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COVID-19 and the Conundrum of Mask Requirements

Robert Gatter
Saint Louis University School of Law

Seema Mohapatra
Indiana University Robert H. McKinney School of Law

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Robert Gatter
Saint Louis University - School of Law

Seema Mohapatra
Indiana University Robert H. McKinney School of Law

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COVID-19 AND THE CONUNDRUM OF MASK REQUIREMENTS

ROB GATTER* AND SEEMA MOHAPATRA**

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(Contact: Robert Gatter at robert.gatter@slu.edu or Seema Mohapatra at mohap@iu.edu)

Abstract: As states begin to loosen their COVID-19 restrictions, public debate is underway about what public health measures are appropriate. Many states have some form of mask-wearing orders to prevent the spread of COVID-19 infection. Public health guidance from the Centers for Disease Control and Prevention and the World Health Organization has conflicted. From a public health point of view, it is not clear what the right answer is. In the absence of directives, individuals are also making their own choices about mask use. At a time when public health measures, like shelter-in-place orders and social distancing, are being used to stop the spread of coronavirus, wearing masks can be seen as a form of solidarity and desire to not infect others. Similarly, not wearing a mask can also be a political statement of sorts. Additionally, black men wearing masks have reported being asked to leave stores and fearing for their own safety. This essay provides an overview of the legal and policy landscape and focuses on the potential for policing against African Americans when mask mandates are in place. Despite the public health benefits of mask usage, due to mask mandates likely being enforced discriminatorily, we advise caution against mask mandates.

Ohio Governor, Mike DeWine, announced on April 27th that everyone in Ohio's stores would soon be required to wear masks for the protection of others. Public backlash was immediate. The very next day, he reversed himself and canceled the order.[1] A nearly identical

* Professor of Law, Center for Health Law Studies, Saint Louis University School of Law; B.A., Johns Hopkins University; J.D., University of Pennsylvania Law School; M.A. (Bioethics), Medical College of Wisconsin.

** Associate Professor of Law and Dean's Fellow, Indiana University Robert H. McKinney School of Law; B.A. (Natural Sciences), Johns Hopkins University; J.D., Northwestern University School of Law; M.P.H. (Chronic Disease Epidemiology), Yale University School of Public Health. We would like to thank Paige Ferise for excellent research assistance.

[1] Rishika Dugyala, *Gov. DeWine: my face mask order went 'too far'*, POLITICO (May 3, 2020), https://www.politico.com/news/2020/05/03/dewine-ohio-face-masks-coronavirus-231175

story unfolded later the same week in Stillwater, Oklahoma. City officials announced that shoppers would be required to wear masks and then withdrew the order, citing threats of violence against store employees.[2]

Meanwhile, mask-wearing orders have stuck in several other states—including Connecticut, Hawaii, Maryland, New Jersey, New York, Pennsylvania, and Rhode Island.[3] Some states mandate masks as an additional social distancing requirement, and others require masks only when one cannot maintain a 6-foot distance from others in a public place.

The Centers for Disease Control and Prevention (CDC) issued a recommendation in early April that individuals wear a mask when in public, reversing its earlier statement that only those sick or caring for someone with Covid-19 should wear masks.[4] Yet, the CDC's new recommendation stopped short of proposing that state and local officials mandate masks in public. The World Health Organization still does not recommend wearing a mask unless symptomatic or taking care of someone who is symptomatic.[5]

From a public health point of view, it is not clear what the right answer is. Some jurisdictions require everyone to wear masks in public places. Others recommend masks and leave

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[2] Hannah Knowles & Marissa Iati, *Oklahoma City backs off mask mandate after public threats, as officials struggle to enforce public health rules*, WASHINGTON POST (May 3, 2020), https://www.washingtonpost.com/nation/2020/05/03/stillwater-oklahoma-mask-order/

[3] Scottie Andrews & James Froio, *These are the states that require you to wear a mask in public*, CNN (Apr. 20, 2020, 7:49 PM), https://edition.cnn.com/2020/04/20/us/states-that-require-masks-trnd/index.html

[4] *Id.*

[5] World Health Organization, *Coronavirus disease (COVID-19) advice for the public: When and how to use masks*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks

it to each person to choose. Still others have been silent on mask use. This leaves states and localities to their own discretion about how to proceed.

In the absence of directives, individuals are also making their own choices about mask use. At a time when public health measures, like shelter-in-place orders and social distancing, are being used to stop the spread of coronavirus, wearing masks can be seen as a form of solidarity and desire to not infect others. Similarly, not[6] wearing a mask can also be a political statement of sorts.[7] Additionally, black men wearing masks have reported being asked to leave stores and fearing for their own safety.[8] There also have been reports of employers not allowing their employees to wear masks because of worries that it makes customers uncomfortable. We, as public health law experts, provide some analysis and recommendations.

The Public Health Case for Requiring Masks

Although the science is not yet crystal clear, there are good reasons to believe that wearing masks when out of one's home and in an indoor space is effective at preventing the spread of SarsCoV-2, the virus that causes Covid-19. The CDC says that the virus is spread from person to person primarily through respiratory droplets expelled by an infectious person when they sneeze

[6] Connor Freidersdorf, *Masks Are a Tool, Not a Symbol*, THE ATLANTIC (May 5, 2020), https://www.theatlantic.com/ideas/archive/2020/05/masks-are-tool-not-symbol/611134/

[7] Associated Press, *Face Masks Make a Political Statement in Era of Coronavirus*, U.S. NEWS (May 7, 2020 3:21 P.M.), https://www.usnews.com/news/politics/articles/2020-05-07/face-masks-make-a-political-statement-in-era-of-coronavirus

[8] Marc Fisher, Clarence Williams, Lori Rozsa, *Will Americans wear masks to prevent coronavirus spread? Politics, history, race, and crime factor into tough decision*, THE WASHINGTON POST (Apr. 18, 2020, 12:21 P.M.), https://www.washingtonpost.com/national/coronavirus-masks-america/2020/04/18/bdb16bf2-7a85-11ea-a130-df573469f094_story.html

or cough.[9] Infected droplets can land in the mouth of another nearby person, or they can land on a surface that another person touches with their hand before touching their nose or mouth, or another person can breathe in the virus from the air around them. How far the virus can travel in the air is an open question. Initially, experts believed that SarsCoV-2 was too heavy to be airborne, but a recent study establishing that viral particles were in the air around two hospitals in Wuhan, China has shed some doubt on that theory.[10]

During a pandemic, when officials are seeking to reduce Covid-19 infections, it is reasonable for them to account for the possibility that the virus is airborne. If an individual infectious with SarsCoV-2 wears a mask, then the droplets they expel from talking, laughing, coughing or sneezing may be largely contained within the mask. In this way, a mask may help prevent all of the methods of transmission, including possibly airborne transmission.

A mask requirement may also be prudent because infected individuals can transmit the virus to others even they do not look or feel sick.[11] Because tests for the virus have been in short supply in the US, and often limited to those who have symptoms and those caring for individuals actively sick with Covid-19, we cannot know who among the apparently healthy is nonetheless

[9] Centers For Disease Control and Prevention, *Frequently Asked Questions* (May 12, 2020), https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics

[10] Kenneth Chang, *Airborne Coronavirus Detected in Wuhan Hospitals*, NEW YORK TIMES (Published Apr. 28, 2020, Updated May 14, 2020), https://www.nytimes.com/2020/04/28/health/coronavirus-hospital-aerosols.html.

[11] Centers for Disease Control and Prevention*, Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission* (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html

infectious with SarsCoV-2. If everyone who feels healthy were to wear masks when out in public, those masks could help prevent the asymptomatic infection of others.

Empirical evidence also supports mask-wearing requirements. Recent systematic reviews suggest that masks work to contain the droplets of individuals infected with SarsCoV-2 when they talk, cough or sneeze[12] and thus work to lower the risk of transmission to others.[13] Yet, science has not conclusively established whether or not home-made cloth masks effectively stop the spread of the virus. There are also systematic reviews of masks that pre-date this pandemic, which show that masks are effective at preventing the spread of other similar viruses.[14]

If, when assessing whether to require that everyone wear masks in public, officials considered only whether masks may reduce the spread of SarsCoV-2, then perhaps their decision would be easy. If masks can help contain the spread, let's require them. This may be tempting as stay-at-home orders are lifted and public health experts brace for spikes in infection. Yet, efficacy—despite its fundamental value in public health decision-making—should not be the only consideration.

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[12] C. Raina MacIntyre & Abrar Ahmad Chughtai*, A Rapid Systemic Review of the Efficacy of Face Masks and Respirators Against Coronaviruses and Other Respiratory Transmissible Diseases for the Community, Healthcare Workers, and Sick Patients*, INT'L J. NURSING STUD. (Forthcoming, Preprint 2020).

[13] Mingming Liang et al., *Efficacy of face mask in preventing respiratory virus transmission: a systematic review*
and meta-analysis, MEDRXIV (Forthcoming 2020).

[14] *See* B.J. Cowling et al., Face masks to prevent transmission of influenza virus: a systematic review, 138 Epidemiology & Infection 449 (2010); Vicente Lopez Chavarrias et al., The use of masks and respirators to prevent transmission of influenza: A systematic review of the scientific evidence, 6 Influenza & Other Respiratory Viruses 257 (2011).

Masks and Racial Discrimination

African-Americans risk being targeted by law enforcement, the employees of retail establishments, or their own neighbors for wearing masks. Numerous news outlets report racial discrimination by police related to mask-wearing during this pandemic. For example, Kam Buckner, an African-American male and Illinois State Representative, was stopped by a Chicago police officer after shopping while wearing a facial mask.[15] The officer asked to see Rep. Buckner's ID and store receipt. When the state legislator asked the officer why he was stopped and questioned, Buckner says the officer answered, "I can't see your face man, and you look like you may be up to something."

A letter signed by Senators Kamala Harris and Corey Booker, among others, chronicles several other incidents of racial discrimination against African-American men for wearing or failing to wear masks.[16] One involved a masked black male physician who was unloading medical supplies from his car to care for homeless people in Miami and was handcuffed and detained by police. The New York Times reported on several black men who are fearful of racial profiling when they decide to leave home wearing a mask.[17]

[15] NBC Chicago, State Rep. Says He Was Stopped by CPD Officer After Shopping at Store While Wearing Mask, Gloves (May 5, 2020 10:41 P.M.), https://www.nbcchicago.com/news/illinois-state-rep-says-he-was-stopped-by-cpd-officer-after-shopping-at-store-with-mask-gloves/2267270/

[16] Letter from Senator Kamala Harris and Senator Cory Booker to Attorney General William Barr and Director Christopher Way (Apr. 17, 2020) (on file at harris.senate.gov).

[17] Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, NEW YORK TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html

Suspicion and policing of African-American males due to mask use is particularly offensive given that the Covid-19 pandemic has disproportionately harmed black communities. According to estimates from the U.S. Census Bureau, African Americans make up about 46 percent of the population in St. Louis, Missouri, but they account for more than 66 percent of Covid-19 cases and 65 percent of Covid-19 deaths in the city.[18] In Chicago, an African-American resident is more than twice as likely as a white resident to become infected with the virus and nearly three times as likely to die of Covid-19.[19]

Wearing a mask is particularly valuable in preventing the spread of the virus in communities where it is more prevalent, and yet doing so increases the risk of racial discrimination. "In essence, black men have to pick their poison — risk their lives (and the lives of others) to Covid-19 by not wearing a mask, [or] risk their lives to police officers who see them as suspicious while wearing a mask . . . ." [20]

In states where there are laws permitting citizens arrests and forms of vigilantism, there is a concern for safety for those black people following public health advice. This risk is a new pandemic-engendered aspect of what has been termed "Living While Black" – the risk that Whites call the police on Blacks for engaging in everyday activities.[21] With the advent of wide-spread

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[18] U.S. Census Bureau*, QuickFacts, St. Louis city, Missouri (County)* (July 1, 2019), https://www.census.gov/quickfacts/stlouiscitymissouricounty.

[19] City of Chicago, *Latest Data, COVID* (May 14, 2020), https://www.chicago.gov/city/en/sites/covid-19/home/latest-data.html.

[20] Fabiola Cineas*, Senators are demanding a solution to police stopping black men for wearing — and not wearing — masks*, VOX (Apr 22, 2020, 2:10 P.M.), https://www.vox.com/2020/4/22/21230999/black-men-wearing-masks-police-bias-harris-booker-senate.

[21] Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863 (2020).

access to cell phone cameras and social media platforms, these incidents have given rise to their own viral hashtag: #LivingWhileBlack.

African-Americans are being infected and dying at a higher rate, despite surveys showing that they are more concerned about the virus and are taking precautions more seriously than white counterparts.[22] The greater concern may lead to more African-Americans wearing masks if it is known to reduce infection, if –that is—fear of policing was not an issue. Perhaps a mask mandate would cause less stigma about people wearing masks because almost everyone would be wearing masks. However, there is a concern that law enforcement would use mask wearing or lack of mask wearing as a proxy to carry out racial profiling.

The Law as an Unreliable Check on Discrimination During a Pandemic

Of course, racial discrimination is illegal, and prosecutors and private litigants are empowered by the law to pursue a remedy for such discrimination. Thus, in theory, the law is a check against any racial discrimination that might result from a mask requirement. And yet there is good reason to believe that the law will not be an effective check against racial discrimination by police when enforcing such a requirement.

First, in an effort to help prevent the spread of the virus, courts are less accessible than they would be during normal times. Thus, a private litigant seeking redress for racial discrimination

[22] Pew Research Center*, Health Concerns From COVID-19 Much Higher Among Hispanics and Blacks Than Whites* (Apr. 14, 2020), https://www.people-press.org/2020/04/14/health-concerns-from-covid-19-much-higher-among-hispanics-and-blacks-than-whites/

by police in relation to a state or local mask requirement may find it difficult to be heard in a timely manner. And, of course, justice delayed is justice denied.

Second, courts are deferential to the actions of state and local officials during a public health emergency. Not only do judges defer to the expertise and judgment of officials, but they tend to cut officials a great deal of slack for having to make judgements quickly and under substantial pressure as a result of an emergency. Moreover, the tendency of courts to defer to officials also results in judges adopting unusually deferential standards of review, which they justify as appropriate in the face of an emergency.

For example, in early April, the U.S. Court of Appeals for the Fifth Circuit granted a writ of mandamus ordering a lower court to vacate its preliminary injunction prohibiting the enforcement against abortion providers of a Texas policy forbidding doctors and hospitals from performing non-life-saving procedures.[23] In its opinion, the Fifth Circuit claimed that *Jacobson v. Massachusetts*, a Supreme Court opinion written decades before the development of modern substantive due process standards, controlled and that *Jacobson* requires only a showing that the Texas ban on non-life-saving medical procedures had a "real and substantial relation" to the state's interest in responding to the pandemic.[24] The Court found that such a relation existed because the Texas ban was designed to preserve medical resources for Covid-19 patients.[25] Moreover, the Fifth Circuit side-stepped the caselaw that imposes a more demanding "undue burden" standard on state

[23] In re Abbott, No. 20-50296, 2020 WL 1866010 (5th Cir. Apr. 13, 2020)

[24] *Id.* at 1.

[25] *Id.*

actions related to abortions, and the Court did so by claiming that *Jacobson* creates a special standard for public health emergencies like this pandemic.

The Fifth Circuit is not alone in lowering the judicial standard of review during a public health crisis. The Superior Court of New Hampshire, in *Binford v. Sununu*, rejected constitutional challenges to the Governor's order that effectively shut down certain businesses during the Covid-19 pandemic.[26] The state court held that, during an emergency, a Governor may "suspend civil rights" temporarily. Furthermore, the Court held that state actions are reviewed merely to determine that the state had a factual basis for deeming its actions as necessary and that those actions were not taken in bad faith. Very few, if any, governmental actions would fail such a lenient test.

Private litigants seeking injunctive relief or compensation for racial discrimination at the hands of police ostensibly enforcing a mask requirement are likely to be disappointed. Deferential judges deploying lenient standards of review and opining that civil liberties take a back seat to civil order during an emergency are not likely to put police in their place. Additionally, as the examples of Ahmaud Arbery and Trayvon Martin demonstrate, white citizens may use their concerns about safety to take the law into their own hands.[27]

[26] Objection to "Emergency Motion for Preliminary Injunction and Permeant Injunction", Binford v. Sununu, No. 217-2020-CV-00152, 2020 (N.H. Super. Mar. 19, 2020).

[27] *See* Frances Robles, *The Citizen's Arrest Law Cited in Arbery's Killing Dates Back to the Civil War*, NEW YORK TIMES (May 13, 2020), https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html; Adrienne Chudzinski, *The Ahmaud Arbery Case Exposes the Failures of the Criminal Justice System*, THE WASHINGTON POST (May 9, 2020 6:00 A.M.),

Solving the Conundrum

There isn't a perfect answer to the question of whether states and localities should require that individuals wear masks in public or merely recommend that they do. Indeed, the issue is complicated. On the one hand, a mask requirement, while potentially effective, very likely will lead to unchecked racial discrimination and add to the unfair burden of this pandemic on racial minorities, especially African Americans. On the other hand, a mask recommendation is unlikely to result in a sufficient percentage of the population wearing masks so as to slow the spread of the virus as businesses re-open. In fact, some studies indicate that, in order to slow the spread, at least 70% of the population must be wearing masks.[28] Encouraging voluntary mask use may result in less compliance, but would avoid the unintended consequences of punitive measures. In some countries, social norms are such that this percentage can be achieved in the absence of legal mandates. In the United States, however, it is unlikely that such compliance will be achieved without laws and orders requiring masks.

As public health law experts, we have considered the scientific, legal, and ethical issues surrounding mask use, weighing the public health evidence, potential for stigma and racial profiling and policing, and the politics of mask use. We conclude that, on balance, a mask recommendation is the better solution for now. It captures some of the public health benefit without the need for an enforcement mechanism that is so likely to result in additional

https://www.washingtonpost.com/outlook/2020/05/09/ahmaud-arbery-case-exposes-failures-criminal-justice-system/.

[28] Jeremy Howard et al., *Face Masks Against COVID-19: An Evidence Review* (Forthcoming, 2020) available at, https://www.preprints.org/manuscript/202004.0203/v2

discrimination. If, in response to a recommendation, most of the population wear masks, this would be beneficial from both a public health and stigma perspective. In support of policies for voluntary mask-waring, we also recommend increased federal funding for states and public health agencies to provide masks to the general public. Additionally, we recommend advertising campaigns to educate the public about mask use, perhaps with well-known celebrities and those of all political stripes, so as to help normalize mask-wearing. This has value not only today but also as we anticipate future disease events. Moreover, solidarity is necessary for public health measures, such as mask use and social distancing, to work. If a public mask recommendation encourages more people to wear masks, people are less likely to assume those who do are sick and avoid them.. Also, this would make masks less of a symbol of political affiliation.[29] If most people wear masks, African-Americans who wear masks are less likely to be targeted.

Given the uneven policing of masking that is likely, we are hesitant to recommend mandatory masking measures. We recognize, however, that some officials will choose to enforce a mask requirement. Indeed, many cities already are mandating masks.[30] While we believe that

[29] Fisher *supra*, note 8.

[30] Arelis R. Hernández, *Laredo, a key Texas border crossing, uses strict coronavirus measures as it fears spread to rest of U.S.,* THE WASHINGTON POST (Apr. 16, 2020), https://www.washingtonpost.com/national/coronavirus-laredo-texas-strict-measures/2020/04/16/91c93b44-7cfd-11ea-a3ee-13e1ae0a3571_story.html?itid=ap_arelisr. Some businesses, like big box stores like Costco. are also requiring masks for entry. *See* Erica Chayes Wida, *Costco Eliminates 2 Shopper Limit And Reopens Food Courts,* Today (May 15, 2020), *https://www.today.com/food/costco-eliminates-2-shopper-limit-reopens-food-courts-t181704*. There have been reports of violence against employees who are trying to enforce these mask mandates. Neil MacFarquhar, *Who's Enforcing Mask Rules? Often Retail Workers, and They're Getting Hurt*, NY Times (May 15, 2020), https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html. These mandates

the likelihood of increased racial discrimination undercuts the public health justification for a mask requirement, we also recognize that states and localities adopting such requirements can take additional steps to mitigate the likely discriminatory effects. We urge that any mask mandates *not* include any fines or other punitive measures. Instead, officials can require that places of public accommodation offer masks for a nominal price at their entrance and deny entry to anyone who is not wearing a mask and who refuses to purchase one. Washington D.C. has adopted this approach.[31] Additionally, any mask mandate should be accompanied by the kind of educational campaign described above.

We warn officials who insist that only the fear of a fine will encourage compliance to account for the likelihood that enforcement will target African-Americans. Any police encounter is fraught with fear for African-Americans due to the targeting by police. For those jurisdictions criminalizing failure to use a mask, we recommend that officials collect and share publicly information about the race of individuals who police stop, question, warn, threaten, fine or arrest for violating the mask requirement. Furthermore, we recommend that those jurisdictions educate police about biased enforcement of the requirement, that they prohibit police from treating the violation of a mask requirement as a primary offense, and that they require officers to carry supplies of masks to provide those who are not wearing masks for a first warning.

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also have the potential for discrimination, as well as Americans with Disabilities Act issues. However, these private party mandates go beyond the scope of this piece.

[31] Elliot C. Williams & Matt Blitz, *D.C.'s Mayor Is Requiring People Wear Masks In Stores, But Is It A Legal Mandate?,* NPR (Apr. 20, 2020), https://www.npr.org/local/305/2020/04/20/838728016/d-c-s-mayor-is-requiring-people-wear-masks-in-stores-but-is-it-a-legal-mandate.

The mask debate is raging in states and localities, in workplaces, and people's own homes. As jurisdictions lift stay-at-home orders, it may be tempting to encourage mask use via mandatory orders with fines for noncompliance. However, given the discriminatory ways such rules are likely to be enforced, it is important to proceed with caution.