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## Anti-Masking Statutes and Anonymous Protest in the Age of Surveillance

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Nicholas Doherty

### I. INTRODUCTION

In the fall of 1845, the Hudson Valley in New York was home to what would come to be known as the Anti-Rent Wars.<sup>1</sup> At the time, large parts of upstate New York were controlled by a few wealthy families who had been granted vast tracts of land, referred to as manors, by the Dutch crown when the state was originally settled.<sup>2</sup> These landowners, called “patroons,” rented land to tenant farmers in what essentially operated as a feudal system.<sup>3</sup> By the time the Anti-Rent Wars began, more than 250,000 people, roughly eight percent of the population of New York, lived and farmed on land controlled by patroons under long-term or lifetime leases.<sup>4</sup> These leases permanently tied the leaseholders to the land with no opportunity to buy it.<sup>5</sup>

The Anti-Rent Wars began in 1839 when Stephen Van Rensselaer IV, a wealthy patroon who had recently inherited the Manor of Rensselaerswyck from his father, demanded back rent from his tenants and sought to evict those who could not pay.<sup>6</sup> When local sheriffs were sent to serve the farmers with eviction notices and perform distress sales, they were met by groups of

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<sup>1</sup> David Levine, *History of America's Other Revolution: The Anti-Rent Wars*, HUDSON VALLEY MAGAZINE (July 30, 2015), <http://www.hvmag.com/Hudson-Valley-Magazine/August-2015/History-of-Americas-Other-Revolution-The-Anti-Rent-Wars/> [https://perma.cc/V95B-4QYG].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Reeve Huston, *The Parties and “The People”: The New York Anti-Rent Wars and the Contours of Jacksonian Politics*, 20 J. OF THE EARLY REPUBLIC 241 (2000).

<sup>5</sup> Huston, *supra* note 4.

<sup>6</sup> Herb Hallas, *Halloween History: New York's Anti-Mask Law*, NEW YORK HISTORY BLOG (2013), <http://newyorkhistoryblog.org/2020/10/30/halloween-history-new-yorks-anti-mask-law/> [https://perma.cc/B3FC-6T8G].

armed young men who were dressed as Native Americans and wearing masks to hide their identities.<sup>7</sup>

The masked men threatened—and eventually assaulted—the sheriffs in an attempt to stop the evictions and distress sales.<sup>8</sup> These skirmishes continued as a downturn in the economy led more and more patrols to seek higher rents, and by 1845, three officials had been killed by masked anti-renters.<sup>9</sup> The governor of New York responded by urging the state legislature to pass a law making it a crime for any person to “appear in any road or public highway, or in any field, lot, wood or enclosure,” with their face “painted, discolored, covered, or concealed.”<sup>10</sup> The legislature passed the measure, our nation’s first anti-masking statute, but made sure to include an exception that allowed the wealthy patrols to continue holding masquerade balls.<sup>11</sup>

Today, what have come to be known as “anti-masking” laws, like the New York statute passed in response to the Anti-Rent Wars, are on the books in jurisdictions across the United States and around the world.<sup>12</sup> While these laws are rarely identical, the term “anti-masking law” generally refers to any ordinance that makes it a crime to wear a mask, face paint, or other face coverings in public. Most anti-masking statutes restrict the wearing of masks or face coverings only under certain circumstances. These circumstances vary widely depending on the jurisdiction, and often reflect the event that inspired the legislature to adopt them. Anti-masking statutes range from narrow bans that *prohibit* wearing masks only in certain places or situations

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> L. M. Bogad, *Facial Insufficiency Political Street Performance in New York City and the Selective Enforcement of the 1845 Mask Law*, 47 *DRAMA REV.* 75, 78 (2003).

<sup>12</sup> Lydia Smith, *Drivers Wearing Face Veil in Germany Will Now be Fined as Controversial Ban Comes into Force*, *INDEPENDENT* (Sept. 23, 2017), <http://www.independent.co.uk/nene/world/europe/driver-burqa-headscarf-veil-burqa-ban-traffic-controversial-law-germany-a7962626.html> [https://perma.cc/8YF8-ZXA4].

(like while committing a crime), to more general bans that *allow* wearing masks only in certain circumstances (like while playing sports).<sup>13</sup>

### *A. Burqa Bans and Religiously Targeted Anti-Masking Statutes*

Lawmakers generally pass anti-masking laws with the stated intention of helping police enforce the law more efficiently by making the perpetrators of crimes more readily identifiable.<sup>14</sup> Unfortunately, in many instances, the bans are passed not in the interest of public safety, but to criminalize the wearing of religious garb and impose the values of those in power on religious minorities and immigrants.<sup>15</sup> While the focus of this article is on the unconstitutionality of general anti-masking provisions in the context of free association and political speech, it is incredibly important to note that in the United States, and around the world, women who choose to wear the burqa or other religious coverings are being used as political pawns by xenophobic politicians who pass anti-masking statutes as a thinly veiled form of discrimination.<sup>16</sup> Burqa bans and other statutes aimed at preventing individuals from expressing or practicing their religion, while usually similar to general anti-masking laws, represent a different set of cultural and constitutional issues that will not be specifically discussed by this article.

### *B. How do Anti-Masking Statutes Work?*

As mentioned above, anti-masking statutes can be divided into the following two distinct categories: “general” anti-masking provisions and “narrow” anti-masking provisions. General provisions proscribe the wearing

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<sup>13</sup> Southern Poverty Law Center, *Is the Practice of ‘Anti-Masking’ Laws Exposing Violent Haters or Denying Their Constitutional Rights?*, UNMASKING THE KLAN (2017), <https://www.splcenter.org/fighting-hate/intelligence-report/1999/unmasking-klan> [<https://perma.cc/KBX9-5N92>].

<sup>14</sup> *Id.*

<sup>15</sup> Liam Stack, *Burqa Bans: Which Countries Outlaw Face Coverings?*, N.Y. TIMES (Oct. 19, 2017) <https://www.nytimes.com/2017/10/19/world/europe/quebec-burqa-ban-europe.html> [<https://perma.cc/62MG-DYWC>].

<sup>16</sup> *Id.*

of masks to conceal a person's identity in public, regardless of coexisting criminality. Historically, people have been convicted under general anti-masking laws for everything from wearing a Ku Klux Klan hood to sporting a wrestling mask to entertain children.<sup>17</sup>

General anti-masking laws almost always contain numerous exceptions. West Virginia, for example, has a broad anti-masking law but makes numerous exceptions including masks worn by individuals who are under the age of sixteen, masks worn as part of holiday costumes, and masks worn in theatrical productions.<sup>18</sup> As with any law containing numerous exceptions, it can sometimes be hard to say when exactly wearing a mask is acceptable and by whom. These decisions often give law enforcement officials leeway to arrest masked individuals even if they might fall under one of the exceptions. Law enforcement is able to use this power to stop protests or rallies, even when those involved are otherwise behaving lawfully and have received permission for the demonstration.

Narrow anti-masking provisions prohibit wearing masks or face coverings under specific circumstances, generally during the commission of a crime or when in groups (essentially only during marches or protests). With some narrow anti-masking provisions, these circumstances are extremely specific. In Ohio, for example, it is illegal for two or more people to wear "white caps, masks or other disguises" while committing a misdemeanor, a law that is clearly intended to apply to the Ku Klux Klan and no one else.<sup>19</sup> Currently, in the United States, at least eighteen states, the District of Columbia, and

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<sup>17</sup> See *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994). In *Daniels*, the defendant's conviction for wearing a football helmet and wrestling mask to entertain children in his neighborhood was overturned by the Georgia Supreme Court because the court found that the defendant did not possess actual intent sufficient to sustain conviction; *State v. Miller*, 398 S.E.2d 547 (Ga. 1990).

<sup>18</sup> W. VA. CODE § 61-6-22.

<sup>19</sup> Matthew Haag, *Is It Illegal to Wear Masks at a Protest? It Depends on the Place*, N.Y. TIMES (Apr. 26, 2017), [https://www.nytimes.com/2017/00/26/us/protests-masks-laws.html?\\_r=0](https://www.nytimes.com/2017/00/26/us/protests-masks-laws.html?_r=0) [<https://perma.cc/R5ZH-JJTS>].

numerous local jurisdictions have either general or narrow anti-masking laws.<sup>20</sup>

While anti-masking laws are, at least in theory, passed to preserve law and order, they also have dangerous free speech and equal protection implications. The Supreme Court, quoting John Stuart Mill, has stated that “[a]nonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”<sup>21</sup> In jurisdictions with anti-masking statutes, citizens are denied the ability to participate in political demonstrations anonymously. By denying individuals this right, anti-masking laws pose a threat to the vibrancy of American democracy by stifling political dissent and chilling political discourse.

The 2016 presidential election and the first years of the Trump presidency have seen heightened levels of political protest and numerous examples of public demonstrations of political dissent, highlighting the reality that public demonstrations, even in the age of social media, are an important element of our democratic society.<sup>22</sup> The ability of citizens to protest publicly as a means of expressing political dissent or showing support for a political idea is critical to preserving our democracy and ensuring that a healthy debate about the future of our nation can be carried out in the public sphere.

Section II of this article will discuss the origins of anti-masking laws, paying particular attention to the historical context of masked protests in the United States. Section III will discuss support and opposition for anti-

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<sup>20</sup> Maha Ahmed & Madison Pauley, *Wearing Masks at Protests Didn't Start With the Far Left*, MOTHER JONES (Oct. 2, 2017) <http://www.motherjones.com/polipoli/2017/09/masks-protests-antifa-black-bloc-explainer/> [<https://perma.cc/Y7U9-RTDG>]; Melissa Kaplan, *State Codes Related to Wearing Masks*, ANAPSID (Sept. 29, 2017), <http://www.anapsid.org/cnd/mcs/maskcodes.html> [<https://perma.cc/9RDR-Y7J7>].

<sup>21</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

<sup>22</sup> Peter Beinart, *The Rise of the Violent Left*, THE ATLANTIC, Sept. 2017, <https://www.theatlantic.com/magmagaz/archive/2017/09/the-rise-of-the-violent-left/534192/> [<https://perma.cc/M7M4-VNAG>].

masking statutes, focusing on the impact statutes have on law enforcement, relevant constitutional issues, and the influences of modern technology and social media in the context of the surveillance state. Section IV will discuss federal grant programs and the ways that the federal government can encourage local jurisdictions to modify or eliminate anti-masking statutes. Section IV will explore the costs of using grant programs to encourage local jurisdictions to eliminate anti-masking statutes as well as the costs likely to be associated with implementation. Section V will address likely opposition to the proposed grant program.

## II. BACKGROUND

Political dissent is an important American tradition that ensures the vibrancy of American democracy and helps to hold those in power accountable. General anti-masking laws hinder the exercise of political dissent and constitute a violation of the constitutionally protected rights to free speech and association enjoyed by Americans. As such, Congress should enact a statute incentivizing the repeal of local general anti-masking statutes by granting those jurisdictions without general anti-masking statutes with a five percent bonus in the funds distributed by the Justice Department as part of the Justice Assistance Grant Program.

The idea of anonymous protest is one that has been around almost as long as political protest itself.<sup>23</sup> As early as the Italian Renaissance, theater performers wore masks and face paint so that they could satirize the behavior of politicians and powerful citizens without being recognized at a time when doing so publicly could have resulted in retribution or even physical danger.<sup>24</sup>

This tradition of using anonymity to protect individuals who criticized those in power continued through the Renaissance and eventually found its

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<sup>23</sup> POLITICS AND THE MASK, MICHIGAN STATE UNIVERSITY MUSEUM (2017), [http://museum.msu.edu/exhibitions/virtual/mask/dialog/politics\\_and\\_the\\_mask.html](http://museum.msu.edu/exhibitions/virtual/mask/dialog/politics_and_the_mask.html) [perma.cc/C5CP-MW9H].

<sup>24</sup> *Id.*

way across the Atlantic. Arguably the most famous “masked” protest in American history occurred on December 16, 1773, when demonstrators, who had painted their faces with soot and dressed as Mohawk Indians, boarded three ships owned by the East India Company and dumped 342 chests of tea in Boston Harbor to protest British colonial rule.<sup>25</sup> The reasons the demonstrators at the Boston Tea Party painted their faces and wore Mohawk disguises were twofold: first, to protect their identities, and second, because the Mohawk image was emerging as a symbol of independence and liberty in the United States in a time before patriotic images like Uncle Sam had been developed.<sup>26</sup>

Like the demonstrators at the Boston Tea Party, other groups in American history have recognized that masks can protect anonymity while conveying powerful symbolic messages. There is perhaps no better illustration of these dual purposes being put to use than that of the Ku Klux Klan. In the early twentieth century, masked protest took a decidedly darker turn as members of the Ku Klux Klan adopted their now infamous hooded white robes.<sup>27</sup> The robes worn by members of the Ku Klux Klan both protected the anonymity of the Klansmen and amplified the fear felt by those who encountered them.<sup>28</sup> Many of today’s anti-masking statutes were specifically enacted to stop the Ku Klux Klan from marching in their hooded robes and include references to wearing hoods in public, as well as masks and other face coverings, for this reason.

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<sup>25</sup> ENCYCLOPAEDIA BRITANNICA, BOSTON TEA PARTY, <https://www.britannica.com/event/Boston-Tea-Party> (last updated Apr. 5, 2019) [<https://perma.cc/V5CQ-N9TQ>].

<sup>26</sup> *Mohawk was Emerging as a Symbol of Liberty in the New Land*, BOSTON TEA PARTY HISTORICAL SOCIETY (Oct. 16, 2017, 2:50 PM), <http://www.boston-tea-party.org/mohawks.html> [<https://perma.cc/H6WQ-2QC9>].

<sup>27</sup> *Ku Klux Klan Robes*, THE ANTI-DEFAMATION LEAGUE, (Oct. 16, 2017), <https://www.adl.org/education/refreferen/hate-symbols/kkk-robes> [<https://perma.cc/H6HQ-W6BZ>].

<sup>28</sup> Elaine Frantz Parsons, *Midnight Rangers: Costume and Performance in the Reconstruction-Era Ku Klux Klan*, 92 J. AM. HIST. 811, 813 (2005) [<https://perma.cc/RPN8-8JR2>].

Masks and face coverings aren't just worn by white supremacists. Anti-fascists, like the Antifa activists who have gained notoriety since the 2016 presidential election, are known to employ a practice called "black bloc" whereby activists wear all black and cover their faces as a means of unifying protestors and protecting their identities.<sup>29</sup> Black-bloc tactics employed by Antifa demonstrators were originally used by protestors in Nazi Germany and later by anti-communist protestors during the Cold War era.<sup>30</sup> Black bloc methods are frequently employed by protestors in situations where anonymity is vital. For example, the Germans who demonstrated against the Nazis and, later, against communism, faced the threat of summary execution if they were identified.<sup>31</sup>

Today, masks are worn by protestors in connection with a variety of social and political movements.<sup>32</sup> Masked protest was closely associated with the Occupy Wall Street movement where supporters frequently wore the Guy Fawkes masks. This mask in particular, has come to be connected with not only the Occupy movement but with protests against the modern socioeconomic order more generally.<sup>33</sup> From black bloc protestors, anarchists, and Antifa to Anonymous and the Occupy movement, political dissenters have long used masks to protect their anonymity and help convey their message.<sup>34</sup> This long tradition of masked protest, for purposes both

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<sup>29</sup> Sarah Ganim & Chris Welch, *Unmasking the Leftist Antifa Movement*, CNN (Nov. 21 2017), <http://www.cnn.com/2017/08/18/us/unmasking-antifa-anti-fascists-hard-left/index.html> [<https://perma.cc/6MXC-EB83>].

<sup>30</sup> *Id.*

<sup>31</sup> *Mobile Killing Squads*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007710#> [<https://perma.cc/535L-B98P>].

<sup>32</sup> Ahmed & Pauley, *supra* note 20.

<sup>33</sup> W. J. T. Mitchell, *Image, Space, Revolution: The Arts of Occupation*, 39 *CRITICAL INQUIRY* 8, 9 (2012).

<sup>34</sup> Francis Dupuis-Deri, *The Black Blocs Ten Years after Seattle: Anarchism, Direct Action, and Deliberative Practices*, 4 *J. FOR THE STUDY OF RADICALISM* 46 (2010), [https://www.academia.edu/2399623/The\\_Black\\_Blocs\\_Ten\\_Years\\_after\\_Seattle\\_Anarchism\\_Direct\\_Action\\_and\\_Deliberative\\_PractiPra](https://www.academia.edu/2399623/The_Black_Blocs_Ten_Years_after_Seattle_Anarchism_Direct_Action_and_Deliberative_PractiPra) [<https://perma.cc/PJX6-NHYQ>]; Ahmed & Pauley, *supra* note 20.

patriotic and repugnant, is a part of the political tradition of the United States and, when coupled with constitutional issues, is part of the reason that anti-masking statutes inspire such energetic debate.

The first anti-masking statute in the United States was passed in response to the violence of the Anti-Rent Wars, but most anti-masking laws have their origins in the period between 1920 and 1960.<sup>35</sup> These laws were almost all passed with the goal of preventing Ku Klux Klansmen from concealing their identities while terrorizing their communities.<sup>36</sup> While the Ku Klux Klan has weakened since the 1970s, anti-masking laws have remained on the books across the country.<sup>37</sup>

While today, Ku Klux Klan marches and rallies are, fortunately, exceedingly rare, anti-masking laws are still being used to stop protests, particularly in instances when authorities feel the need to stop demonstrations that politicians and civic leaders view as undesirable. In 2011 and 2012, the anti-masking law passed in New York following the Anti-Rent Wars 166 years earlier was used again to arrest and charge protestors associated with the Occupy Wall Street movement for wearing Guy Fawkes masks during protests.<sup>38</sup> Further, new anti-masking laws are regularly proposed by legislators is an effort to appear “tough on crime” in jurisdictions around the country, frequently in response to political dissent and protests.<sup>39</sup> In Washington State, for example, state Senator Jim Honeyford introduced a

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<sup>35</sup> Southern Poverty Law Center, *supra* note 13.

<sup>36</sup> *Id.*

<sup>37</sup> Southern Poverty Law Center, *Ku Klux Klan*, TOP TAKEAWAYS, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> [<https://perma.cc/QP4C-V9E6>].

<sup>38</sup> Ahmed & Pauley, *supra* note 20.

<sup>39</sup> Joseph O’Sullivan, *Wearing Masks, Hoods at Protests Could Become Crime Under New Bill*, SEATTLE TIMES (Aug. 31, 2017), <http://www.seattletimes.com/seattse-news/politics/ditch-the-guy-fawkes-mask-new-bill-would-outlaw-masks-and-hoods-at-protests/> [<https://perma.cc/3TA8-7S2U>]; The Associated Press, *Arizona Lawmaker Working on Bill to Ban Masks at Protests*, WASHINGTON TIMES (Aug. 24, 2017), <http://www.washingtontimes.com/news/2017/aug/24/arizona-lawmaker-working-on-bill-to-ban-masks-at-p/> [<https://perma.cc/SU9Q-79JV>].

bill in May of 2017 that would prohibit the wearing of masks in public.<sup>40</sup> Senator Honeyford cited the Seattle World Trade Organization riots in 1999, known as the “Battle in Seattle,” along with recent May Day demonstrations as inspiration for his proposed anti-masking statute for Washington.<sup>41</sup> The ACLU of Washington State has opposed Senator Honeyford’s proposed statute, which would go so far as to require individuals to obtain written permission before wearing a mask on another person’s private property, as unconstitutional.<sup>42</sup>

Similarly, anti-masking laws have become more and more common internationally, often as a result of increased immigration and the fear of terrorism. Many of the laws that have been proposed and enacted recently, in the United States but particularly in Europe, are essentially prohibitions on the religious garb worn by immigrants coming primarily from the Middle East and Northern Africa.<sup>43</sup> Across Europe, as tension surrounding the influx of immigrants and refugees has increased along with fear of terrorism and violence, lawmakers have moved to introduce legislation like the “burka bans” passed by France in 2010 and by Austria in 2017.<sup>44</sup>

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<sup>40</sup> Washington Senate Bill 5941 (proposed).

<sup>41</sup> O’Sullivan, *supra* note 39.

<sup>42</sup> Sydney Brownstone, *State Senator Introduces Bill to Ban Masks and Hoods in Public*, STRANGER (May 22, 2017), <http://www.thestranger.com/slog/2017/05/22/25159343/state-senator-introduces-bill-to-ban-masks-and-hoods-in-public> [https://perma.cc/6HDL-F4LM].

<sup>43</sup> *See, e.g.*, Pete Allen, *France’s Senate Backs National Assembly and Bans Women from Wearing the Burka in Public*, DAILY MAIL (Sept. 15, 2010), <http://www.dailymail.co.uk/news/article-1312016/Frances-Senate-bans-women-wearing-burka-public.html> [https://perma.cc/VSP2-N246]; Mike Wright, *Austria’s ‘Burka Ban’ Comes into Force, Prohibiting Face Veils in Public Places*, TELEGRAPH (Oct. 1, 2017), <http://www.telegraph.co.uk/news/2017/10/01/austrias-burka-ban-comes-force-prohibiting-face-veils-public/> [https://perma.cc/5L8P-YGGE].

<sup>44</sup> *Id.*

### III. SUPPORT AND OPPOSITION FOR ANTI-MASKING LAWS

The number of states with anti-masking laws on the books, combined with the number of proposed statutes, demonstrates that legislatures around the United States still believe that anti-masking laws serve an important role in preventing violence at protests, riots, and political gatherings.<sup>45</sup> There is an undeniable law enforcement benefit to disallowing masks. Masked protestors are, obviously, more difficult for law enforcement to identify and eventually prosecute.

#### *A. Impacts on Law Enforcement in the Age of Social Media*

Police have increasingly used social media and the internet to identify individuals who have perpetrated violence during protests, sometimes by posting on social media and asking for help identifying perpetrators.<sup>46</sup> There is likely a concern among politicians that repealing statutes that make it easier for police to identify criminals will allow their political opponents to paint them as being weak on crime and may even lead to increasing criminality at protests.

In addition to assisting with policing during protests, the origins of many anti-masking laws as tools for ending the terror of the Ku Klux Klan in jurisdictions across the United States means that any discussion about repealing anti-masking laws happens in the shadow of our nation's history of racism. Opponents of repeal can paint any effort to rescind anti-masking statutes as a boon to the Ku Klux Klan, an accusation no politician is eager to face. The ability of police to prevent Ku Klux Klan members from

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<sup>45</sup> See, e.g., Jayme Fraser, *Bill to Ban Masks at Protests That Become Riots Divides Police, Civil Rights Advocates*, MISSOULIAN (Mar. 22, 2017), [http://missoulian.com/news/government-and-politics/bill-to-ban-masks-at-protests-that-become-riots-divides/article\\_bf34d218-2cb5-5e0d-95fa-9b7b8162fddc.html](http://missoulian.com/news/government-and-politics/bill-to-ban-masks-at-protests-that-become-riots-divides/article_bf34d218-2cb5-5e0d-95fa-9b7b8162fddc.html) [<https://perma.cc/XAS3-BJ77>].

<sup>46</sup> Frances Robles, *Two Men Arrested in Connection With Charlottesville Violence*, N.Y. TIMES (Aug. 26, 2017), [https://www.nytimes.com/2017/00/26/us/charlottesville-arrests.html?smid=tw-nytimes&smtyp=cur&\\_r=0](https://www.nytimes.com/2017/00/26/us/charlottesville-arrests.html?smid=tw-nytimes&smtyp=cur&_r=0) [<https://perma.cc/3A9U-R2FA>].

marching through their communities while wearing their hoods is a valuable tool to maintain peace in communities where the group is still active and repeal would make it more difficult to prevent Klan activities.<sup>47</sup> Given that the Ku Klux Klan is widely and properly recognized as a hate group, some Klansmen would no doubt take advantage of the right to wear a hood while they marched, both to spread fear and to protect their reputations.

### *B. Constitutional Issues*

Despite the law enforcement benefits of anti-masking statutes, they have long been opposed by a variety of groups, ranging from the ACLU to the Ku Klux Klan, as a violation of individual Constitutional rights under the First Amendment right to free speech and the Due Process Clause.<sup>48</sup> This opposition is based on the idea that there is a constitutionally protected right to engage in speech, even when, and perhaps *particularly* when, that speech is unpopular or considered to be outside the scope of what is polite. Opponents of anti-masking laws have argued that wearing masks is a form of protected “symbolic speech” of the sort that the Supreme Court has previously held to be protected by the First Amendment.<sup>49</sup>

Anti-masking laws are frequently used by police to target protestors in what many consider an infringement on individual rights to free speech and free association.<sup>50</sup> In *NAACP v. Alabama*, the Supreme Court stated that “effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus

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<sup>47</sup> See *Miller*, 398 S.E.2d at 672.

<sup>48</sup> American Knights of the Ku Klux Klan, Case No. 3:98-CV- 403RM (N.D. Ind. May 4, 1999); *State Anti-Mask Law Violates Right to Speech*, ACLU (October 18, 2000), <http://www.aclumich.org/article/sstat-anti-mask-law-violates-right-speech> [<https://perma.cc/XZ3R-UPTJ>]; Southern Poverty Law Center, *supra* note 35.

<sup>49</sup> See *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

<sup>50</sup> See e.g. Benjamin R. Freed, *Occupy's Halloween Party Might Break D.C.'s Anti-Mask Law*, DCIST (Oct. 5, 2012), <https://dcist.com/story/12/10/05/occupys-halloween-party-might-break/> [<https://perma.cc/9XG5-PXY6>].

between the freedoms of speech and assembly.”<sup>51</sup> The Court has further found that this First Amendment protection of the right to association extends beyond association for political purposes.<sup>52</sup> This protection applies even to groups that are identified as hate groups and whose ideas are not only unpopular, but abhorrent.<sup>53</sup>

In addition to the right of free association, the Supreme Court has found that citizens have the right to associate anonymously. Absent a compelling need, the Court has held that the government cannot require a group to release the names of its members.<sup>54</sup> The Court has found that “anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society.”<sup>55</sup> It is hard to argue logically that the right to associate freely, and to do so anonymously, does not extend to the realm of political protests and voicing political dissent. The right to engage politically while remaining anonymous should not be limited to our living rooms.

### *C. Social Media and Privacy Considerations in the Surveillance State*

There are also more general privacy-based arguments against anti-masking laws. This opposition comes from individuals concerned with preserving individual privacy, particularly with respect to participation in politically charged events or protests.<sup>56</sup> Privacy in the public sphere has eroded rapidly as technology has progressed. For example, New York Civil Liberties Union volunteers have counted more than 3000 visible security and CCTV cameras

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<sup>51</sup> NAACP v. State of Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

<sup>52</sup> Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 766-70 (1976).

<sup>53</sup> Collin v. Smith, 578 F.2d 1197, 1203 (7th Cir. 1978).

<sup>54</sup> NAACP, 357 U.S. at 458-59.

<sup>55</sup> *McIntyre*, 514 U.S. at 357.

<sup>56</sup> Omer Tene, *Privacy, Masks and Religion*, THE CENTER FOR INTERNET AND SOCIETY, (Sept. 1, 2012, 5:39 PM), <http://cyberlaw.stanford.edu/blog/2012/09/privacy-masks-and-religion> [<https://perma.cc/3YT3-ZZME>].

in Manhattan.<sup>57</sup> Today almost every step a person takes while walking from Central Park to lower Manhattan is on camera.<sup>58</sup> As privacy in public has become less common, the ability to congregate in public anonymously has naturally been diminished. This increased surveillance and the inability to voice political dissent anonymously has necessarily had a chilling effect on political speech, particularly when that speech is unpopular or controversial.

This constant surveillance, both by stationary and cellphone cameras, played a large role in the aftermath of the Charlottesville protests. Following the protests, images of protestors on both sides were shared on social media, resulting in retaliation both online and in person.<sup>59</sup> The Twitter account @YesYoureRacist, which had 407,000 followers as of October 2017, has been calling out racism online since 2012.<sup>60</sup> Following the Charlottesville protests, @YesYoureRacist and others online got to work sharing photos and videos of the protests as broadly as possible and asking individuals on social media to help identify the white nationalist protestors pictured.<sup>61</sup> Once these protestors were identified, sometimes incorrectly, many of them understandably faced a backlash on social media and, in some instances, termination by their employers.<sup>62</sup>

Recently, protestors have become more concerned about protecting their anonymity as they become increasingly aware of the dangers posed by “doxing.”<sup>63</sup> Doxing is a form of cyber-harassment whereby a person’s

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<sup>57</sup> NY CIVIL LIBERTIES UNION, *NYCLU Surveillance Camera Project*, <https://www.nyclu.org/en/nyclu-surveillance-camera-project> [<https://perma.cc/L3HP-3AFX>].

<sup>58</sup> Brian Palmer, *Big Apple is Watching*, SLATE (May 3, 2016), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2010/05/big\\_apple\\_is\\_watching\\_you.html](http://www.slate.com/articles/news_and_politics/explainer/2010/05/big_apple_is_watching_you.html) [<https://perma.cc/DUV8-3LXY>].

<sup>59</sup> Alyssa Newcomb, *Twitter Users Are Outing Charlottesville Protestors*, NBC (Oct. 22, 2017), <https://www.nbcnews.com/tech/social-media/twitter-users-are-outing-charlottesville-protestors-n792501> [<https://perma.cc/5G8E-4V7K>].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

personal information is posted online.<sup>64</sup> This information often includes an individual's home address, phone number, social security number, or employment information.<sup>65</sup> Doxing increased in visibility following the white supremacist rallies in Charlottesville, Virginia, in August 2017, but the practice has existed for nearly as long as the internet.<sup>66</sup> Following the events in Charlottesville, both white supremacists and counter-protestors participated in doxing members of the opposition who were identified in pictures online.<sup>67</sup>

In some situations, individuals were incorrectly identified as having been marching in support of white supremacy at the Charlottesville protests.<sup>68</sup> Following the protests, Kyle Quinn, a professor of biomedical engineering at the University of Arkansas, was identified by Twitter account @YesYoureRacist as one of the white supremacist protestors at the Charlottesville protests in a tweet that was shared more than 11,000 times.<sup>69</sup> The only problem was that Mr. Quinn wasn't at the protest; in fact he was more than 1000 miles away in Fayetteville, Arkansas.<sup>70</sup> Immediately after being misidentified as a white supremacist, Mr. Quinn's Twitter and email were bombarded by messages calling him a racist, threats against him and his

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<sup>64</sup> Julia M. MacAllister, *The Doxing Dilemma: Seeking A Remedy for the Malicious Publication of Personal Information*, 85 *FORDHAM L. REV.* 2451, 2453 (2017).

<sup>65</sup> *Id.*

<sup>66</sup> Nellie Bowles, *How 'Doxing' Became a Mainstream Tool in the Culture Wars*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/technology/doxing-protests.html> [<https://perma.cc/F97F-TTQF>].

<sup>67</sup> Micah Lee, *How Right-Wing Extremists Stalk, Dox, and Harass Their Enemies*, THE INTERCEPT (Sept. 6, 2017), <https://theintercept.com/2017/09/06/how-right-wing-extremists-stalk-dox-and-harass-their-enemies/> [<https://perma.cc/H7DW-8QD9>]; Bowles, *supra* note 66.

<sup>68</sup> Laura Sydell, *Kyle Quinn Hid At A Friend's House After Being Misidentified On Twitter As A Racist*, NPR (Nov. 22, 2017), <https://www.npr.org/sections/alltechconsidered/2017/08/17/543980653/kyle-quinn-hid-at-a-friend-s-house-after-being-misidentified-on-twitter-as-a-rac> [<https://perma.cc/4KYM-J798>].

<sup>69</sup> Rozina Sini, *Professor Wrongly Labelled as Racist in Charlottesville*, BBC (Aug. 15, 2017), <http://www.bbc.com/news/world-us-canada-40935419> [<https://perma.cc/9FW3-24A2>].

<sup>70</sup> *Id.*

wife, and demands that he lose his job at the University of Arkansas. Professor Quinn's home address was shared online, at which point he contacted the police.<sup>71</sup> Professor Quinn and his wife were forced to hide out at a friend's house in an effort to ensure their safety.

Professor Quinn's story is far from unique. Following the Boston Marathon bombing in 2013, users on Reddit and other internet forums scoured pictures from the scene near the bombing to identify "suspects."<sup>72</sup> Users developed a theory that Sunil Tripathi, a 22-year-old Brown University student, was one of the bombers.<sup>73</sup> This rumor was not based on any real facts. Sun Tripathi had actually been missing for more than a month, and the Facebook page his family had set up to aid in their search was quickly inundated by hateful posts.<sup>74</sup> The family was forced to take the Facebook page down and were overwhelmed by calls from media.<sup>75</sup> Reddit eventually apologized, but not until after Sun Tripathi's family had been put through hours of harassment and stress.<sup>76</sup>

A major driver of the increased need for privacy is undoubtedly the ongoing collision of social media and political protest.<sup>77</sup> Starting with the uprisings during the Arab Spring in early 2011, the internet and social media have increasingly been used to promote and document political uprisings and demonstrations.<sup>78</sup>

It is hard to argue that forcing white nationalists to answer for their hateful rhetoric via online identification is necessarily a bad thing, and therefore it

<sup>71</sup> Sydell, *supra* note 68.

<sup>72</sup> Steve Henn, *Social Media's Rush To Judgment In The Boston Bombings*, NPR (Apr. 23, 2013), <https://www.npr.org/sections/alltechconsidered/2013/04/23/178556269/Social-Medias-Rush-To-Judgment-In-The-Boston-Bombings> [<https://perma.cc/6HFG-E36Q>].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFFAIRS 28, 29 (2011).

<sup>78</sup> Zeynep Tufekci & Christopher Wilson, *Social Media and the Decision to Participate in Political Protest: Observations From Tahrir Square*, 62 J. OF COMM. 363, 363 (2012).

might make sense to not permit them to wear masks. However, in certain instances, protestors have desired to cover their faces not out of cowardice, but out of concern for their safety. In 1979, Iranian-Americans sued the State of California over its anti-masking law, arguing that it put their family members in Iran in danger by not allowing them to protect their identities while protesting the country's new leadership.<sup>79</sup> The court agreed, and the law was struck down.<sup>80</sup>

The competing support and opposition to anti-masking laws has generated considerable litigation. Courts that have evaluated anti-masking laws have struggled with the tension between public safety interests and First Amendment protections that the laws create. Courts have come down on different sides of the issue, but most find that anti-masking laws are constitutional.

In *State v. Miller*, the Georgia Supreme Court overturned a lower court ruling and upheld Georgia's ban on the wearing of Klan masks stating that "[t]he state interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate government activity."<sup>81</sup> Similarly, in *Church of the American Knights of the Ku Klux Klan v. Kelly*, the Klan, represented by the New York Civil Liberties Union, challenged the New York Anti-Mask statute, but the court upheld the ban, stating "[w]hile the First Amendment protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so."<sup>82</sup>

Unlike the Georgia Supreme Court, the United States Supreme Court has not taken an anti-masking case, allowing the conflicting rulings of state and

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<sup>79</sup> Haag, *supra* note 19.

<sup>80</sup> Ghafari v. Mun. Court, 87 Cal. App. 3d 255 (Cal. Ct. App. 1978).

<sup>81</sup> Peter Applebome, *Georgia Supreme Court Reinstates Ban on Wearing of Klan Masks*, N.Y. TIMES (Dec. 6, 1990), <http://www.nytimes.com/1990/12/06/us/georgia-supreme-court-reinstates-ban-on-wearing-of-klan-masks.html> [<https://perma.cc/9LGV-R8GF>].

<sup>82</sup> Associated Press, *Supreme Court Rejects KKK Mask Case* (Dec. 6, 2004), <http://www.foxnews.com/story/2004/12/06/supreme-court-rejects-klk-mask-case.html> (last updated Jan. 14, 2015) [<https://perma.cc/Q3G2-VZUV>].

local courts to stay in effect. This has created a patchwork of anti-mask jurisprudence that has the result of giving some United States citizens the right to wear masks when expressing political dissent while others cannot. The Supreme Court *has* ruled on cases relating to other forms of anonymous political speech, specifically pamphleteering.<sup>83</sup> The Court has held that the right to engage in political speech is protected by the First Amendment and that the Framers intended these First Amendment protections to include a right to engage in anonymous free speech in the vein of Benjamin Franklin's Silence Dogwood letters. Accordingly, in *Virginia v. Black*, the Supreme Court ruled that Virginia's ban on cross burning was not unconstitutional, but that the state was required to prove that a defendant had an "intent to intimidate."<sup>84</sup>

#### IV. PROPOSED STATUTE

General anti-masking statutes prohibiting the wearing of masks or face coverings in public without any associated criminal activity infringe on the ability of citizens to exercise their rights to free speech and anonymous association. As such, this article proposes that Congress immediately enact legislation whereby jurisdictions without general anti-masking statutes receive additional funds through the Justice Department grant system. Because criminal law is almost exclusively a state law issue, the federal government lacks the power to unilaterally overturn all general anti-masking statutes. Congress does, however, have the ability to encourage states to act through the use of federal funds. In *United States v. Butler*, the Supreme Court concluded that Congress has broad authority to tax and spend for the general welfare, and that this power permitted the federal government to place conditions on federal money granted to states.

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<sup>83</sup> *McIntyre*, 514 U.S. at 357.

<sup>84</sup> *Virigina v. Black*, 538 U.S. 343, 363 (2003).

### A. Federal Grants

The federal government regularly transfers funds to state and local government for a number of reasons.<sup>85</sup> In 2016 alone, the federal government transferred \$660 billion in grant money to state and local government.<sup>86</sup> In the past, the federal government has used this grant money to encourage states to adopt certain legislation. Federal priorities, for example raising the drinking age to 21, have seen the federal government use conditional grants to create policy in areas in which it does not have a constitutionally based power to legislate.

### B. Restrictions on Conditional Federal Grants

In 1987, under pressure from Mothers Against Drunk Driving, Congress passed 23 U.S.C. § 158A, the National Minimum Drinking Age Act, in an attempt to force states to raise the drinking age to twenty-one.<sup>87</sup> The law reduced the amount of federal highway funds the Department of Transportation was authorized to grant to any state that did not raise their drinking age.<sup>88</sup> The state of South Dakota refused to raise its drinking age to twenty-one and instead challenged the Act, claiming it was a violation of the Tenth and Twenty-First Amendments.<sup>89</sup>

The court in *South Dakota v. Dole* found that Congress had authority under its spending power to restrict grant funds in the manner prescribed by the National Minimum Drinking Age Act so long as the exercise of the spending power (1) is designed to promote the general welfare; (2) any conditions are unambiguous and thereby enable the States to exercise their choice

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<sup>85</sup> ROBERT JAY DILGER, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 2 (2018), <https://fas.org/sgp/crs/misc/R40638.pdf> [<https://perma.cc/TG4S-5E4L>].

<sup>86</sup> *Id.* at 7.

<sup>87</sup> Mark Meierhenry, *The History of South Dakota v. Dole*, 52 S.D. L. REV. 454, 455 (2007).

<sup>88</sup> *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

<sup>89</sup> *Id.* at 205–06.

knowingly, cognizant of the consequences; (3) there is a connection between the program that the federal funds were designated for and Congress's stated goal; (4) the condition is not otherwise unconstitutional; and (5) and the condition is not coercive.

The federal government uses federal funds to help fund crime prevention using grants to state and local governments through a variety of programs.<sup>90</sup> Many of these grants are awarded by the Justice Department through the Office of Justice Programs' Justice Assistance Grant Program (JAG). In 2016 alone, more than \$274 million in JAG funding was distributed to state and local governments.<sup>91</sup>

JAG funds are apportioned using a four-step calculation process that distribute funds based on a state or territory's share of violent crime in relation to its population. The distribution essentially divides the total amount of funding available in half and distributes one half based on population and one half based on the rate of violent crime.<sup>92</sup> States that have both a small population and account for a small portion of the violent crimes committed in the United States receive a minimum distribution.<sup>93</sup> The distribution is equivalent to 0.25 percent of the funds available for the year.<sup>94</sup> For example, in 2016, Wyoming accounted for 0.10 percent of the nation's total violent crime and 0.18 percent of the population.<sup>95</sup> The total amount available that year was \$274.9 million, meaning under the initial distribution, Wyoming received 0.10 percent of \$137.4 million for its share of violent crime and 0.18 percent of \$137.4 million for its share of the population. This total, about

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<sup>90</sup> OFFICE OF JUSTICE PROGRAMS-ABOUT, <https://ojp.gov/about/about.htm> [<https://perma.cc/CYX5-KDCW>].

<sup>91</sup> Alexia D. Cooper, Bureau of Justice Statistics, NCJ 250157, *Justice Assistance Grant Program 1* (2016) <https://www.bjs.gov/content/pub/pdf/jagp16.pdf> [<https://perma.cc/BYB2-DYBG>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

\$380,000, is significantly less than the minimum JAG allocation for the year, which was \$687,266 or 0.25 percent of the total available funds.

The funds provided by the JAG programs are used for a variety of purposes, including supporting law enforcement; drug treatment; crime prevention and education; programs supporting and protecting victims and witnesses; and planning, evaluation, and technology improvements in police departments across the county.<sup>96</sup> These funds are distributed to state and local police in every state in the country. In 2016, a total of 1,501 local governments were eligible for awards, either directly or in conjunction with their county government.<sup>97</sup> Two states had more than 100 local governments eligible to receive JAG grants.<sup>98</sup>

In order to encourage states to repeal general anti-masking statutes, Congress should provide a five percent JAG funding bonus to state and local governments that do not have a general anti-masking statute or who repeal their general anti-masking statutes. While some lawmakers would no doubt be concerned that repealing an anti-masking statute would make policing more difficult for law enforcement officers and might be politically unpopular, they could use the promised JAG funds to soften the blow. Lawmakers and law enforcement agencies would be able to use these funds to increase police manpower, train officers to better respond to protests, or even to help combat the opioid epidemic.

Because even small states are guaranteed JAG funds, every state will have an incentive not to pass or maintain a general anti-masking statute. Even the smallest states that receive the minimum amount in JAG funding would receive tens of thousands of dollars by keeping an anti-masking statute off the books. Additionally, this funding bonus would avoid the challenges posed by an obvious alternative, a penalty aimed at jurisdictions who maintain general anti-masking statutes. A penalty or some sort of condition on existing

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

federal funds may be effective but would risk reducing funds for important law enforcement programs. A penalty would also potentially face challenges from states and local jurisdictions arguing that the condition, overturning anti-masking statutes, would be unconstitutionally coercive.

### *C. Social Justice Considerations*

We live in an era when political dissent is more important than ever. As the Trump presidency proceeds, it has become increasingly clear that the president and his administration are uncomfortable with criticism.<sup>99</sup> The administration's belief that criticism and dissent are unpatriotic poses a challenge to democratic norms designed to help the population as a whole hold our leaders accountable. At a time when it is more important than ever for Americans to be involved in the political process, and when our nation is more politically divided than ever, it is crucial that individuals be able to protest the government anonymously, without risking losing their jobs or being threatened because they are pictured on social media and then doxed by people who do not agree with their positions.

The tension between liberty and security is one that has challenged the United States and other democracies, and it will continue to do so. In an era when fears of terrorism, gun violence, and civic unrest are at an all-time high, it can be tempting to allow the government to impose restrictions on our liberties in exchange for feeling more secure. It is critical that we resist these temptations and continue to embrace the rights that makes democracy worth having, chief among them being our ability to criticize the government and express political dissent. Maintaining a democracy requires bravery on the

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<sup>99</sup> Aaron Blake, *The Trump White House's Increasingly Authoritarian Response to Criticism*, WASH. POST, (Oct. 21, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/10/09/kellyanne-conway-and-the-white-houses-very-authoritarian-attitude-toward-criticism/?noredirect=on&utm\\_term=.bcba1f23da71](https://www.washingtonpost.com/news/the-fix/wp/2017/10/09/kellyanne-conway-and-the-white-houses-very-authoritarian-attitude-toward-criticism/?noredirect=on&utm_term=.bcba1f23da71) [https://perma.cc/7KKR-4EXT].

part of individual citizens. In this case, it means protecting the rights of all individuals, whether or not we agree with them, to protest anonymously.

While general anti-masking statutes are a serious constraint on the right of citizens to voice their dissent anonymously, it is important to note that they exist within a larger context of government repression of dissent. Police tactics that interfere with peaceful protests in the name of preserving order and keeping the peace are threats to our democracy. It is important that they be examined and that policymakers consider the balance between security and allowing political dissent when determining whether they should be allowed.

#### *D. Costs*

The financial costs of implementing the proposed five percent JAG grant funding boost would be substantial, but would provide additional funds for important services at the state and local level while serving the purpose of eliminating unconstitutional general anti-masking provisions. If every jurisdiction receiving a JAG grant in 2016 complied with the proposed requirement and eliminated general anti-masking provisions, the cost to the Justice Department would be \$13.7 million a year. This \$13.7 million could have a significant impact on the ability of local government to provide needed services, but would represent a minute portion of the overall federal budget, which totaled \$3.8 trillion in fiscal year 2015.

The amount of JAG funding granted by the Justice Department varies from year to year, so the cost of the five percent increase would also vary. Looking at JAG expenditures from the past three years, outlays have averaged \$273.86 million a year, meaning that the five percent boost associated with implementing this proposal would cost an average of \$13.67 million a year, assuming the JAG program continues to be funded at its current rate.

The proposed budget request for the Justice Department for fiscal year 2018 was \$27.7 billion, with \$1.93 billion designated for various state and

local grant programs.<sup>100</sup> The allocation of \$14 million, an amount that could be in line with five percent of the average JAG grant allocation, would amount to just 0.007 percent of the Department’s total budget for state and local grants. Even with the costs associated with developing, implementing, and managing the plan, the costs to the Justice Department of protecting the ability of Americans to express political dissent anonymously would be minimal and the funds distributed would help state and local jurisdictions to better achieve the goals that inspired the JAG program in the first place.

<b>JAG Grant Spending and Cost of 5% Funding Boost</b>		
	<b>JAG Expenditures Without 5% Boost</b>	<b>JAG Expenditures With 100% Utilization</b>
<b>2014</b>	\$290.9 million <sup>101</sup>	\$305.4 million
<b>2015</b>	\$255.8 million <sup>102</sup>	\$268.6 million
<b>2016</b>	\$274.9 million <sup>103</sup>	\$288.6 million
<b>Average</b>	\$273.86 million	\$287.53 million

<sup>100</sup> U.S. Dept. of Justice, FY 2018 Budget Request At A Glance (2018) <https://www.justice.gov/jmd/page/file/968216/download> [https://perma.cc/7D3D-KP2X].

<sup>101</sup> Alexia D. Cooper & Kimberly Martin, Bureau of Justice Statistics, NCJ 247137, *Justice Assistance Grant Program, 2014*, 1 (2014) <https://www.bjs.gov/content/pub/pdf/jagp14.pdf> [https://perma.cc/E7V2-ELPM].

<sup>102</sup> Alexia D. Cooper, Bureau of Justice Statistics, NCJ 249105, *Justice Assistance Grant Program, 2015*, 1 (2015) <https://www.bjs.gov/content/pub/pdf/jagp15.pdf> [https://perma.cc/27CH-6G8W].

<sup>103</sup> Cooper, *supra* note 91, at 1.

### *E. Implementation*

Congress created the JAG grant program as part of the Consolidated Appropriations Act of 2005.<sup>104</sup> Changes to the program, like those proposed in this article, would require Congressional approval. Congress could amend the scope of the program to allow the Justice Department to implement the proposed changes as part of the appropriations process. The change would first need to be approved by the appropriate appropriations subcommittees in the Senate and House of Representatives (called the Subcommittee on Commerce, Justice, Science, and Related Agencies in both), be approved by the Appropriations Committee in both chambers and then be passed as part of the act and signed into law. Congress could also make the change as a stand-alone bill, but because it involves changing appropriations to a federal agency, the appropriations process is the most likely route for Congress to take.

The implementation of the program would necessarily involve the Justice Department and would require that the Department develop specific criteria with respect to what would be considered a general anti-masking statute under the terms of the program. My proposal would be to include any statute or ordinance that criminalizes the wearing of masks, hoods, face paint, or other items intended to obscure a person's identity without corresponding criminal activity. This would require a careful review of the anti-masking statutes in each jurisdiction where they have been enacted to determine whether the statute complied with the requirement. Fortunately, the Justice Department employs more than 10,000 attorneys and has considerable resources at its disposal with which to review the anti-masking laws currently in place in the United States.<sup>105</sup>

Once the Justice Department has determined which jurisdictions comply with the requirement, those jurisdictions would be eligible for the five percent

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<sup>104</sup> *Id.*

<sup>105</sup> U.S. Dept. of Justice, *supra* note 100.

boost in JAG grant funding. The Department's existing system for determining the amount that each state and local jurisdiction receives would remain unchanged with the five percent bonus being applied last. Jurisdictions that maintained or passed anti-masking laws that failed to comply with the Justice Department requirement at any point during the fiscal year prior to distribution would be ineligible for funds, but they would be eligible the year following a repeal. This will give the Justice Department enough time to determine which jurisdictions will be eligible for the bonus in the future and so better budget for future JAG grant spending.

It is likely that managing the program will require the Justice Department to invest resources in determining whether any given jurisdiction has enacted an anti-masking statute during the previous year that would put that jurisdiction out of compliance. These costs would be difficult to ascertain initially but should be consistent once the program is operating.

## V. LIKELY OPPOSITION

Opposition to the proposed JAG grant funding increase for jurisdictions that overturn their general anti-masking statutes will likely come in the following two main forms: opposition to the revocation of the anti-masking statutes generally, and opposition to using the JAG grant system to convince jurisdictions to revoke their statutes.

While the constitutional rights to free speech and free assembly are critical to the health of American democracy, and while the United States has a long history of anonymous political dissent in the form of masked protest, there will be those who oppose the elimination of general anti-masking statutes. The origin of many anti-masking statutes in preventing intimidation and terrorism by hooded members of the Ku Klux Klan is incredibly powerful. Individuals who consider the origins of anti-masking statutes, but not their implications for free speech and voicing political dissent, could easily see any effort to repeal the statutes as an effort to help the Ku Klux Klan cause damage in our communities.

Concerns that overturning anti-masking statutes will benefit the Ku Klux Klan are far from baseless; in fact many of the challenges to anti-masking statutes have been brought by modern affiliates of the Ku Klux Klan. But the Klan's diminished status and the ability adopt narrow anti-masking statutes that criminalize wearing a mask or hood for purposes of intimidation or while committing a crime can reduce the ability of the Ku Klux Klan to utilize repeal of anti-masking laws to their benefit.

Fortunately, the Ku Klux Klan of today is not the force it once was. At the height of its power, during the Civil Rights Movement in the 1960s, members of the Ku Klux Klan used a campaign of fear to control minorities in the South and maintain the Jim Crow-era status quo that had for so long codified white supremacy.<sup>106</sup> In 1965, Klan membership was estimated to be between 35,000 and 50,000.<sup>107</sup> The violence of the Klan of that time left an indelible mark on the psyche of the United States, and the South in particular. The Klan of today, by contrast, is a shadow of what existed during the Civil Rights Movement. The organization has splintered into local chapters and has no unifying national leadership.<sup>108</sup> This fortunate reduction in the Klan's power has come following years of the Klan being decimated by internal struggles, lawsuits, and the incarceration of many of its leaders.<sup>109</sup>

The reduced power of the Klan must be considered in weighing the impact of repealing anti-masking legislation. While it is undeniable that anti-masking statutes were passed in an attempt to stop the Klan's violence, the statutes did little to stop it from terrorizing the South during the Civil Rights era and beyond. While any law that hinders the ability of the modern Klan to continue to inspire fear in individuals by marching in public, it is important to note that most anti-masking statutes do not stop the Klan from marching

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<sup>106</sup> Southern Poverty Law Center, *Ku Klux Klan: A History of Racism and Violence*, 45 (2011), <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf> [<https://perma.cc/D6SP-393W>].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

in their robes with their faces uncovered. The history of anti-masking statutes and their origins with respect to the Ku Klux Klan are important to consider, but in the broad scheme of free speech and other constitutional rights, it is necessary to allow unpopular speech, including symbolic speech in the form of masked protests by groups supporting ideologies of hate, in order to preserve the ability for Americans to speak out and voice their dissent.

Other opposition to repealing general anti-masking statutes will come from law enforcement and individuals who are concerned that repealing anti-masking statutes would lead to lawlessness and violence at protests and rallies. Masked protestors are, obviously, much more difficult to identify, meaning that when they commit acts of violence, particularly when they do so in crowds of other individuals wearing masks, the police have a harder time apprehending them. Some may further argue that not allowing protestors to wear masks discourages unlawful behavior in the first place by dramatically increasing the likelihood that any wrongdoing would result in apprehension and punishment.

While it is important to recognize that repealing anti-masking statutes may make policing more difficult, it is also important to keep in mind that individuals set on acting violently at protests will likely find ways to circumvent anti-masking statutes. Protestors can wear masks while committing acts of violence and then take them off or, more likely, just ignore the anti-masking statute altogether and run from any police officers who try to apprehend them. Again, here it is important to keep in mind the importance of protecting the right of Americans to express political dissent and the impact that anti-masking laws actually have on crime prevention.

Other criticism of the proposed scheme will likely be focused on the cost and the means of implementation. Spending several million dollars every year to keep anti-masking statutes off the books might seem like a high price to pay. In addition, using the JAG grant scheme as a vehicle for convincing states and localities to repeal anti-masking statutes will make the program

more difficult for the Justice Department to implement and result in increased costs for managing the program.

While the cost of the program should be considered, it is important to keep in mind that the funds being offered are not being wasted but instead helping to support state and local law enforcement. The JAG program has limits on what funds can be used for. JAG awards are only to be used to support law enforcement, prosecution and courts, prevention and education, corrections and community corrections, drug treatment, technology improvements, and victim and witness programs. Increasing the funds available to state and local government in pursuit of these ends will have benefits beyond ensuring that Americans can fully exercise their constitutional right to express dissent; they will have a beneficial impact on communities across the country.

## VI. CONCLUSION

The United States has long prided itself on being a force for democracy and a place where people with opposing ideologies and ideas are free to engage in a debate over how best to ensure that our nation continues to thrive. It is imperative that we recognize the importance of dissent in this process and recognize that in an increasingly interconnected world, it is important that we make it possible for people to express their dissent without fear of being doxed or fired because some individuals might not agree with them. The ability to express dissent anonymously, and to use masks to convey meaning, is an important part of the American tradition.

General anti-masking statutes inhibit the ability of Americans to express their dissent and hinder the national dialogue that is so important in a democracy. It is important that we do everything we can to ensure that they are repealed. By incentivizing states and local jurisdictions to repeal their general anti-masking statutes using the JAG grant process, we would ensure that Americans are able to exercise their rights as citizens and that our law enforcement agencies are better funded and more able to keep our communities safe.

