

DAMNED IF YOU DO AND DAMNED IF YOU DON'T

New York's Mask Limbo

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In September 2011, protesters gathered in a little-known New York City park to form a protest movement that would become known as Occupy Wall Street.¹ Millions had been left unemployed by the 2008 financial crisis, and the ensuing bailouts for banks drew widespread anger. The protest gained speed and in just a few days, the New York City Police Department (“NYPD”) arrested seven people, most of whom were charged simply for wearing face coverings.²

New York's criminalization of masks shocked many of those observing the generally peaceful Occupy Wall Street protests, but the law being enforced was nothing new. In fact, it dates back to the early nineteenth century, after New Yorkers rebelled against extortionary rents and the threats of eviction. While the grievances of the past may be familiar to us in the present, the tactics used to express them are not. In 1845, renters not only turned to protest, but they even murdered landlords and at least one law enforcement officers. And they did this all while wearing masks; specifically, masks caricaturing Native Americans.³

And so New York's anti-mask law was born, but it went beyond merely outlawing masked protests. Apart from narrow exceptions like “masquerade parties,” all masked gatherings have remained illegal in New York for more than 150 years.⁴ . And that was still legal landscape in 2020, when masks transformed from novelties to necessities.

On April 15, 2020, Governor Andrew Cuomo issued Executive Order 202.17 ordering nearly all New Yorkers to wear masks in public gatherings.⁵ The Governor's masking order is one of thirty-five COVID-19 executive orders since the March 7, 2020 order declaring a disaster

¹ See Heather Gatuney, *What is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST (Oct. 10, 2011), https://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story.html.

² Christopher Robbins, *NYPD Uses Law from 1845 to Arrest Masked Protestors in Financial District*, GOTHAMIST (Sept. 19, 2011, 6:31 PM), <https://gothamist.com/news/nypd-uses-law-from-1845-to-arrest-masked-protestors-in-financial-district>; see also Laura Marcinek, *New York City Police Arrest Seven Wall Street Protestors*, BLOOMBERG (Sept. 19, 2011, 10:21 AM), <https://www.bloomberg.com/news/articles/2011-09-19/new-york-city-police-arrest-seven-wall-street-protesters>. Three protestors were arrested on charges of attempting to enter a bank building and jumping over a police barricade. Robbins, *supra*.

³ Herb Hallas, *Halloween History: New York's Anti-Mask Law*, N.Y. ALMANACK (Oct. 30, 2013), <https://newyorkalmanack.com/2013/10/halloween-history-new-yorks-anti-mask-law/>.

⁴ N.Y. PENAL LAW § 240.35(4).

⁵ Exec. Order No. 202.17 (Apr. 15, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.17.pdf.

emergency.⁶ Historically, New York Governors had the power to suspend state law in an emergency, but recent legislation gave Cuomo the additional authority to issue directives related to the emergency to last thirty days at a time, with the possibility of unlimited thirty-day renewals, so long as the directive is not otherwise unconstitutional.⁷

So if you think that means wearing a mask in public is simultaneously required and illegal, you would be right.⁸

Governor Cuomo *could* have suspended the 1845 mask law, but he didn't. Now, every responsibly masked grocery shopper, jogger, and commuter is stuck in legal limbo. Leaving so many New Yorkers in this impossible spot is not good leadership when the state is not in the grip of a pandemic; when it is, Governor Cuomo is being downright irresponsible. New York needs clear, effective leadership right now.

But Governor Cuomo's failure to suspend the 1845 mask law is more than just ineffective leadership—it's a prime example of why one-man rule by decree is a bad idea. Legislation representative of more voices might have suspended or even repealed the mask law. Instead, we must endure the “damned if you do, damned if you don't” path Cuomo offers.

Looking past legal theory, the potential real-world consequences are troubling. An example of what may come is illustrated by the selective enforcement of social distancing that is already occurring: of the forty people arrested in Brooklyn for social-distancing violations, thirty-nine were people of color.⁹ Governor Cuomo's legal limbo invites yet more of this injustice for New Yorkers of color.

But let's be clear: New York's mask ban was a bad law long before COVID-19.¹⁰ Pre-pandemic protesters faced the terrible choice between risking arrest for wearing a mask and exposing their identity to any officer with a camera. In a city that endured generations of unconstitutional policing of political protests, religious services, and other constitutionally protected activity, a mask is often the only defense against police tracking. And at a time when facial

⁶ *Executive Orders from the Office of the Governor*, GOVERNOR ANDREW M. CUOMO, <https://www.governor.ny.gov/executiveorders>; see also Albert Fox Cahn, *A New York Dictatorship?*, GOTHAM GAZETTE: SURVEILLANCE & THE CITY (Apr. 14, 2020), <https://www.gothamgazette.com/opinion/9300-surveillance-and-the-city-a-new-york-dictatorship-cuomo-power-coronavirus>.

⁷ S. B. S7919, 2019–2020 Leg., 238th Sess. (N.Y. 2020), see also Ross Barkan, *Albany's Dead-of-Night Coronavirus Vote Gives Cuomo Sweeping New Emergency Powers*, GOTHAMIST (Mar. 5, 2020, 11:11 AM), <https://gothamist.com/news/ny-coronavirus-cuomo-new-emergency-powers>.

⁸ Compare Melissa Gira Grant, *A Brief Criminal History of the Mask*, NEW REPUBLIC (Apr. 21, 2020), <https://newrepublic.com/article/157370/brief-criminal-history-mask>, with Sam Feldman (@srfeld), TWITTER (Apr. 17, 2020, 3:31 PM), <https://twitter.com/srfeld/status/1251231848468041730>.

⁹ Elizabeth Joseph et al., *35 of the 40 People Arrested for Social Distancing Violations in Brooklyn Were Black*, CNN (May 8, 2020, 2:31 PM), <https://www.cnn.com/2020/05/08/us/nypd-social-distancing-35-of-40-people-arrested-black-trnd/index.html>.

¹⁰ See U.S. CONST. amend. I.

recognition technology makes it possible for officers to use a single photo to identify hundreds, if not thousands, of individuals, masks have never been more crucial.

Masks may offer protection from facial recognition for only a little longer as the COVID-19 crisis and the rise of mask-wearing has sent tech companies scrambling. For example, a GitHub database of public-facing Instagram photos where individuals are wearing masks—pictures presumably posted by the mask-wearers—was put together by an AI startup and is being used to improve facial recognition algorithms.¹¹

This casts new shadows on Governor Cuomo's insistence on the "damned if you do, damned if you don't" stance he has offered New Yorkers. By not simply repealing the mask law—something that would have been easy for him, given his new near-omnipotence—Cuomo has shown little regard for New Yorkers or the constitutional right to protest, and has side-stepped the looming privacy crisis of facial recognition despite mask-wearing. To protect New Yorkers' health and privacy, Cuomo must depart this legal limbo. Until he does, it will be dangerous for people to keep their masks on—or take them off.

¹¹ Alfred Ng, *Your Face Mask Selfies Could Be Training the Next Facial Recognition Tool*, CNET (May 19, 2020, 5:00 AM), <https://www.cnet.com/news/your-face-mask-selfies-could-be-training-the-next-facial-recognition-tool/>.



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