mask law that will unquestionably safeguard individuals' constitutional rights while simultaneously enabling the government to meet its stated goal of preventing crime.

Part I of this Note discusses First and Fourteenth Amendment objections to anti-mask statutes, concluding that most of the existing statutes are unconstitutional. This Part also raises the troubling issue of judicial bias, examining the inconsistent review that some courts have afforded anti-mask laws. Part II proposes a Model Anti-Mask Act that balances both constitutional and public safety concerns by prohibiting public mask-wearing when intended to conceal the wearer's identity, unless the wearer requires the resulting anonymity to exercise First Amendment rights or to engage in specified activities where the need for privacy is apparent. After emphasizing that continued bias from the bench could

20. See Peter Applebome, *Klan Challenges Law Against Hoods*, N.Y. Times, Apr. 15, 1990, at 12; Ian Ball, *Ku Klux Klan Bares a Face for Right to Stay Masked*, Telegraph Limited, Apr. 22, 1990, International section, at 16; Michael J. McCarthy & Wayne E. Green, *Law Against Masks is Upheld in Georgia*, Wall St. J., Dec. 6, 1990, at B4.

21. See *Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978) (granting Iranian students' request to enjoin public university from preventing mask-wearing during planned protest against the Shah of Iran); *Schumann v. New York*, 270 F. Supp. 730 (S.D.N.Y. 1967) (denying request of pantomime troupe, whose members wore masks during public demonstrations, to enjoin enforcement of an anti-mask law); *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813 (Cal. Ct. App. 1978) (declaring anti-mask statute unconstitutional in response to challenge of Iranian nationals who were prosecuted for wearing masks while demonstrating); *Robinson v. State*, 393 So. 2d 1076 (Fla. 1981) (reversing conviction under Florida's anti-mask law, as court found law unconstitutional); *City of Pineville v. Marshall*, 299 S.W. 1072 (Ky. 1927) (convicting individuals under municipality's anti-mask ordinance who wore masks while marching peaceably in a parade); *People v. Gillespi*, 202 N.E.2d 565 (N.Y.) (upholding convictions of men under anti-mask law for appearing in public while dressed as women), *modified*, 204 N.E.2d 211 (N.Y. 1964); *People v. Archibald*, 296 N.Y.S.2d 834 (N.Y. App. Term. 1968) (convicting man under anti-mask statute who appeared in public while wearing women's clothing, wig, and makeup), *aff'd*, 260 N.E.2d 871 (N.Y. 1970).

defeat the constitutional protections provided by the Model Anti-Mask Act, this Note concludes by urging legislators to adopt, and courts to subsequently provide consistent judicial review of, the proposed Model Act.

I. CONSTITUTIONAL OBJECTIONS TO ANTI-MASK LAWS

A. *First Amendment Objections*

Challenges to anti-mask laws have asserted that the laws conflict with the First Amendment's free speech²² and free assembly²³ guarantees.²⁴ By noting the different functions that masks serve, individuals making such challenges have alleged both the *direct violation* and *inhibition* of First Amendment rights. First, they have alleged that masks constitute a form of expressive conduct,²⁵ stating that the visual effects of their masks assist in conveying their messages.²⁶ Consequently, anti-mask laws directly violate First Amendment rights and must therefore satisfy the test provided in *United States v. O'Brien*.²⁷ Second, individuals have alleged that masks are necessary for them to publicly speak and assemble, because the resulting anonymity reduces the risk of physical, economic, and social reprisals they would suffer if identified as holding the beliefs that they do.²⁸ Because anti-mask laws thus inhibit exercise of First Amendment rights, they are also subject to the test in *NAACP v. Ala-*

22. The U.S. Constitution's free speech guarantee applies to state, as well as federal, government action pursuant to the Supreme Court's decision in *Gitlow v. New York*, 268 U.S. 652 (1925), which incorporated the guarantee into the Due Process Clause of the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 1 (stating that no State shall deprive "any person of life, liberty, or property, without due process of law").

23. The Supreme Court ruled that the U.S. Constitution's free assembly guarantee applies to state, as well as federal, government action when it incorporated the guarantee into the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1 (stating that no State shall deprive "any person of life, liberty, or property, without due process of law"); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

24. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . .").

25. Some commentators might assert that mask-wearing is not expressive conduct, but rather pure speech, in accordance with *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505 (1969), in which the Supreme Court termed the wearing of armbands "closely akin to pure speech." Mask-wearing differs from the wearing of armbands, however, because masks provide their wearers with physical anonymity, thereby giving rise to government interests other than those existing merely due to the "pure" communication of ideas.

26. *See* *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshipers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990); *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978); *Schumann v. New York*, 270 F. Supp. 730, 732 (S.D.N.Y. 1967); *Robinson v. State*, 393 So. 2d 1076, 1076 (Fla. 1981); *State v. Miller*, 398 S.E.2d 547, 549 (Ga. 1990); *City of Pineville v. Marshall*, 299 S.W. 1072, 1073 (Ky. 1927); *People v. Archibald*, 260 N.E.2d 871, 27 N.Y.2d 504, 505 (1970) (The official reporter is cited because only it, and not the regional reporter, provides background material noting the mask-wearer's First Amendment claim.), *aff'g* 296 N.Y.S.2d 834 (N.Y. App. Term. 1968); *Hernandez v. Commonwealth*, 406 S.E.2d 398, 399 (Va. Ct. App. 1991).

27. 391 U.S. 367 (1968).

28. *See* *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978); *Ghafari v. Municipi-*

bama ex rel Patterson.²⁹ As explained below, *O'Brien* and *NAACP v. Alabama* both call for the invalidation of most existing anti-mask laws.

1. Constitutional Standards

a. Direct Violation Test

Laws that directly violate the right to free speech by prohibiting conduct that expresses ideas, commonly referred to as "expressive conduct," must meet the standard enunciated in *United States v. O'Brien*.³⁰ In *O'Brien*, the Supreme Court upheld a federal law prohibiting the destruction of draft cards against a challenge from an individual who had burned his card as a means of protesting the United States' involvement in the Vietnam War.³¹

The *O'Brien* test requires that a challenged law be unrelated to the suppression of free expression.³² This requirement is satisfied if the government is concerned solely with the prohibited conduct itself and not the conduct's communicative content.³³ Under the test, courts also require that banning the conduct furthers an important or substantial interest³⁴ within the government's constitutional power,³⁵ and is narrowly tailored so as not to burden speech substantially more than is necessary.³⁶

b. Inhibition Test

Laws that inhibit, rather than actually prohibit, First Amendment

pal Court, 150 Cal. Rptr. 813, 814 (Cal. Ct. App. 1978); *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990).

29. 357 U.S. 449 (1958).

30. 391 U.S. 367 (1968).

31. *See id.* at 377; *see also Barnes v. Glen Theatre*, 111 S. Ct. 2456 (1991) (employing the *O'Brien* test to adjudicate a challenge to a law that prohibited nude dancing); *United States v. Eichman*, 496 U.S. 310 (1990) (utilizing the *O'Brien* test to invalidate a law regulating the treatment of United States flags).

32. *See O'Brien*, 391 U.S. at 377.

33. The *O'Brien* Court ruled that the law banning draft card destruction was unrelated to the suppression of free expression, because it was "limited to the noncommunicative aspect" of draft card destruction. *See id.* at 381-82.

34. *See id.* at 377. In *O'Brien*, the Court ruled that the challenged law, which operated so as to ensure individuals had "continuing availability" of their draft cards, "substantially further[ed] the smooth and proper functioning of the system that Congress . . . established to raise armies." *Id.* at 381.

35. *See id.* at 377. The *O'Brien* Court found the law under consideration within "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end." *Id.*

36. In *O'Brien*, the Court originally required that challenged laws represent the least restrictive manner of achieving their objectives. *See id.* The law banning destruction of draft cards satisfied this requirement because, as the *O'Brien* Court explained, "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued [draft cards] than a law which prohibits their wilful mutilation or destruction." *Id.* at 381.

The Court recently modified this standard in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989), replacing it with the narrowly tailored requirement.

rights must comport with the Supreme Court's *NAACP v. Alabama ex rel Patterson*³⁷ ruling. That case recognized the crucial role anonymity can play in the exercise of speech and assembly rights, as the Court held unconstitutional a state court order requiring the National Association for the Advancement of Colored People to divulge the names and addresses of its Alabama members.³⁸

Under the *NAACP v. Alabama* standard, a law that inhibits the exercise of a constitutional right can be upheld only if it serves a compelling government interest.³⁹ The Supreme Court later introduced, in *Shelton v. Tucker*,⁴⁰ an additional component of this standard when ruling that "even [if the] governmental purpose [of such a law is] . . . substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."⁴¹

2. Direct Violation of First Amendment Rights

As noted above, anti-mask laws can result in a direct violation of the right to free speech, because a mask can enhance communication of the wearer's ideas.⁴² This is often the case when concealment of identity is

37. 357 U.S. 449 (1958).

38. See *id.* at 466. The Court ruled that "compelled disclosure of . . . membership . . . may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs . . ." *Id.* at 462-63.

Two years later in *Talley v. California*, 362 U.S. 60 (1960), the Court relied on *NAACP v. Alabama* when invalidating a municipal ordinance that required all publicly distributed handbills to bear the names and addresses of their distributors. Noting that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," *Talley*, 362 U.S. at 64, the Court concluded that there is "no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," *id.* See also *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990) (citing *NAACP v. Alabama* while addressing challenge to an EEOC subpoena of confidential materials, explaining that "burdens that are less than direct may sometimes pose First Amendment concerns"); *Meese v. Keene*, 481 U.S. 465 (1987) (citing *NAACP v. Alabama* while ruling on challenge to Foreign Agents Registration Act).

39. See *NAACP v. Alabama*, 357 U.S. at 463 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)). In *NAACP v. Alabama*, the Court ruled that Alabama's interest in determining whether the NAACP was conducting intra-state business, in violation of its foreign corporation registration statute, was "not . . . sufficient to overcome [the] . . . constitutional objections." *Id.* at 465.

40. 364 U.S. 479 (1960).

41. *Id.* at 488. *Shelton* invalidated an Arkansas regulation that required teachers in public schools to disclose the names and addresses of every organization to which they had belonged or regularly contributed during the preceding five years. See *id.* at 480. Emphasizing that the statute required teachers to list "every conceivable kind of associational tie—social, professional, political, avocational, or religious" many of which "could have no possible bearing upon the teacher's occupational competence," *id.* at 488, the Court concluded that the statute's "interference with associational freedom [went] far beyond what might be justified," *id.* at 490.

42. Although apparently not yet raised in any cases to date, the right to receive expressive speech is also impaired by anti-mask laws. As the right to free speech includes the right to receive speech, see, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (invalidating state ban on advertising of

an unintended consequence of expressive mask-wearing,⁴³ such as when demonstrators mimic a political leader.⁴⁴ Mask-wearing is also directly expressive when used in a hyperbolic manner, such as when individuals employ masks to conceal their identities, even though they have no actual fear of being identified.⁴⁵

To pass constitutional muster while prohibiting expressive mask-wearing, anti-mask laws must satisfy the *United States v. O'Brien*⁴⁶ requirements detailed above. Thus, anti-mask laws must be unrelated to the suppression of free expression, within the constitutional power of the government, and narrowly tailored to achieve an important or substantial government interest.⁴⁷

prescription drug prices on basis of consumers' right to comparative product information); *Stanley v. Georgia*, 394 U.S. 557 (1969) (permitting possession of obscene material in one's dwelling on basis of free access to ideas); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (relying on the right to receive information and ideas while invalidating law that required intended recipients of certain foreign mail to act affirmatively in order to actually receive such mail), it is a logical inference that the right to speak by expressive conduct likewise includes the right to receive expressive conduct.

Some people want to see expression that includes disguised individuals, such as public theatrical performances, political protests (for example, *Schumann v. New York*, 270 F. Supp. 730 (S.D.N.Y. 1967) (ruling on challenge to anti-mask law by pantomime troupe whose members publicly wore masks during political protests)), and parades (for example, those occurring during Mardi Gras). Even individuals who support anti-mask laws because the mere sight of masked Ku Klux Klan members frightens people probably realize that if such expression were permitted, people might quickly become immune to its initially unsettling effect. (The fact that the sight of masked Klan members frightens people is insufficient to constitutionally justify a ban of the Klan mask. See discussion *infra* note 157.) Moreover, when public speakers have the option of being masked, their decisions to wear masks to maintain anonymity serve as acknowledgements that there is something unusual about their speech.

43. Demonstrators on both sides of the abortion debate have employed masks without necessarily intending to conceal their identities. At a pro-choice demonstration, individuals wore surgical masks to protest the Supreme Court's *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), decision. See Drea Maier, *Demonstrating Differences; NOW Rallies Against 'Gag'*, N.Y. Newsday, July 7, 1991, at 17. *Rust* upheld regulations that prohibit workers in federally-funded clinics from informing patients of the availability of abortion. See *Rust*, 111 S. Ct. at 1778. At a pro-life demonstration, an individual wore a rubber skeleton's mask and a black hooded robe with "abortion" written on it to protest the Supreme Court's *Roe v. Wade*, 410 U.S. 113 (1973), decision. See *A Bitter Battle Boils On* (photograph), U.S. News & World Rep., Feb. 3, 1986, at 5. *Roe* legalized abortion throughout the United States. See *Roe*, 410 U.S. at 154.

44. See, e.g., *Bushwhacked* (photograph), N.Y. Post, Mar. 10, 1992, at 8 (protesting President George Bush's position on the international status of elephants, an animal-rights activist wears a mask bearing the resemblance of Bush outside the United Nations Building in New York City).

45. A hypothetical example of such expression would occur when protestors wear brown bags over their heads and carry signs stating, "I oppose the President, but fear his martial law tactics."

46. 391 U.S. 367 (1968).

47. See *supra* notes 32-36 and accompanying text.

a. *Anti-Mask Laws: Furthering an Important or Substantial Government Interest?*

In defending anti-mask laws, state and local governments assert the objective of crime prevention, contending that individuals are more likely to commit crimes when they cannot be identified.⁴⁸ The government further claims that because "criminal" anti-mask laws⁴⁹ require concurrent criminal activity, "general" anti-mask laws, which by definition criminalize the sheer act of mask-wearing,⁵⁰ enable law enforcement to short-circuit crime.⁵¹ The narrow anti-mask laws⁵² have the same objective, but supposedly attempt to target those mask-wearers more likely to perpetrate crime, namely those who don masks seeking the resulting anonymity. Of course, the anti-mask laws that prohibit mask-wearing only when the wearers possess specified criminal intent⁵³ ban mask-wearing

48. See *Aryan v. Mackey*, 462 F. Supp. 90, 93 (N.D. Tex. 1978); *Schumann v. New York*, 270 F. Supp. 730, 733 (S.D.N.Y. 1967); *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978); *City of Pineville v. Marshall*, 299 S.W. 1072, 1074 (Ky. 1927); see also N.Y. Penal Law § 240.35(4) (McKinney 1989) (New York's anti-mask statute is contained in title N of its criminal code, which is titled "Offenses Against Public Order . . ."); Okla. Stat. Ann. tit. 21, § 1301 (West 1983) (Oklahoma's anti-mask statute is contained in part VI of the state's criminal code, which is titled "Crimes Against Public Peace."); Va. Code Ann. § 18.2-422 (Michie 1988) (Virginia's anti-mask statute is contained in chapter 9, article 5 of its criminal code, which is titled "Activities Tending to Cause Violence.").

The court in *City of Pineville v. Marshall*, 299 S.W. 1072 (Ky. 1927), in upholding an anti-mask ordinance, succinctly explained the problem faced by law enforcement where the government permits random mask-wearing:

If every one [sic] is permitted to go disguised upon the streets of a city or town, the innocent and unwary may fall easy victims to the criminal and vicious, and peace officers be [sic] powerless to afford protection, unless a crime is committed in their presence and the offender then seized.

Id. at 1074.

Sustaining an early law that required automobiles to bear license plates, another court similarly relied on the principle that the potential for crime is greater where effective identification is absent. The court explained:

It is not difficult to see that the registration and numbering of automobiles is intimately connected with their safe operation in the streets[,] . . . [as] many automobiles are precisely alike in external appearance. . . . Those operators who are most reckless and indifferent—and those are the ones who endanger the safety of others—may violate [the speed limit] ordinance with impunity unless some method is adopted by which they or their automobiles may be identified. . . . It is reasonable to believe that, when he knows that the number displayed at the rear identifies his automobile, fear of discovery and punishment will lead the automobile's driver to observe the requirements of the ordinance.

People v. Schneider, 103 N.W. 172, 173 (Mich. 1905).

In light of this general proposition, it must be noted that, in at least some circumstances, it is possible that concealing one's identity in an obvious manner, such as by the use of a Ku Klux Klan hood or a George Washington mask, draws attention to the wearer and actually discourages crime.

49. See *supra* note 7 and accompanying text.

50. See *supra* text accompanying note 8.

51. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978).

52. See *supra* notes 15-16 and accompanying text.

53. See *supra* notes 17-18 and accompanying text.

by individuals even more likely to commit crime. Few individuals would argue that preventing crime is not an important or substantial government interest.⁵⁴ Accordingly, all anti-mask laws satisfy this component of the *O'Brien* test.

b. *Anti-Mask Laws: Unrelated to the Suppression of Free Expression?*

By exempting only certain expressive mask-wearing,⁵⁵ such as that occurring as part of theatrical productions and specified parades,⁵⁶ many anti-mask statutes⁵⁷ prohibit mask-wearing on the basis of the actor's message. Consequently, the statutes directly conflict with the *O'Brien* requirement that laws regulating expressive conduct be unrelated to the suppression of free expression.⁵⁸

Conceivably, the government could rely on the Supreme Court's *O'Brien* and *Barnes v. Glen Theatre*⁵⁹ rulings in asserting that "narrow" anti-mask laws,⁶⁰ which purport to regulate mask-wearing merely on the basis of whether the wearer desires the resulting anonymity,⁶¹ are unrelated to the suppression of free expression. The *O'Brien* Court found that

54. *But see infra* part I.B.1 ("Violation of the Due Process Guarantee") (discussing how anti-mask laws are susceptible to a substantive due process challenge on the basis that they criminalize some activity that is entirely innocent).

55. The question of whether the government could constitutionally ban all expressive mask-wearing (while permitting mask-wearing by individuals not engaged in expression, such as skiers and welders) is not practically relevant to this discussion, because it is doubtful that society would accept, nor legislators adopt, the banning of masks for the purposes of entertainment and political expression.

56. The Louisiana, Michigan, and Oklahoma anti-mask statutes, while containing language exempting parades, additionally require that the parades be of an educational, religious, or historical character. *See* La. Rev. Stat. Ann. § 14:313 (West 1986); Mich. Comp. Laws § 750.396 (1979); Okla. Stat. Ann. tit. 21, § 1301 (West 1983).

57. *See* discussion of anti-mask laws' statutory exemptions *supra* notes 13-14 and accompanying text.

58. *But see* *Schumann v. New York*, 270 F. Supp. 730, 733 (S.D.N.Y. 1967) (finding it permissible for an anti-mask statute to allow masked entertainment, yet prohibit masked political expression).

In a different decision, an exception permitting mask-wearing conducted for the purposes of amusement or entertainment was the dispositive factor in the court declaring the statute void on its face for vagueness under the Fourteenth Amendment's Due Process Clause. *See* U.S. Const. amend. XIV, § 1 (stating that no State shall deprive any person of "life, liberty, or property, without due process of law"); *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978). The court explained that such an exception poses the unconstitutional dilemma of distinguishing between entertainment and political speech, but did not reach the question of whether such a distinction would be constitutional independent of the vagueness concern.

59. 111 S. Ct. 2456 (1991).

60. *See supra* notes 15-16 and accompanying text.

61. Such an intent requirement renders many expressive masks permissible, as demonstrators often use masks only to express ideas and not to conceal their identities. *See supra* notes 43-44 and accompanying text.

Indeed, one court explicitly acknowledged that the state's narrow anti-mask law permits mask-wearing in order to make a political point only when the wearers are not intending to conceal their identities. *See State v. Miller*, 398 S.E.2d 547, 551-52 (Ga. 1990).

the law banning draft card destruction passed this component of the test because its operation was "limited to the noncommunicative aspect of O'Brien's conduct."⁶² Similarly, the *Barnes* Court ruled that a law banning public nudity was unrelated to the suppression of free expression, even though it encompassed expressive nude dancing, explaining that "[p]ublic nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity."⁶³ The government could therefore contend that narrow anti-mask laws likewise aim to prohibit only the "noncommunicative aspect" of mask-wearing—intentional anonymity—regardless of accompanying expression.

Such an assertion, however, fails to consider the following crucial aspect of the *O'Brien* and *Barnes* decisions. In *O'Brien*, Justice John Harlan cautioned that *O'Brien* "does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression . . . in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."⁶⁴ The *Barnes* Court appears to have heeded Justice Harlan's warning, as it emphasized that the law banning public nudity did not exert a stifling effect on expression, stating, "[T]he requirement that dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes it less graphic."⁶⁵

In contrast, because certain individuals need to conceal their identities in order to speak publicly, the anonymity provided by their masks is inextricably intertwined with their right to free speech. Furthermore, as such individuals tend to be those with unpopular ideas,⁶⁶ narrow anti-mask laws silence, albeit indirectly,⁶⁷ politically unpopular speakers.

62. *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968).

63. *Barnes*, 111 S. Ct. at 2463.

64. *O'Brien*, 391 U.S. at 388-89 (Harlan, J., concurring).

65. *Barnes*, 111 S. Ct. at 2463.

66. It is ironic to note how the narrow anti-mask laws, by requiring intent to conceal the mask-wearer's identity, prevent the very speakers who require the anonymity of masks from using them. Indeed, Georgia goes so far in stripping unpopular speakers of their anonymity that not only does its narrow anti-mask law effectively prohibit such individuals from wearing masks in public, but the State's Attorney General has explicitly authorized the State's Crime Information Center to maintain lists of individuals who violate the law. See Op. Att'y Gen. No. 76-33 (1976); cf. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) (holding that political contribution disclosure requirements intended to deter political corruption could not be applied to an unpopular political party, because the inhibiting effect of such disclosures was significantly greater on the members of unpopular parties than it was on members of mainstream parties).

67. Attempting to invalidate narrow anti-mask laws on the basis that they are intended to stifle unpopular speakers would likely be unsuccessful, as courts will strike down laws due to unconstitutional legislative motives only in extraordinary circumstances. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Even when courts find a law's motive unconstitutional, courts will not invalidate the law if it also serves a constitutional purpose. See *Palmer v. Thompson*, 403 U.S. 217 (1971); see also Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask*

The laws, by thus effectively banning more than the mere "noncommunicative aspect" of mask-wearing,⁶⁸ would likely be deemed related to the suppression of free expression.⁶⁹

Those anti-mask laws banning mask-wearing only when the wearer possesses specified criminal intent,⁷⁰ however, generally appear to be unrelated to the suppression of free expression. Such laws do not necessarily take into account an individual's message,⁷¹ but rather only whether or not the individual possesses criminal intent. Significantly, the impact of such laws differs from that of the narrow laws, as these laws do not effectively prohibit espousers of unpopular ideas from speaking; by simply requiring that mask-wearers not possess criminal intent, they enable individuals to express themselves in many alternate ways.

c. *Anti-Mask Laws: Within the Constitutional Power of the Government?*

Anti-mask laws that make content-based distinctions among public speakers⁷² might be justified by the contention that they, in permitting mask-wearing for entertainment but not for political demonstrations, ban speech that is more likely to result in disorder. An ordinance that similarly regulated expressive conduct on the basis of its communicative content, however, was invalidated by the Supreme Court in *Police Department of Chicago v. Mosley*.⁷³ There, the Court weighed the constitutionality of an ordinance that prohibited all picketing, except labor-related picketing, near schools. The Court ruled the ordinance unconsti-

Laws and the First Amendment, 25 Ga. L. Rev. 819, 843-45 (1991) (explaining how an attempt to invalidate anti-mask laws based on the alleged unconstitutional objective of stifling the Ku Klux Klan's expression would likely fail because the crime prevention purpose of the laws is constitutional); *infra* note 163 (citing judicial acknowledgments of the seemingly unconstitutional motives for enactment of certain anti-mask statutes).

68. The court in *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), ruled otherwise, flatly asserting that the Georgia anti-mask statute regulated "only the noncommunicative function of the mask." *Id.* at 551. The court's conclusion was not surprising in light of its dismissal of the defendant's contention that, as a Klan member, he required anonymity in order to speak. *See id.* at 553; *infra* notes 159-62 and accompanying text.

69. Professor Lawrence Tribe supports the general contention that seemingly content-neutral speech regulations, such as narrow anti-mask laws, can, in practice, effectively discriminate on the basis of the expression's communicative content. Professor Tribe has therefore stated that courts must evaluate to what extent such regulations "fall[] unevenly upon various groups in . . . society," Lawrence H. Tribe, *American Constitutional Law* § 12-23, at 979 (2d ed. 1988), for the free speech guarantee "should not be avoidable by government action which seeks to attain that unconstitutional objective under some other guise," *id.* § 12-5, at 814 (footnote omitted). *See also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 36-37 (1975) (explaining that "even a formally content-neutral [speech] restriction may have unequal effects on various types of messages" and that such "differential impact amounts to de facto content discrimination").

70. *See supra* notes 17-18 and accompanying text.

71. *See supra* note 67.

72. *See supra* notes 13-14 and accompanying text.

73. 408 U.S. 92 (1972).

tutional, explaining that "[p]redictions about imminent disruption from [demonstrations] involve judgments appropriately made on an individualized basis, not by means of broad classifications,"⁷⁴ and emphasizing that expression would be poorly protected if the government were permitted to make distinctions "on such a wholesale and categorical basis."⁷⁵ In *R.A.V. v. City of St. Paul*, the Supreme Court recently echoed the *Mosley* principle when it ruled that the government may not even ban "fighting words"⁷⁶ if it does so on the basis of the communicative content of the fighting words.⁷⁷

Unlike the ordinance in *Mosley*, anti-mask laws do not actually prevent any individual from speaking in a specified public area. However, anti-mask laws do burden certain speakers with diminished access to the public forum based solely on the content of their messages. Consequently, in accordance with *R.A.V.*, which prohibits making content-based distinctions among speakers even in the context of speech that is not constitutionally protected, these anti-mask laws fall outside the constitutional power of the government.

The government could defend narrow anti-mask laws⁷⁸ by contending that they single out individuals likely to commit crime, because criminals who wear masks undeniably desire their resulting anonymity.⁷⁹ Such laws, however, simultaneously silence speakers who need to conceal their identities, such as those espousing unpopular beliefs.⁸⁰ The Supreme Court, in *Martin v. City of Struthers*,⁸¹ struck down an ordinance that likewise impinged First Amendment rights while pursuing a crime pre-

74. *Id.* at 100-01.

75. *Id.* at 101. Although the *Mosley* Court based its ruling largely on the Fourteenth Amendment's equal protection guarantee, *see* U.S. Const. amend. XIV, § 1 (stating that no State shall "deny to any person within its jurisdiction the equal protection of the laws"), it invalidated the ordinance as a direct result of the ordinance's concern with the communicative content of picketing, explaining that regulating expressive conduct based on the content of the actor's message "is never permitted." *Mosley*, 408 U.S. at 99.

The *Mosley* Court stressed that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *id.* at 95, because the "government must afford all points of view an equal opportunity to be heard," *id.* at 96. *See also infra* notes 144-45 and accompanying text (discussing the superfluity of the *Mosley* Court invoking the equal protection guarantee).

76. "Fighting words," defined as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not constitutionally protected. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (footnote omitted).

77. *See* 112 S. Ct. 2538, 2545 (1992).

78. *See supra* notes 15-16 and accompanying text.

79. The Georgia Supreme Court, in *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), stated that "[p]ublic disguise is a particularly effective means of committing crimes From the beginning of time the mask or hood has been the criminal's dress. It conceals evidence, hinders apprehension and calms the criminal's inward cowardly fear." *Id.* at 550 (quoting Morris B. Abram & Alexander F. Miller, Anti-Defamation League of B'nai B'rith, *How to Stop Violence! Intimidation! In Your Community* 7 (1949)).

80. Even if certain speakers of unpopular ideas caused disorder at prior demonstrations, the Supreme Court's ruling in *Kunz v. New York*, 340 U.S. 290, 294 (1951), prevents the government from subsequently denying such individuals the right to speak.

81. 319 U.S. 141 (1943).

vention objective. The law at issue in *Martin* banned all canvassing in residential neighborhoods, as the municipality feared that individuals posing as canvassers might actually be assessing residences' suitability for burglary.⁸²

The apparently contrary outcomes of *Martin* and *United States v. O'Brien*,⁸³ which upheld the law banning draft card destruction, can be reconciled by comparing the availability of alternate communication methods for the respective actors.⁸⁴ Although would-be draft card destroyers can still express their dissatisfaction with military policy in many comparable ways, such as by destroying replicas of draft cards, individuals who are prohibited from canvassing houses might not have an alternate means of effectively communicating their ideas.⁸⁵

Admittedly, although canvassing houses and wearing masks can thus constitute all-or-nothing speaking opportunities for certain individuals, the analogy is imperfect. As the *Martin* Court noted, homeowners themselves can of course post signs to prohibit canvassing on their property and its concomitant potential for crime. Therefore, *Martin* does not necessarily require that courts invalidate anti-mask laws, because individuals have no equivalent veto over whether they, their minor children, or their belongings will publicly come in contact with masked individuals.⁸⁶

Due to this distinction, the Supreme Court's *Edwards v. South Carolina*⁸⁷ decision is implicated. There, the Court provided the constitutional standard with which to evaluate laws directed at preventing public

82. See *id.* at 144. In reaching this decision, the Court concluded that "[w]hile door to door distributors [sic] of literature may be . . . a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id.* at 145. See also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (citing *Martin* in ruling on contention that party's boycott violated antitrust laws); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (citing *Martin* while addressing challenge to ordinance that regulated the availability of public newsracks); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (holding that the great potential for littering that accompanies distribution of handbills does not constitute a government interest sufficient to ban them).

83. 391 U.S. 367 (1968).

84. Supreme Court Justice John Harlan noted the importance of the availability of alternate communication channels in his concurring opinion to *O'Brien*. See *supra* note 64 and accompanying text.

85. The *Martin* Court emphasized that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." *Martin*, 319 U.S. at 146. See also *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) ("The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.").

86. Some anti-mask laws prohibit mask-wearing on the private property of another. See, e.g., S.C. Code Ann. § 16-7-110 (Law. Co-op. 1976) (banning masked individuals from "demand[ing] entrance or admission to or enter[ing] upon the premises . . . of any other person"); Va. Code Ann. § 18.2-422 (Michie 1988) (prohibiting mask-wearing "upon any private property . . . without first having obtained from the owner or tenant thereof consent to do so in writing"). The constitutionality of such laws is likely affected by the *Martin* decision. Mask-wearing in private places, however, is not addressed in this Note. See *supra* note 8.

87. 372 U.S. 229 (1963).

disorder but that simultaneously prohibit speech.⁸⁸ *Edwards* implicitly requires law enforcement officers to permit public expression until the point where they can no longer maintain order.⁸⁹ In *Edwards*, the Court found the imminence of disorder insufficient by itself as a justification for silencing speakers, explaining that “[p]olice protection at the [demonstration at issue] was at all times sufficient to meet any foreseeable possibility of disorder.”⁹⁰ Although it may be true that the use of masks by a large group of demonstrators increases the likelihood for disorder,⁹¹ the increased possibility of violence cannot alone justify a blanket ban on such demonstrations in light of *Edwards*.⁹² Instead, the proper standard for determining whether a given masked demonstration can be banned is whether the police are able to maintain order, with the wearing of masks merely one factor to be taken into account.⁹³ Consequently, narrow anti-mask laws also fall outside the constitutional power of the government.

The anti-mask laws that prohibit mask-wearing only when accompa-

88. The *Edwards* Court reversed, on First Amendment grounds, breach of the peace convictions of demonstrators who had refused to obey a police order to disperse. *See id.* at 238.

89. *See id.* at 236.

90. *Id.* at 232-33 (footnote omitted). In an earlier case, the Court intimated this constitutional requirement that the government not prematurely stifle speech, pointing out that society has “appropriate public remedies to protect the peace and order of the community if . . . speeches should result in disorder or violence.” *Kunz v. New York*, 340 U.S. 290, 294 (1951).

91. Under the Model Anti-Mask Act proposed *infra* part II.A, because the presence of masked individuals at a demonstration is a factor that law enforcement might want to take into consideration when planning security measures, the government could require applicants for public speaking or assembly permits to disclose at the time of application whether demonstrators will wear masks. *See infra* text accompanying note 195.

92. *See* Oskar E. Rey, Note, *Antimask Laws: Exploring the Outer Bounds of Protected Speech Under the First Amendment*, 66 Wash. L. Rev. 1139, 1157 (1991) (concluding that anti-mask laws are unconstitutional because the government may ban demonstrations for the purpose of maintaining order only when “civil disorder is imminent and cannot be prevented by the law enforcement officials present”).

93. A federal district court that enjoined a public university’s mask prohibition followed this approach by examining the circumstances of the demonstration at issue. *See Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978). The *Aryan* court found the government’s stated fears of the presence of masked agitators and terrorists, *see id.* at 93, and the possibility that masked individuals would be more likely to become disruptive “merely speculative,” *id.* at 94 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969)), and therefore insufficient to permit the mask prohibition given the resulting inhibition of expression, *see id.* Because the *Aryan* court was ruling on the anti-mask policy of a public university, it applied the *Tinker* standard, which permits prohibition of expression when “school authorities ha[ve] reason to anticipate that the . . . [expression] would substantially interfere with the work of the school or impinge upon the rights of other students.” *Tinker*, 393 U.S. at 509.

Because the *Tinker* standard is applicable only to the “special characteristics of the school environment,” *id.* at 506, the *Aryan* ruling bodes especially well for the constitutionality of anti-mask laws, which are generally contested for their enforcement in the public arena. As detailed above, the Supreme Court has designated a higher threshold of government interest that must exist before the government can infringe expression in the public arena. *See Edwards v. South Carolina*, 372 U.S. 229 (1963).

nied by certain criminal intent,⁹⁴ however, do not prevent would-be mask-wearers from speaking publicly. By simply proscribing mask-wearers from intending specified criminal activity, the laws do not silence individuals who require anonymity in order to speak publicly. These anti-mask laws therefore fall within the constitutional power of the government.

d. *Anti-Mask Laws: Narrowly Tailored?*

Anti-mask laws that prohibit mask-wearing only when the wearer possesses specified criminal intent⁹⁵ permit virtually all First Amendment exercise by mask-wearers, requiring only that they possess no criminal intent. By not burdening speech substantially more than is necessary, these laws satisfy the narrowly tailored requirement. This is not the case, however, with the anti-mask laws that make content-based distinctions among masked speakers, nor the narrow laws, which ban mask-wearing by those individuals desiring their resulting anonymity.

Anti-mask laws that explicitly permit only certain expressive mask-wearing⁹⁶ unnecessarily ban First Amendment exercise, as individuals engaged in political expression do not generally pose the danger that individuals intending to commit crime do. Therefore, such laws fail the narrowly tailored requirement. Similarly, because individuals who require anonymity in order to speak for lawful reasons do not present the crime risk of those individuals who desire anonymity for unlawful reasons, narrow anti-mask laws⁹⁷ overly restrict free speech and also fail the narrowly tailored requirement.

3. Inhibition of First Amendment Rights

Anti-mask laws can inhibit individuals from exercising the right to free speech, because, without anonymity, certain individuals might remain silent. Those with unpopular ideas want to avoid the economic and social reprisals that may result if they were identified.⁹⁸ Some, such as rape accusers entering courtrooms, wish to avoid the discomfort they would otherwise experience.⁹⁹ Others, such as informants who testify at public

94. See *supra* notes 17-18 and accompanying text.

95. See *supra* notes 17-18 and accompanying text.

96. See *supra* notes 13-14 and accompanying text.

97. See *supra* notes 15-16 and accompanying text.

98. See *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 462-63 (1958); *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990). Commentators might allege that anti-mask laws inhibit the right to receive speech, as individuals may be curtailed from receiving certain speech if they are prohibited from being anonymous while doing so. Examples include those individuals merely observing, rather than participating in, a Ku Klux Klan rally, and individuals patronizing bookstores that sell sexually explicit materials. People wishing to observe a Ku Klux Klan rally might fear they will be perceived as supporting the Klan, while individuals who want to frequent adult bookstores might wish to avoid the discomfort that would accompany their being spotted.

99. The recent trial of Mike Tyson on a rape charge involved an interesting use of masks. While the accuser entered through a back door of the courthouse, a police decoy,

hearings, fear retribution from particular individuals.¹⁰⁰ Anti-mask laws can also inhibit exercise of the First Amendment's right to assemble, which guarantees the right to associate for the purpose of expressing beliefs.¹⁰¹ For example, the laws impair membership in politically unpopular groups, as individuals might not publicly recruit new members unless permitted to conceal their identities while doing so.¹⁰²

To pass constitutional muster despite inhibiting First Amendment rights, anti-mask laws must satisfy the *NAACP v. Alabama ex rel Patterson*¹⁰³ and *Shelton v. Tucker*¹⁰⁴ requirements that they constitute the least restrictive means for achieving a compelling government interest.¹⁰⁵

a. Mask-Wearing Presents a Novel Government Concern

The prevention of crime, which is the stated objective of anti-mask laws, is certainly a compelling government interest.¹⁰⁶ A California court nevertheless invalidated that state's anti-mask law, explaining that the law effectively "either inhibits the exercise of free speech or exposes the speaker . . . to retaliation."¹⁰⁷ That court cited the Supreme Court's

with her head and face covered by a silk scarf, distracted the attention of the horde of photographers, reporters, and Mike Tyson supporters by entering the courthouse via the main entrance. See *Eyewitness News* (WABC television broadcast, Jan. 30, 1992).

100. See *Glovely Day* (photograph), N.Y. Post, Jan. 18, 1992, at 2 (wearing a ski mask at a public press conference, the 12-year-old victim of a racial attack meets professional boxer Evander Holyfield); *Telling All* (photograph), U.S. News & World Rep., Feb. 3, 1986, at 26 (an individual wears a black hood while providing information about the operations of organized crime).

101. See *NAACP v. Alabama*, 357 U.S. at 460. In accordance with *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which distinguished between the First Amendment's "freedom of expressive association," which guarantees the right to take part in First Amendment activities as a group, and the Fourteenth Amendment's "freedom of intimate association," which protects "choices to enter into and maintain certain intimate human relationships," *id.* at 617, an inhibition of membership in a political group such as the NAACP potentially constitutes a violation of the First Amendment's freedom of association. The Klan member prosecuted under Georgia's anti-mask law in *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), therefore pursued a First Amendment approach. See *id.* at 552.

102. Anti-mask laws could even potentially inhibit association in privately owned areas, as they preclude entering a private meeting area while concealing one's identity. Consequently, when the location of an unpopular group's meeting place is known, the media could film individuals entering and leaving the meeting area, thereby discouraging attendance.

Some anti-mask laws do explicitly impose restrictions on the meetings of masked individuals conducted in private places. See, e.g., S.C. Code Ann. § 16-7-110 (Law. Co-op. 1976) (requiring individuals who are masked while "participat[ing] in any meeting or demonstration upon the private property of another" to first obtain "the written permission of the owner and the occupant of such property"). Mask-wearing in private places, however, is not addressed in this Note. See *supra* note 8.

103. 357 U.S. 449 (1958).

104. 364 U.S. 479 (1960).

105. See *supra* notes 39-41 and accompanying text.

106. See *supra* part I.A.2.a ("Anti-Mask Laws: Furthering an Important or Substantial Government Interest?").

107. *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978).

holding in *NAACP v. Alabama*, which recognized the important role anonymity can play in exercising First Amendment rights.¹⁰⁸

Despite the California court's ruling, the *NAACP v. Alabama* decision does not constitute sufficient precedent with which to determine the constitutionality of anti-mask laws, because the presence in public of a masked individual is a different situation and affects different government interests than those addressed in *NAACP v. Alabama*. First, while *NAACP v. Alabama* ruled that the NAACP could not be required to divulge its membership list to the State, the Court was not concerned with whether the NAACP members could conceal their physical identities while meeting in public. Second, *NAACP v. Alabama* was concerned with the prevention of non-violent crime,¹⁰⁹ whereas anti-mask laws are ostensibly intended to prevent the violent crime of public disorder.¹¹⁰ Anti-mask cases thus pose a novel question that necessitates reference to Supreme Court rulings on laws intended to prevent violent crime, but that also inhibit First Amendment rights.

Unfortunately, there simply is no such direct Supreme Court precedent. Because anti-mask laws' inhibition of speech produces the same result as a prohibition of speech, however, it is appropriate to utilize the relevant constitutional standard for laws intended to prevent violent crime, but that also *prohibit* speech. As previously discussed, the Supreme Court established this standard in *Edwards v. South Carolina*,¹¹¹ requiring that the police permit public speech and assembly until they are no longer able to maintain order.¹¹² Under this test, as indicated in the preceding section, only those anti-mask laws requiring specified criminal intent¹¹³ pass constitutional muster.¹¹⁴

b. *Anti-Mask Laws Are Not the Least Restrictive Means*

In violation of the standard established by *Shelton v. Tucker*¹¹⁵ for laws that inhibit First Amendment rights, anti-mask laws do not accomplish the government objective of crime prevention in the manner least

108. See *id.*; see also *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978) (citing *NAACP v. Alabama* in ruling a public university's anti-mask regulation unconstitutional, stating that the situation was one in which "the activity restricted is so closely connected to the speech that a loss of the activity results in a loss of the expression itself"). But see *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990) (acknowledging the precedent contained in the *NAACP v. Alabama* holding, but ruling it unavailable to the Klan member challenging an anti-mask statute). For a critique of the *Miller* court's examination of this point, see *infra* notes 159-62 and accompanying text.

109. See *supra* note 39.

110. But see *infra* note 163 (citing judicial acknowledgments of the seemingly unconstitutional motives for enactment of certain anti-mask statutes).

111. 372 U.S. 229 (1963).

112. See *supra* note 89 and accompanying text.

113. See *supra* notes 17-18 and accompanying text.

114. See *supra* notes 92-94 and accompanying text.

115. 364 U.S. 479 (1960).

restrictive of such rights. As detailed above,¹¹⁶ anti-mask laws that permit only certain expressive mask-wearing¹¹⁷ and those that effectively prohibit intentional anonymity by speakers who require it¹¹⁸ overly restrict First Amendment rights.¹¹⁹ Again, anti-mask laws that prohibit mask-wearing only when the wearer possesses specified criminal intent¹²⁰ do not unnecessarily impinge First Amendment rights, and would therefore pass constitutional muster.

B. Fourteenth Amendment Objections

In addition to the First Amendment issues already discussed, anti-mask laws raise a number of Fourteenth Amendment due process¹²¹ and equal protection¹²² concerns. Three likely Fourteenth Amendment objections are discussed below.

1. Violation of the Due Process Guarantee

Some observers might consider most anti-mask laws unconstitutional because they, by definition, do not require probable cause of independent criminal activity or criminal intent.¹²³ Without such a probable cause requirement, the laws potentially criminalize innocent activity because not all individuals who publicly conceal their identities¹²⁴ (nor, in the case of narrow anti-mask laws,¹²⁵ not all such individuals who also desire their resulting anonymity)¹²⁶ are perpetrating, nor intending to perpe-

116. See *supra* part I.A.2.d ("Anti-Mask Laws: Narrowly Tailored?").

117. See *supra* notes 13-14 and accompanying text.

118. See *supra* text accompanying notes 66-67.

119. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978) (finding an anti-mask statute unconstitutional due to the existence of less restrictive laws).

120. See *supra* notes 17-18 and accompanying text.

121. See U.S. Const. amend. XIV, § 1 (stating that no State shall deprive "any person of life, liberty, or property, without due process of law"); *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981); *People v. Gillespi*, 204 N.E.2d 211, 212 (N.Y.), *modifying* 202 N.E.2d 565 (N.Y. 1964); *People v. Archibald*, 296 N.Y.S.2d 834, 836 (N.Y. App. Term. 1968), *aff'd*, 260 N.E.2d 871 (N.Y. 1970).

122. See U.S. Const. amend. XIV, § 1 (stating that no State shall "deny to any person within its jurisdiction the equal protection of the laws"); *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978); *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981); *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990).

123. See *supra* notes 8-11 and accompanying text.

124. Such individuals include surgeons in public hospitals, Muslim women, and people wearing ski masks on cold days.

125. See *supra* notes 15-16 and accompanying text.

126. Such individuals include patients entering and exiting abortion clinics, see *48 Hours: Abortion Battle* (CBS television broadcast, Oct. 20, 1988), celebrities appearing in public while not wishing to be recognized, see William Norwich, N.Y. Post, Mar. 4, 1992, at 12 (visiting a museum in Washington, D.C., singer Michael Jackson wears a black satin surgical mask), and undercover agents testifying at trials who need to retain anonymity for future investigatory work, see, e.g., *Cloak and Dagger in the Courtroom*, N.Y. Times, July 28, 1992, at A9 (discussing federal judge's statement that he is considering allowing agents of the Central Intelligence Agency to testify while wearing special eyeglasses or hairpieces in order to "preserve their usefulness as covert operators").

trate, crime. Consequently, anti-mask laws, except of course those few that do require specified criminal intent,¹²⁷ might be open to the claim that they constitute an arbitrary exercise of the state's police power, and therefore violate the Fourteenth Amendment's Due Process Clause.¹²⁸ Several state courts have addressed this constitutional claim, reaching divergent conclusions.¹²⁹

a. *Constitutional Standards*

The state's police power generally provides the legislature with authority to enact laws protecting the health, safety, general welfare, and morals of the community.¹³⁰ Laws that have a crime prevention objective, such as anti-mask laws,¹³¹ certainly fall within the reach of the government's police power. However, in order to protect individuals from arbitrary laws, the Constitution further requires, pursuant to the principle of substantive due process, that laws be rationally related to their objectives.¹³²

Addressing a criminal law that encompassed both criminal and non-criminal activities in *Papachristou v. City of Jacksonville*,¹³³ the Supreme

127. See *supra* notes 17-18 and accompanying text.

128. See U.S. Const. amend. XIV, § 1 (stating that no State shall deprive "any person of life, liberty, or property, without due process of law").

129. Compare *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1981) (finding an anti-mask statute unconstitutional because it was "susceptible of application to entirely innocent activities" and "create[d] prohibitions that completely lack[ed] any rational basis") with *People v. Gillespi*, 204 N.E.2d 211, 212 (N.Y.) (sustaining an anti-mask law, explaining that because it is not "an unreasonable [or] arbitrary exercise of the police power for the Legislature to enact a statute regulating the dress of citizens," the law did not violate "the due process clause of the Fourteenth Amendment of the Constitution of the United States"), modifying 202 N.E.2d 565 (N.Y. 1964) and *People v. Archibald*, 296 N.Y.S.2d 834, 836 (N.Y. App. Term. 1968) (upholding conviction under anti-mask law despite the statute's lack of a criminal intent requirement, ruling that the statute was not "an unreasonable [nor] arbitrary exercise of police power"), *aff'd*, 260 N.E.2d 871 (N.Y. 1970). See also *People v. Luechini*, 136 N.Y.S. 319, 320 (N.Y. Sup. Ct. 1912) (reversing an anti-mask law conviction, reasoning that it could not "conceive that our Legislature, in the exercise of its police power, intended to declare [mask-wearing] *malum prohibitum*, i.e. criminal in itself without proof of specific criminal intent," and therefore not reaching the issue of whether such a law exceeds the state's police power).

130. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (generally describing the state's police power as "relat[ing] to the safety, health, morals and general welfare of the public"); *Leisy v. Hardin*, 135 U.S. 100, 158 (1890) (describing the police power of the government as including "protection of the safety, the health, the morals, the good order and the general welfare of the people"); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) (acknowledging the law-making powers of the state in matters "affecting the public interest").

131. See *supra* part I.A.2.a ("Anti-Mask Laws: Furthering an Important or Substantial Government Interest?").

132. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). If the law affects a fundamental right, then courts employ a stricter standard. See *Griswold v. Connecticut*, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring).

133. 405 U.S. 156 (1972).

Court invalidated an ordinance that proscribed, in relevant part, habitual nightwalking. The Court found the ordinance in violation of the due process guarantee, explaining that although nightwalking might be indicative of the actor "going to or coming from a burglary," it is "by modern standards . . . normally innocent," for "sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result."¹³⁴

b. *Concealment of Identity Does Not Appear To Be Constitutionally Protected*

Although the *Papachristou* Court did not explicitly invoke the "constitutional right to freedom of movement,"¹³⁵ it did intimate that nightwalking is entitled to equivalent judicial protection, stating that nightwalking has been "historically part of the amenities of life as we have known them[,] . . . [even though it is] not mentioned in the Constitution or in the Bill of Rights."¹³⁶ Consequently, despite the fact that the physical concealment of identity does not appear to be a constitutional right,¹³⁷ courts could rely on the *Papachristou* holding to find anti-mask laws in violation of the due process guarantee if the laws do not provide exceptions for the many situations in which public mask-wearing has historically been innocent.

2. Violations of the Equal Protection Guarantee

Anti-mask laws might violate the Equal Protection Clause due to the manner in which they differentiate between instances of speech. Moreover, convictions under even a constitutional anti-mask law would themselves violate the equal protection guarantee if certain selective enforcement had taken place.

a. *Treating Expression Differently Based on Classifications*

The exceptions under most anti-mask laws for occasions such as theat-

134. *Id.* at 163-64.

135. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

136. *Papachristou*, 405 U.S. at 164.

137. The apparent constitutionality of "criminal" anti-mask laws, which provide enhanced penalties for crimes committed while masked, *see supra* note 7 and accompanying text, suggests that the mere physical anonymity, in and of itself, intentionally effected by mask-wearing is not constitutionally protected, *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (invalidating an ordinance that prohibited certain "fighting words"—even though fighting words are not constitutionally protected speech—because the law violated the free speech guarantee by distinguishing among the communicative content of different instances of fighting words); *State v. Mitchell*, 485 N.W.2d 807, 815 (Wis. 1992) (invalidating a statute that enhanced criminal penalties when the actor possessed specified motivations, because it "directly punish[ed] a defendant's constitutionally protected thought"); *see also Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978) (expressing agreement with State's assertion that there is no federal constitutional right to be physically anonymous); *State v. Miller*, No. 90D-929-2, slip op. at 3 (Ga. Super. Ct. May 25, 1990) (stating that "[t]here is clearly not an absolute right to anonymity"), *rev'd on other grounds*, 398 S.E.2d 547 (Ga. 1990).

rical productions and holiday celebrations, but not for political demonstrations,¹³⁸ would appear to violate the equal protection guarantee, because they afford varying treatment to different types of expression. In addition, because the narrow anti-mask laws¹³⁹ effectively make distinctions between those speakers who require anonymity and those who do not,¹⁴⁰ they likewise appear to be in violation of the Equal Protection Clause. Although two courts did rule that anti-mask laws violated the Fourteenth Amendment due to their classifications,¹⁴¹ this approach is actually both misplaced and entirely unnecessary.

One court that found an Equal Protection Clause violation relied on the Supreme Court's *Police Department of Chicago v. Mosley*¹⁴² decision. That decision invoked the First Amendment's free speech and Fourteenth Amendment's equal protection guarantees to invalidate an ordinance that prohibited all picketing, except labor-related picketing, near schools.¹⁴³ The *Mosley* Court, however, did not need to employ the Equal Protection Clause to find the ordinance unconstitutional. As the *Mosley* Court itself pointed out, because the ordinance in dispute prohibited picketing based on subject matter, it "'slip[ped] from . . . neutrality . . . into a concern about content.'" ¹⁴⁴ Thus, the Court in *Mosley* needed only employ the *United States v. O'Brien* requirement that laws regulating expressive conduct be unrelated to the suppression of free expression.¹⁴⁵

Indeed, the Equal Protection Clause analysis' redundancy is evident in the very decisions that found anti-mask laws in violation of that clause,

138. See *supra* notes 13-14 and accompanying text.

139. See *supra* notes 15-16 and accompanying text.

140. See *supra* text accompanying notes 66-67.

141. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 818-19 (Cal. Ct. App. 1978); *State v. Miller*, No. 90D-929-2, slip op. at 6, 9-10 (Ga. Super. Ct. May 25, 1990), *rev'd*, 398 S.E.2d 547 (Ga. 1990).

142. 408 U.S. 92 (1972).

143. *Mosley* explained that because the ordinance "discriminat[ed] among pickets . . . based on the content of their expression[,] . . . under the Equal Protection Clause, it may not stand." *Id.* at 102.

144. *Id.* at 99 (quoting Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29).

145. See *supra* notes 32-33 and accompanying text. *O'Brien* produces such a result in these circumstances because, as Professor Kenneth Karst has explained, discriminating among speakers is equivalent to violating the First Amendment's ban on censorship. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975). As another scholar has pointed out, employing the Equal Protection Clause in such cases "adds nothing constructive to the analysis. It . . . deflect[s] attention from the central constitutional issue[,] [which is] . . . fundamentally a first amendment issue." Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 206 (1983). See also *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 n.4 (1992) (explaining that the Court "has occasionally fused the First Amendment into the Equal Protection Clause . . . , but at least with the acknowledgment . . . that the First Amendment underlies its analysis" (footnote omitted)).

Mosley did rely on *O'Brien*, but only for its least restrictive requirement. See *supra* note 36 and accompanying text (discussing the least restrictive requirement of *O'Brien*).

as those courts also ruled that the laws ran afoul of the First Amendment.¹⁴⁶ When anti-mask laws are selectively enforced, however, the Equal Protection Clause is unquestionably implicated. This issue is discussed in the following section.

b. *Selective Enforcement*

Even if courts deemed anti-mask laws constitutional on their face, selective enforcement of the laws would violate the Equal Protection Clause when such enforcement was motivated by a standard such as "race, religion, or other arbitrary classification,"¹⁴⁷ or due to the exercise of protected statutory or constitutional rights.¹⁴⁸ To avoid this fatal conflict, the government must enforce anti-mask laws equally against virtually all violators. For example, unless the government also prosecuted individuals covering their faces while entering and exiting abortion clinics, convictions of individuals exercising First Amendment rights while wearing Klan hoods would not be constitutional. Similarly, if a certain locality enforced an anti-mask law only against individuals entering and exiting abortion clinics but not against other mask-wearers, then convictions of these individuals would likewise be unconstitutional.¹⁴⁹

C. *Inconsistent Judicial Review*

The standard of judicial objectivity has been set forth as follows: "As judges sworn to defend the Constitution . . . we cannot decide this or any case on [the] basis [of the parties' beliefs]. Ideological tyranny, no matter

146. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816-17 (Cal. Ct. App. 1978); *State v. Miller*, No. 90D-929-2, slip op. at 9-10 (Ga. Super. Ct. May 25, 1990), *rev'd*, 398 S.E.2d 547 (Ga. 1990).

147. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

148. See *United States v. Goodwin*, 457 U.S. 368, 372 (1982); see also *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965) (holding that governmental discrimination against speakers is unconstitutional, whether effected by an explicit statute or "the equivalent of such a system by selective enforcement of an extremely broad" statute).

149. At least some anti-mask laws have been selectively enforced. In Florida, for example, the Attorney General permitted parade participants to wear hooded gowns representing those individuals who had lost their lives in traffic accidents, as the parade was deemed to fall "so closely within the spirit and intendment of the" State's anti-mask statute's exception for "theatrical productions." Op. Att'y Gen. 757, 758 (1951). In Georgia, the Presiding Justice of the State Supreme Court, dissenting from the ruling that sustained Georgia's anti-mask statute, see *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), emphasized evidence of selective enforcement that arose during the trial, at which "Judge Osgood Williams, one of the drafters of the statute . . . testified that in [his] twenty-eight years [as a] Superior Court judge not one person who committed an armed robbery while wearing a mask was charged under the anti-mask statute," *id.* at 554-55 (Smith, J., dissenting).

Commenting on a grand jury indictment of students who wore masks during a hazing incident at a college, Charleston, South Carolina Solicitor Charles Condon seemed to endorse similar selective enforcement of his state's anti-mask law when he stated, "While you might think it's ridiculous to have a statute on wearing masks, if you put it in the proper context, I think it only applies to incidents that have racial motivations behind them." *5 Citadel Cadets Indicted Over Racial Hazing*, N.Y. Times, Oct. 8, 1987, at A20.

how worthy its motivation, is forbidden as much to appointed judges as to elected legislators."¹⁵⁰ A number of cases involving Ku Klux Klan challenges to anti-mask statutes, however, has called into question whether certain courts have adhered to this ideal. In these cases, the courts appear to have violated the First Amendment rights of Klan members by sustaining anti-mask laws that do not satisfy the constitutional requirements detailed in this Note. Indeed, such cases are in sharp contrast to the successful challenges brought by Iranian nationals, where other courts employed proper constitutional analysis to invalidate mask prohibitions.¹⁵¹

One court deciding a Klan challenge rejected the contention that wearing the Klan hood constitutes expressive conduct,¹⁵² while another court concluded that the expressive effect of such activity is only *de minimis*.¹⁵³ In so ruling, the judges presiding in these cases have precluded the Klan from pursuing a First Amendment direct violation claim, because the *United States v. O'Brien*¹⁵⁴ test that protects expressive conduct¹⁵⁵ comes into play only when a "sufficient" amount of protected expression is impaired.¹⁵⁶ Moreover, the one court that did concede the communicative element of wearing the Klan hood disregarded settled First Amendment law by ruling that such hood-wearing¹⁵⁷ is not constitutionally

150. *Collin v. Smith*, 578 F.2d 1197, 1200 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). *Collin* ruled unconstitutional an ordinance that would have prohibited Nazis from conducting a planned march in Skokie, Illinois. See *id.* at 1207.

151. See *Aryan v. Mackey*, 462 F. Supp. 90 (N.D. Tex. 1978); *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813 (Cal. Ct. App. 1978).

152. See *Hernandez v. Commonwealth*, 406 S.E.2d 398, 400 (Va. Ct. App. 1991) (ruling that the Klan mask does not serve as a symbol of the Klan identity, explaining that "[t]he [Klan] robe and the hood may be such symbols, but the mask is not. . . [because the] mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and the hood"); see also *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990) (utilizing the overbreadth doctrine to invalidate an anti-mask ordinance in response to a Klan challenge, explaining that "certain masks and disguises may constitute strong symbolic political expression that is afforded protection by the First Amendment," but failing to indicate whether the Ku Klux Klan hood itself constituted such a mask (emphasis added)).

153. See *State v. Miller*, 398 S.E.2d 547, 551 (Ga. 1990) (terming the expressive effect of the mask *de minimis* in light of the permissible wearing of the Klan robe and pointed hat).

154. 391 U.S. 367 (1968).

155. See *supra* part I.A.1.a ("Direct Violation Test").

156. See *O'Brien*, 391 U.S. at 376.

157. In *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), the Georgia Supreme Court termed the message of the Klan hood "the communication of a threat" and therefore not entitled to First Amendment protection. See *id.* at 551. Despite the *Miller* court's Shakespearean-sounding explanation—"A nameless, faceless figure strikes terror in the human heart. But, remove the mask, and the nightmarish form is reduced to its true dimensions," *id.* at 550—the Presiding Justice emphasized in his dissent that the United States Supreme Court "rejected the . . . argument that if a certain audience takes serious offense at a particular expression . . . the expression may be prohibited," *id.* at 556 (Smith, J., dissenting) (citing *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989)). See also *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir.) (invalidating an ordinance that would have pre-

protected.¹⁵⁸

By questioning the assertion that Klan members without hoods are inhibited from exercising First Amendment rights, one court was also able to rule the principle of *NAACP v. Alabama ex rel Patterson*¹⁵⁹ unavailable. The court stated that the Klan member challenging the anti-mask statute had not satisfied the required showing of feared reprisals, emphasizing the "uncontroverted showing" of reprisals made in *NAACP v. Alabama*.¹⁶⁰ In so ruling, the court disagreed with the lower court's

vented a planned Nazi march, explaining that any resulting "'shock effect . . . [on the part of observers] must be attributed to the content of the ideas expressed [and] [i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'" (quoting *Street v. New York*, 394 U.S. 576, 592 (1969) (first alteration in original) (footnote omitted in original))), *cert. denied*, 439 U.S. 916 (1978).

Inconsistencies in the *Miller* decision suggest that the court rendered the ruling that it did for political reasons. For example, if the court truly believed that masks may be banned when expressing a threat, then it is doubtful that the court would have explicitly permitted the continued wearing of the traditional Klan robe and pointed hat. See *Miller*, 398 S.E.2d at 551.

158. Rather than distort constitutional analysis to reach the conclusion that wearing the Klan hood is not protected expressive conduct, there remain the options of either obtaining a Supreme Court ruling or passing a constitutional amendment to explicitly change the type of speech that receives constitutional protection. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (proposing that the government should be able to ban certain racist speech). Matsuda interestingly points out that prohibiting such speech was in fact the primary purpose of anti-mask laws, explaining:

[M]any states have passed anti-mask statutes in a barely disguised effort to limit Ku Klux Klan activities. These statutes purportedly cover the wearing of masks in general, with no specific mention of the intent to control the Klan. Neutral reasons, such as the need to prevent pickpockets from moving unidentified through crowds, or the need to demask burglars and bank robbers, are proffered for such statutes. The result of forgetting—or pretending to forget—the real reason for antimask [sic] legislation is farcical. . . . We know why state legislatures—those quirkily populist institutions—have passed anti-mask statutes. It is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know.

Id. at 2374 (footnotes omitted). See also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431 (1990) (asserting that certain racist speech is not entitled to constitutional protection). But see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484 (1990) (stating that even racist speech must be protected, especially in light of how free speech has contributed to the advancement of racial equality).

159. 357 U.S. 449 (1958).

160. See *Miller*, 398 S.E.2d at 553 (quoting *NAACP v. Alabama*, 357 U.S. at 462). Although it is true that *NAACP v. Alabama* contained an "uncontroverted showing" of reprisals, the United States Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), explicitly stated that such an "uncontroverted showing" is unnecessary, explaining, "The evidence offered need show only a reasonable probability that the compelled disclosure . . . will subject [the individuals] to threats, harassment or reprisals from either Government officials or private parties," *id.* at 74.

Moreover, publicized episodes involving public figures, such as CBS's firing of Jimmy "The Greek" Snyder for comments he made concerning the physical capabilities of black athletes, see Dave Anderson, *'Greek' Loses an Out Bet*, N.Y. Times, Jan. 17, 1988, § 5, at

finding that

the "Klan" is in effect a persecuted group in that its beliefs may be so abhorrent to most members of society that the Klan members and their families may be in the same amount of danger as the Iranian students in *Ghafari* [*v. Municipal Court*¹⁶¹] and the black members of the N.A.A.C.P. in *N.A.A.C.P. v. Alabama*.¹⁶²

That certain courts have engaged in what appears to be ideology-based judicial reasoning, however laudable such efforts might be, should come as no surprise in light of comments made by judges and law enforcement officials that indicate the tacit anti-Klan purpose of anti-mask laws.¹⁶³

II. MODEL ANTI-MASK ACT

This section proposes a Model Anti-Mask Act that is designed to achieve the crime prevention goals of most existing anti-mask laws, while at the same time protecting individuals who wear masks as a means of exercising First Amendment rights and engaging in specified lawful activities.

Most existing anti-mask laws are unconstitutional, for, as discussed above, they ban mask-wearing even when individuals are engaged in First Amendment activities, such as political demonstrations, and even when individuals are performing entirely innocent acts, such as crossing

1, and the forced resignation of Los Angeles Dodgers' vice president in charge of player personnel, Al Campanis, for stating that blacks may lack the abilities needed to be professional baseball managers, see Murray Chass, *Campanis is Out; Racial Remarks Cited by Dodgers*, N.Y. Times, Apr. 9, 1987, at B13, lend credence to the Klan's assertion. See also *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974) (upholding firing of Klan member against a federal civil rights challenge); *Savina v. Gebhart*, 497 F. Supp. 65 (D. Md. 1980) (same); Nat Hentoff, *Outing the Klan*, Wash. Post, June 20, 1992, at A23 (discussing the Jewish Defense Organization's concerted effort of contacting the employers and unions of Klan members and demanding that such individuals be fired).

161. 150 Cal. Rptr. 813 (Cal. Ct. App. 1978).

162. *State v. Miller*, No. 90D-929-2, slip op. at 4 (Ga. Super. Ct. May 25, 1990), *rev'd*, 398 S.E.2d 547 (Ga. 1990). The court also distinguished *NAACP v. Alabama* by pointing out that the anti-mask law did not require mask-wearers to divulge their names and addresses, information that had been sought by the government in *NAACP v. Alabama*. See *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990) (citing *NAACP v. Alabama*, 357 U.S. at 451).

163. The Georgia Assistant County Solicitor prosecuting *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), David Fuller, while discussing the trial court decision that found Georgia's anti-mask law unconstitutional, *State v. Miller*, No. 90D-929-2, slip op. (Ga. Super. Ct. May 25, 1990), *rev'd*, 398 S.E.2d 547 (Ga. 1990), stated, "It saddens me because this order, if upheld, gives protection to some groups worthy of it, but it's going to afford the same protection to groups not worthy of it, such as the Klan." *Klan Hoods Upheld*, N.Y. Newsday, May 27, 1990, at 14.

The Supreme Court of Arizona, in *State v. Gates*, 576 P.2d 1357 (Ariz. 1978), stated without hesitation that "[t]he purpose of the . . . [state's anti-mask law] was to frustrate the efforts of the Ku Klux Klan in Arizona," *id.* at 1358, while Virginia's Court of Appeals openly "acknowledge[d] that the legislature's original motivation for enacting the anti-mask statute may have been to 'unmask the Klan,'" *Hernandez v. Commonwealth*, 406 S.E.2d 398, 401 (Va. Ct. App. 1991).

picket lines. Moreover, the few existing anti-mask laws that are constitutional—the ones requiring concurrent criminal activity¹⁶⁴ and specified criminal intent¹⁶⁵—are inadequate to serve law enforcement needs. This is because the police need probable cause of criminal activity¹⁶⁶ and criminal intent, respectively, to make arrests under such laws, which results in the laws failing to prohibit the potentially criminal mask-wearing that the unconstitutional laws do.

In contrast, the Model Anti-Mask Act prohibits public mask-wearing only when the mask-wearer both (1) intends the resulting concealment of identity, and (2) does *not* need that anonymity to exercise the rights of free speech or assembly or to engage in specified activities where the need for privacy is apparent. By completely avoiding both the direct violation and inhibition of First Amendment rights that characterize most existing anti-mask laws, the Model Anti-Mask Act is unrelated to the suppression of free expression,¹⁶⁷ falls within the constitutional power of the government,¹⁶⁸ and satisfies the narrowly tailored¹⁶⁹ and least restrictive tests,¹⁷⁰ which the other laws fail. Furthermore, by requiring the intent to conceal identity¹⁷¹ and providing exceptions for common instances of such mask-wearing in which individuals do not have criminal intent, the Act renders a substantive due process challenge moot. The Model Act simultaneously satisfies law enforcement needs by targeting individuals who are neither exercising the right to speak or assemble nor covered under the specified exceptions—precisely those mask-wearers who pose the crime risk feared by the government, as one is left to wonder for what lawful purpose such individuals desire anonymity.

164. See *supra* note 7 and accompanying text.

165. See *supra* notes 17-18 and accompanying text.

166. A California court slightly expanded the reach of its criminal anti-mask law when it stated that the principal criminal offense (as opposed to the concurrent mask-wearing) does not have to occur before law enforcement can arrest the mask-wearer, reasoning that the plain meaning of the statute indicates that it encompasses mask-wearing accompanied by criminal intent. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978). Such an interpretation of criminal anti-mask laws, however, still requires that law enforcement have probable cause of criminal intent.

The Florida and District of Columbia anti-mask statutes prohibit mask-wearing accompanied by a *civil* law violation, but it is questionable whether such a provision assists government crime-fighting efforts. See D.C. Code Ann. § 22-3112.3 (1989); Fla. Stat. Ann. §§ 876.11-.16 (West 1976 & Supp. 1992).

167. See *supra* notes 32-33 and accompanying text.

168. See *supra* note 35 and accompanying text.

169. See *supra* note 36 and accompanying text.

170. See *supra* notes 40-41 and accompanying text.

171. The Model Act's requirement that mask-wearers intend to conceal their identities excludes from the Act's reach a variety of innocent masked activities (for example, the wearing of "masks" by hockey goalies, scuba divers, and individuals who, for medical reasons, have bandages covering their faces). See *supra* notes 15-16 and accompanying text (discussing the requirement, of existing narrow anti-mask laws, that mask-wearers intend to conceal their identities). The intent requirement similarly permits expressive mask-wearing when the wearers do not desire their resulting anonymity. See *supra* notes 43-44 and accompanying text.

A. *A Proposed Model Anti-Mask Act*

The Model Act is divided into two main sections. The first, section 100, criminalizes public mask-wearing when accompanied by the intent to conceal identity, unless any of several specified exceptions are applicable. The second, section 200, provides enhanced penalties for crimes committed or attempted while the actor's identity is concealed. The portions in brackets constitute the penalty provisions, which, as indicated in the "Drafter's Note" following each main section, may be modified to conform with the general penalty provisions of the adopting jurisdictions.

MODEL ANTI-MASK ACT

§ 100. Concealing One's Physical Identity in Public

(a) A person is guilty of a [misdemeanor in the second degree] when, with the intent to conceal his physical identity, the person conceals his physical identity while upon any public way or public property by intentionally wearing a mask, hood, or other device that hides, conceals, or covers any portion of his face; by intentionally disguising his voice; by intentionally disguising or concealing his fingerprints; or by any other intentional means.

(b) Section 100(a) shall not apply to a person engaged in any of the following activities if the person requires anonymity to engage in the respective activity:

(1) A person who is participating in speech or assembly that is protected by the United States Constitution or the constitution of this State, including travelling immediately to and from the area where the speech or assembly is occurring;

(A) Localities may require that such persons indicate, at the time of application for a ministerially-granted public speech or assembly permit, the intention to employ physical concealment of identity at the public speech or assembly.

or

(2) A person entering, exiting, or within an establishment or area for the purpose of:

(A) obtaining or providing medical counseling or services;¹⁷²

(B) working or otherwise conducting business during a labor dispute;

(C) obtaining or providing sexually explicit materials;¹⁷³

(D) criminal arrest,¹⁷⁴ arraignment, indictment, or

172. Individuals entering and exiting abortion clinics might alternatively be protected under the theory of inhibition of the abortion right. *See Roe v. Wade*, 410 U.S. 113 (1973).

173. Alternatively, producers and purchasers of sexually explicit materials could be constitutionally protected under theories of the inhibition of speech and receipt of speech, respectively. *See supra* note 98.

174. Arrested individuals often turn their heads or put their shirts in front of their faces to avoid news cameras. *See, e.g., She Picks Amy* (photograph), N.Y. *Newsday*, July

trial;¹⁷⁵

(i) But section 100(b)(2)(D) shall not be construed to limit the police or judiciary from identifying suspects in accordance with the laws of criminal and judicial procedure.

or

(E) filing a criminal complaint or testifying at a criminal judicial proceeding or legislative hearing.

(i) But section 100(b)(2)(E) shall not be construed to impair the Fifth Amendment constitutional right of criminal defendants that guarantees them the right to face their accusers.

(c) Section 100(a) shall not apply to a person who is a public official¹⁷⁶ or a public figure.¹⁷⁷

(d) Sections 100(b) and 100(c) shall not apply to a person in violation of section 200.

(e) The penalty for a violation of this code section is a [misdemeanor in the second degree].

DRAFTER'S NOTE

Sections 100(a) and 100(e) may be modified to conform with the general penalty provisions of the adopting jurisdictions.

§ 200. *Committing a Crime While Concealing One's Physical Identity; Enhanced Penalties*

(a) The penalty for any criminal offense ("the primary offense"), whether perpetrated or attempted, other than the offense specified under section 100, shall be increased as

1, 1992, at 7 (arriving at police headquarters, the suspect in an attempted murder case covers her face with her hair).

The government's failure to prosecute these individuals for anti-mask law violations in states where the laws exist is another example of the selective enforcement discussed *supra* part I.B.2.b ("Selective Enforcement"). Of course, the fact that the accused is in police custody could easily justify the government's decision not to prosecute. However, such acts of selective enforcement would create an Equal Protection Clause violation if, for example, the State prevented only Ku Klux Klan members from concealing their identities while being transported to police stations. See *supra* part I.B.2.b ("Selective Enforcement").

175. Carolyn Warmus, on trial in New York for a highly publicized murder, had her lawyers place umbrellas and manilla envelopes in front of her face while entering the courthouse. See Lisa W. Foderaro, *Romance and Murder Make Warmus Trial Its Own Theater*, N.Y. Times, Feb. 3, 1991, § 12WC, at 2.

176. As public officials necessarily engage in constitutionally protected political speech in carrying out their duties, they might also be protected under the theory of inhibition of speech on the basis that the scrutiny they receive in public inhibits them from being outspoken.

177. Alternatively, those public figures who are entertainers and political activists might be protected under the theory of inhibition of speech, as the unwelcome attention they receive in public could conceivably inhibit their exercise of the First Amendment activities of dramatic acting and political activism, respectively.

This is the same definition of "public figure" as provided by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974), which defined "public figure" for the purposes of establishing when actual malice is required to obtain damages for defamatory falsehoods.

provided in section 200(b), if the offender intentionally conceals his physical identity, as defined in section 100(a), for the purpose of escaping discovery, recognition, or identification in the commission of the primary offense.

(b) The penalty for commission of the primary offense shall be enhanced as follows.

(1) A [misdemeanor in the second degree] shall be punishable as if it were a [misdemeanor in the first degree].

(2) A [misdemeanor in the first degree] shall be punishable as if it were a [felony in the third degree].

(3) A [felony in the third degree] shall be punishable as if it were a [felony in the second degree].

(4) A [felony in the second degree] shall be punishable as if it were a [felony in the first degree].

DRAFTER'S NOTE

Section 200(b) may be modified to conform with the general penalty provisions of the adopting jurisdictions.

B. *Constitutionality and Enforcement of the Model Act's Provisions*

The following sections discuss several provisions of the Model Anti-Mask Act, explaining that, despite apparent enforcement difficulties, the Act poses no novel police concerns. The sections also examine the constitutionality of various portions of the Act, revealing that the Model Act passes constitutional muster.

1. Requirement that Mask-Wearers Intend the Concealment of Identity

Requiring law enforcement officers to determine whether a mask-wearer possesses a certain intent is not peculiar to the Model Act, as virtually all criminal laws contain an element of mental culpability, generally referred to as "mens rea."¹⁷⁸ The Model Anti-Mask Act further requires law enforcement to prove a "dual component" of mens rea, for not only must law enforcement show that the mask-wearer intended to wear his or her mask, but it must also show that the mask-wearer desired the resulting anonymity. Again, such a dual component of mens rea already exists in other criminal laws, including loitering for the purpose of committing prostitution,¹⁷⁹ loitering for the purpose of unlawfully using a controlled substance,¹⁸⁰ and possessing an imitation pistol with the in-

178. Mens rea is defined "[a]s an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." Black's Law Dictionary 985 (6th ed. 1990).

179. See, e.g., N.Y. Penal Law § 240.37 (McKinney 1989) (prohibiting individuals from "remain[ing] or wander[ing] about in a public place and repeatedly beckon[ing] to . . . stop[ping], or . . . engag[ing] passers-by in conversation . . . for the purpose of prostitution" (emphasis added)).

180. See, e.g., N.Y. Penal Law § 240.36 (McKinney 1989) (prohibiting individuals

tent to use it illegally.¹⁸¹ Moreover, existing anti-mask laws that require the intent to conceal identity,¹⁸² and those that require specified criminal intent,¹⁸³ have dual components of mens rea as well.

Under the Model Act, law enforcement officials must have probable cause to believe that a mask-wearer intends the concealment of his or her identity before they may arrest the individual. In order to facilitate law enforcement, however, this Note proposes that only "reasonable suspicion"¹⁸⁴ of that intent is necessary to demask an individual temporarily in accordance with the limited frisk doctrine of *Terry v. Ohio*.¹⁸⁵ Temporary demasking will likely defuse any intended crime, because the police will have witnessed the true physical identity of the potential criminal, thereby depriving him or her of physical anonymity.¹⁸⁶

a. *The Disguise of a Permitted Use of a Mask*

As with all laws containing a mens rea element, individuals might misrepresent their intentions in an attempt to appear in compliance with the Model Act.¹⁸⁷ Furthermore, those individuals who actually are employing permitted uses of masks, such as political demonstrators, might at the same time harbor criminal intent.¹⁸⁸ Section 100(d) of the Act addresses this concern by precluding such individuals from using the Act's exceptions to avoid punishment for masked criminal activities.¹⁸⁹ Because these mask-wearers are permitted to intend the concealment of their identities, the police will need probable cause of their independent criminal intent to arrest them. As proposed above, however, the police will need only reasonable suspicion of independent criminal intent to demask

from "loiter[ing] or remain[ing] in any place . . . for the purpose of unlawfully using or possessing a controlled substance" (emphasis added)).

181. See, e.g., N.Y. Penal Law § 265.01 (McKinney 1989) (prohibiting individuals from possessing an "imitation pistol . . . with intent to use the same unlawfully" (emphasis added)).

182. See *supra* notes 15-16 and accompanying text.

183. See *supra* notes 17-18 and accompanying text.

184. "Reasonable suspicion" is a lower standard of evidence than "probable cause," which enables the police to stop and frisk individuals for weapons in order to protect both the officer and others from violence. See *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

185. 392 U.S. 1 (1968).

186. Even in situations in which no reasonable suspicion exists, the Model Act should be construed to allow the police to demask individuals temporarily if circumstances warrant it, such as when, in an area experiencing heavy gang violence, the police must determine if a given demonstrator is a gang member. However, such demasking must only be temporary and must be conducted so as to avoid exposure of the demonstrator's identity to any non-police onlookers. Furthermore, the police would not be permitted to record the results of such demasking in their records.

187. An analogous situation is a scenario where individuals carrying baseball bats with the intent to injure someone claim, upon being approached by law enforcement officers, that they intend only to play baseball.

188. See, e.g., *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 816 (Cal. Ct. App. 1978) (discussing fear that masked individuals demonstrating in front of an embassy were planning to storm the embassy).

189. See *supra* part II.A ("*A Proposed Model Anti-Mask Act*").

such mask-wearers temporarily.¹⁹⁰

2. First Amendment Activity Exception

Where localities do not impose permit requirements on individuals wishing to exercise First Amendment rights,¹⁹¹ the Model Act requires law enforcement officers to ascertain whether mask-wearers are engaged in such activity. Law enforcement's resulting discretion in making such determinations might open up the Model Act to a constitutional claim that it is impermissibly vague.¹⁹²

In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, however, the Supreme Court did not note any vagueness problem in permitting law enforcement to distinguish between First Amendment activity and non-First Amendment activity.¹⁹³ The Court's ruling appears to have been based on a principle expressed in its subsequent *City of Dallas v. Stanglin* decision, where it stated that, although "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall— . . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment."¹⁹⁴ Thus, that law enforcement might have to distinguish between First Amendment mask-wearing and non-First Amendment mask-wearing would not render the Model Act unconstitutionally vague.

Requiring applicants for speaking and assembly permits to indicate their intention to use masks would be found constitutional. This is because it serves the same policing purpose as that served generally by such permits,¹⁹⁵ for the government might want to take additional security

190. See *supra* notes 184-86 and accompanying text.

191. The Supreme Court has upheld such permit requirements as long as they are granted ministerially, meaning that the government does not consider the content of the applicant's speech, but rather only whether the planned exercise would unduly interfere with the use of public areas and streets. See *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941).

192. The Fourteenth Amendment's Due Process Clause prohibits vague laws in order to prevent law enforcement from having discretion that is subject to abuse. See U.S. Const. amend. XIV, § 1 (stating that no State shall deprive any person of "life, liberty, or property, without due process of law"); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

193. See 482 U.S. 569 (1987). In *Jews for Jesus, Inc.*, the Court addressed a constitutional challenge to an airport's ban of all First Amendment activity that was not "airport-related." While finding the ban unconstitutional on other grounds, the Court noted that "the vagueness of [the ban] presents serious constitutional difficulty," but only because "[t]he line between airport-related speech and nonairport-related speech is, at best, murky." *Id.* at 576.

194. 490 U.S. 19, 25 (1989).

195. Courts have found constitutional the requirement to obtain a ministerially-granted permit before publicly speaking or assembling, see *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941), explaining that it serves the function of providing the "public authorities [with] notice in advance so as to afford opportunity for proper policing," *id.* at 576. *Cox* also noted the government interest in preventing overlapping demonstrations. See *id.*

measures due to the difficulty of identifying masked individuals. To ensure equal access to the public forum, however, the government cannot require permit applicants to provide their names and addresses, because such a requirement would potentially exert the same inhibiting effect on the exercise of First Amendment rights as existing anti-mask laws themselves.¹⁹⁶

3. Other Enumerated Exceptions

The Model Act's exceptions need to pass only the "mere rationality" test under an equal protection challenge.¹⁹⁷ The Model Act should easily pass this test, because, generally, those mask-wearers who desire to conceal their identities for no apparent lawful reason are more likely to possess criminal intent than those individuals covered under the Act's exceptions.¹⁹⁸

4. The Need for Consistent Judicial Review

As a final note, it must be pointed out that the Model Anti-Mask Act's protection of individuals' constitutional rights will be retarded if the judiciary fails to invalidate anti-mask laws that do not observe the constitutional requirements embodied in the Act. Moreover, even if states quickly adopt the Model Act, the inconsistent judicial review that appears to have characterized the history of existing anti-mask laws,¹⁹⁹ if continued, will undermine the Act's effect.

CONCLUSION

Virtually all existing anti-mask laws violate the United States Constitution. Because mask-wearing can itself serve an expressive function, as well as enable speakers who need anonymity to express their beliefs publicly, anti-mask laws both directly violate and inhibit the First Amendment's free speech and free assembly guarantees. Furthermore, as many instances of mask-wearing are completely innocent, anti-mask laws likely violate the Fourteenth Amendment's substantive due process guarantee.

Society therefore needs an anti-mask law that not only satisfies constitutional requirements but also provides law enforcement with an effective prophylactic crime-fighting device. The Model Anti-Mask Act simultaneously accommodates these concerns by banning mask-wearing when

196. Indeed, it was compelled disclosure of such identifying information that the NAACP successfully challenged in *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958). See *supra* note 38 and accompanying text.

197. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that challengers must show that "legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker").

198. See *supra* part I.A.2.d ("*Anti-Mask Laws: Narrowly Tailored?*"); *supra* text following note 171 (discussing how the Model Act covers individuals most likely to pose the risk of crime feared by the government).

199. See *supra* part I.C ("*Inconsistent Judicial Review*").

individuals seek anonymity, yet do not need that anonymity to exercise First Amendment rights or to engage in specified activities where the need for privacy is manifest.

All United States jurisdictions should consider adopting the Model Anti-Mask Act, while courts must strike down existing anti-mask laws that do not meet the requirements specified herein. In order to preserve the integrity of constitutional jurisprudence, the judiciary must subsequently apply consistent judicial review to the Model Act despite the fact that generally unpopular groups such as the Ku Klux Klan might seek the Act's protection. Widespread adoption of the Model Act, along with consistent judicial review of the Act, will ensure that First Amendment protections are provided to all individuals nationwide, thereby affirming what the Supreme Court has termed America's "profound national commitment to the principle that debate on public issues . . . be uninhibited, robust, and wide-open."²⁰⁰ Further, such actions will validate this country's belief "that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."²⁰¹

200. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

201. *Martin v. City of Struthers*, 319 U.S. 141, 150 (1943) (Murphy, J., concurring).