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# Masks, Face Veil Bans and “Living Together”. What’s Privacy Got to Do with It?

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**Abstract:** The “living together” concept poses a puzzle. Why did Europeans decide that life in a modern democracy requires showing one’s face? One explanation is opposition to Muslims and Islam. But the enforcement of face veil bans against non-religious mask wearing raises doubts. This essay poses an alternative explanation. What if the face veil bans persist because of European conceptions of privacy? *Von Hannover v. Germany* held that one be private in public. Given this, why wear a mask? What is there to hide? To explore this idea, the essay turns to the United States, where one cannot be “private in public” and mask wearing has been opposed on narrow grounds such as public security and the content of specific masks. At the same time, the United States respects the decisional privacy of someone to wear a mask even for “irrational” reasons, something the “living together” idea tends to ignore.

**Keywords:** masks, face veils, living together, privacy, *Von Hannover v. Germany*

In *SAS v. France*, the European Court of Human Rights upheld France’s ban on face veils because “living together” in a modern society requires showing one’s face.<sup>1</sup> As a student of mask and face veil bans (Kahn, 2021; Kahn, 2019a; Kahn 2020), and someone who believes that people ought to be able to mask (or not mask) to the greatest extent possible consistent with other concerns (such as safety during a pandemic; see Kahn [2021, n. 45], viewing mask mandates as a necessary evil during the pandemic), I have always found the “living together” idea curious. Is the doctrine a fig leaf for anti-Muslim sentiment? Or something meant to be taken seriously?<sup>2</sup> If so, what accounts for

<sup>1</sup> *SAS v. France*, no. 43835/11 (Unreported, Eur. Ct. H.R., 1 July 2014), paras. 142–155.

<sup>2</sup> For a pair of critical takes of *SAS* as an impingement on religious liberty of Muslims by a secular Europe, see Edwards (2014); Michaels (2018). Cf. Mechoulan (2018) approving of burqa bans as a positive step in a clash against a competing ideology.

the sudden decision that, in Europe at least, human life together requires showing one's face?<sup>3</sup>

My interest, as a teacher of Privacy Law in the United States, is with underpinnings of the “living together” doctrine. Is there something in Europe's conception of privacy – especially the right to be private in public – that explains at least some of the success of the “living together” doctrine? In other words, even if the burqa (and the mobilisation against it) was necessary for the rise of the “living together” concept, do European concepts of privacy explain its persistence? And how does the debate over face veil bans in Europe compare to the United States, where mask bans date to the nineteenth century, and yet privacy doctrine makes showing one's face in public a fairly risky act?

Before tackling these questions, let me identify three ways masks and face veils might enhance a wearer's privacy: 1. masks promote privacy by giving the wearer control over what others know about them (classic informational privacy); 2. this control over the release of information indirectly promotes the wearer's decisional privacy (i.e. the ability to mask makes it easier for the wearer to do things); and 3. the choice to mask itself is a form of decisional privacy – even if the mask is worn for reasons other than concealing part of oneself. My thesis is that European privacy norms protect informational privacy – i.e. the ability of the wearer to control information that the bare, maskless face reveals (at least in theory). But the choice to wear a mask (decisional privacy) falls outside European privacy norms. The question is why.

In what follows I first sketch the history of mask bans in the United States. Initially, mask bans were largely symbolic laws that helped the state to make expressive statements repudiating threatening, unpopular groups such as the Ku Klux Klan.<sup>4</sup> In recent years, however, the anti-Klan heritage of most mask bans has morphed into a broader targeting of mask wearing protesters, often with the aim of comparing the mask wearers to the Klan.<sup>5</sup> As these bans have largely been survived First Amendment speech claims, I look at privacy related objections to these laws. Then I turn to Europe where face veil bans have swept across the continent over the past decade. I examine “living together” justification for these bans, and the possibility that “living together” draws on European conceptions of privacy.<sup>6</sup>

The main body of the paper attempts to make sense of the “living together” concept on its own terms. Other societies, most notably in East Asia, seem more comfortable with masking. So, it is hard to see “living together” as stating something universal about human nature. But assume, for argument's sake, it does. This leads to two questions.<sup>7</sup>

<sup>3</sup> Or the revival of this idea. In the aftermath of the French Revolution showing one's face was associated with truth-telling and revolutionary transparency, as opposed to the disguises worn by aristocrats seeking to escape the new order. See Johnson (2001). Indeed, post-revolutionary France banned mask wearing during Carnival in 1790. *Ibid.* 90. So, there may be other reasons for European dislike of masks than the ones described in this essay. I hope to explore the face, and the role it has played in defining European anti-masking norms in future work.

<sup>4</sup> See *infra*, part 1. I discuss the symbolic nature of mask bans at greater length in Kahn (2019c).

<sup>5</sup> For instance, Jay Lawrence, a Republican state legislator, supported a proposed mask ban targeting Antifa by comparing that group to the Klan. See Giles (2017). See also Kahn (2019a, p. 75).

<sup>6</sup> See *infra* part 2.

<sup>7</sup> See *infra* part 3.

First, one might ask why masks and face veils led Europeans to reject them. I focus on three possibilities. Masks conceal identities; masks promote criminality; and masks make people feel uneasy. The sense of uneasiness strikes me as the strongest argument for the broad scope of the face veil bans enacted across Europe. But I am not sure they tell the entire story.<sup>8</sup>

Alternatively, one can turn the question around and ask what makes Europeans so willing to show their faces. This question intrigues me, and is at the heart of this essay. In the United States, showing one’s face can be risky – certainly if you are a protester, but even if you are not. So the need to mask, if not accepted, is understood. Could it be that, in Europe, the broader conception of privacy (the right to be private in public, as well as the right to be forgotten) makes showing one’s face an easier ask than it is in the United States?<sup>9</sup>

I conclude by exploring the implications of my argument. European privacy norms might protect the informational privacy of the maskless individual, and give that person control over what society can know about them. But the “living together” doctrine and the face veil bans that it justifies fall short when it comes to decisional privacy. They cannot account for the crazy person who, for whatever reason, simply wants to wear a mask. The larger question is whether one can tie the lack of decisional privacy to mask (or unmask) to other aspects of European privacy norms.<sup>10</sup>

Let me end this section with some caveats. First, this is an early presentation of this idea. As someone born and raised in the United States, I am far from an authority on what Europeans think about privacy. I am also well aware that not all Europeans think the same thing about it. Second, I am not entirely convinced that the living together doctrine is genuinely about showing one’s face. To me, the argument that “living together” is largely a fig leaf for arguments about the place of Muslims in a secular Europe has some force. Rather, I wrote this essay as a thought experiment. If one takes “living together” at face value, what does this mean?

## 1. Mask bans in the United States

Mask bans have a long history in the United States (Kahn, 2019a, pp. 88–104, describing the history behind the New York and anti-Klan mask bans). In 1845, the New York State enacted a ban on wearing a mask while armed. The law, enacted in response to angry tenants challenging efforts to collect back rent, remained in force until 2020 (Kahn, 2019a, pp. 88–97, describing the political context behind the passage of New York’s mask ban; Kahn, 2021, pp. 669–672, describing the repeal of New York’s mask ban). Most mask laws, until a few years ago, however, have targeted the Ku Klux Klan. As the waves of Klan activity rose in the 1870s, 1920s, and 1940s and 1950s, mask bans followed.<sup>11</sup> The bans had a variety of specific purposes. But a key element in all of

<sup>8</sup> See *infra* s. 3(3.1).

<sup>9</sup> See *infra* s. 3(3.2).

<sup>10</sup> See *infra* part 4.

<sup>11</sup> This is the main point I make in my paper, see Kahn (2019b).

the bans was the expression of a symbolic repudiation of the Klan – sometimes by social groups that shared its interest in maintaining segregation (Kahn, 2019b, pp. 14–17). More recently, a new wave of bans has targeted a wide range of groups including Antifa, and environmental activists protesting pipelines. These laws, however, like their anti-Klan predecessors, often served a symbolic purpose – in the case of the more recent laws, to connect the groups like Antifa with the Ku Klux Klan (Kahn, 2019a, pp. 137–140, describing the rise of anti-Antifa mask bans).

Despite the anti-Klan origins of most mask bans, the bans targeted all manner of mask wearers – including those with no connection to the Klan or riotous tenants. For example, in 1878 the Tennessee Supreme Court upheld a mask prosecution brought against a man caught stealing from a chicken coop,<sup>12</sup> while in 1968 the appellate division in New York upheld a prosecution of a man dressed in make up early in the morning on a Manhattan subway platform.<sup>13</sup> Georgia’s anti-mask law was used against a man wearing a wrestling mask to entertain neighbourhood children,<sup>14</sup> and against a jogger who was wearing a mask on a cold day.<sup>15</sup> At the same time, these laws were rarely used – and at times defendants were able to escape punishment by invoking the original, anti-Klan purpose of most of these laws.

Since then, there has been a noticeable shift. In the 1970s and 1980s mask wearers could often invoke their constitutional rights to freedom of speech and assembly; since the mid-1990s, this has become much harder. In *Church of the Knights of the American Ku Klux Klan v. Kerik*,<sup>16</sup> the Second Circuit rejected the theory – accepted by earlier courts – that the right to anonymous membership established in *NAACP v. Alabama*<sup>17</sup> extended to mask wearing. Being able to conceal your name does not entitle you to conceal your face.<sup>18</sup> Even when courts narrowed the scope of mask bans by requiring the state to show that the wearer “intended to intimidate” others, the door was open for the police to interpret “intimidation” quite broadly. For example, the Eleventh Circuit in *Gates v. Khokhar*, upheld that the refusal at a peaceful demonstration to obey police officer’s order to unmask could be a form of “intimidation”.<sup>19</sup>

Against this background, privacy has emerged as a way to protect mask wearers. Scott Skinner Thompson has argued that wearing a mask, or hood, could send the symbolic message: “Don’t look at me!” (Skinner-Thompson, 2017, p. 1703). Likewise, in *Robinson v. State*, the Florida Supreme Court invalidated that state’s mask law as an overly broad intrusion on the wearer’s privacy.<sup>20</sup> In a ruling that ran all of six paragraphs,

<sup>12</sup> *State v. Walpole*, 68 Tenn. 370, 371 (Tenn. 1878) (upholding the ten year minimum penalty for mask wearing by noting the sacrifices made during the suppression of the Confederacy).

<sup>13</sup> *People v. Archibald*, 296 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 1968).

<sup>14</sup> *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994).

<sup>15</sup> *Mollette v. City of Forrest Park*, 780 S.E.2d 780 (Ga. App.2015).

<sup>16</sup> 356 F.3d 197 (2d Cir. 2004).

<sup>17</sup> 357 U.S. 449, 462 (1957) (disclosing membership list would impinge on freedom of association where members, were their identities revealed, would face harassment).

<sup>18</sup> *Kerik*, 356 F.3d, 205. Likewise, *Kerik* held that a Ku Klux Klan mask was not “expressive” because a Klan mask did not make an expressive message distinct from the robe and hood. *Ibid.* 209.

<sup>19</sup> 881 F.3d 1290 (11th Cir. 2018).

<sup>20</sup> *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980).

the court could not conceive of a blanket mask ban being constitutionally permissible given the wide range of innocent mask wearing would proscribe.<sup>21</sup> While *Robinson* was decided in 1980, the sense that the state cannot punish all mask wearing suggests that privacy – especially decisional privacy – might play a role in protecting the right to mask where speech alone might fail. At least in the United States.

At minimum, if one follows the logic of *Robinson* one can identify many possible innocent uses of masks. For instance, one might – as occurred during the pandemic – wear a mask for health reasons; alternatively, one might wear a mask for religious reasons, as some Muslim women do.<sup>22</sup> Moreover, in a world where Clearview AI maintains a database of 3 billion faces scraped from Facebook, Google and CCTV cameras, a person with no intent to commit a crime might still find masking a reasonable step to protect their privacy (Kashmir, 2020, describing the operations of Clearview AI). This choice to mask might be expressive; but it also might simply be a form of rational action in a society such as the United States where people in “Blue States” monitor readers of the *New York Post*, while people in “Red States” monitor readers of the *New York Times* – and shaming/cancellation is always one misstep away.

This suggests a need to rethink our use of mask bans – and, for that matter, how we protect mask wearing (Kahn, 2021, pp. 707–708, opposing mask mandates; Lawrence et al., 2020, p. 509). To the extent we are committed to the ideal of a small-l liberal society in which the individual is free to choose their version of the good life, the ability to conceal one’s identity is a necessity. This does not mean, however, that a society must tolerate all masking. A mask could be punishable under a burglary statute; or, maybe, a state like North Dakota concerned about outside agitators spreading mayhem during anti-pipeline protests could enact a law banning wearing a mask at a protest, or while trespassing (Kahn, 2021, pp. 691–693, describing anti-pipeline mask bans).<sup>23</sup> What North Dakota enacted instead, a blanket ban on mask wearing in all public areas in the state, is harder to justify.

## 2. Face veil bans in Europe

This logic of limited or no mask bans, however, runs into a roadblock once we turn to Europe. As we have seen, in 2014 the ECHR held that “living together” requires showing one’s face.<sup>24</sup> Here is a conception of social life in which decisional privacy has no apparent role – at least when it comes to masking. This is so, even though there were very few European bans on masking in 2006, when the current wave of face veil bans began. There are two possibilities here: 1. the rise of face veil bans is not really about masking, but about Muslims (or the aspects of Islam represented by the face veil); or 2. there is something about European conception of the self that is comfortable with

<sup>21</sup> Ibid.

<sup>22</sup> For an overview of the reasons Muslim women veil, see Brems et al. (2014).

<sup>23</sup> I am not necessarily defending a mask ban narrowly targeting protest activities. All I am saying is that such a ban would be preferable to the statewide ban North Dakota ultimately enacted.

<sup>24</sup> *S.A.S v. France*, para. 142.

exposing faces in an age of mass surveillance. It is this sense of comfort that I want to study.

But before getting into this, it is worth examining the anti-Islamic sentiment behind face veil bans. Part of this is certainly true. The motivation behind the face veil bans – from the municipal bans in Belgium and the Netherlands, to the laws that swept France, Austria and several other European countries – was not merely about showing one’s face. They were bans of the burqa, which was opposed for a variety of reasons (gender equality, fear of giving credibility to political Islam, etc.) that had nothing to do with face showing. One sees this, for instance, in the push for bans of the hijab and burkini as well as in some of the legislative debates over the face veil bans (Kahn, 2021, pp. 677–679). For instance, the Austrian legislators enacting their 2017 law appeared much more concerned about Islam, assimilation and gender issues than they were about the ways masks impede human communication (Kahn, 2021, p. 680).

I have discussed anti-Islamic motivations of bans on headscarves and burqas in other places (see, e.g. Kahn, 2011); here I want to take the ECHR, and the ban supporters at their word. Was the Court right that, in a modern society showing one’s face is a necessity? At first blush, this appears plausible. The person who wears a mask while shopping, walking down a street or tending their garden might well be seen as a bit eccentric. Of course, if this is true of Europe, it is also likely true of the United States as well. And yet the mask debate in the United States has largely been about threats (be they the Klan or Antifa) rather than about everyday mask wearing.

This brings us privacy norms, and more specifically, the contrast between the United States, where privacy is spatial and centres on the home, and Europe where privacy is attached to the person (see Whitman, 2004, contrasting the dignity of personal honour with the freedom from intrusion on experiences in one’s own home). Whereas in the United States, a person who ventures outside their home and is caught on camera is largely out of luck, in Europe one is supposed to (in theory at least) be able to be “private in public”. This is the message of the *Von Hannover* case.<sup>25</sup> And if Princess Caroline can keep her images out of the paper, perhaps non-royals (i.e. both Harry and Meghan as well as you and me) can do so as well.

This belief, to the extent it is true, might explain the willingness of Europeans to adopt the “living together” rationale – even if it came about for other reasons. If I know *Bild* will not run my picture, why should I bother with a mask? If I have a right to petition Google to remove unpleasant images from my past, why should not I stare into the CCTV screen and smile?<sup>26</sup> The willingness to dispense with masks might be even stronger to the extent European citizens trust their governments more than Americans do. The question, however, remains whether this trust is reasonable. For the European ready to denounce Google’s refusal to let us be forgotten as “totalitarianism” (Gabriel, 2014, cited and briefly described in Solove & Schwarz, 2017) what is the reason for

<sup>25</sup> *Von Hannover v. Germany* (No. 1), no. 539200/00, 24 June 2004.

<sup>26</sup> For example, *Peck v. United Kingdom*, 44647/98 [2003] ECHR 44 (28 January 2003) describes a situation in which footage of a suicide attempt was broadcast on television. Despite promises to mask the applicant’s identity, it was revealed.

trusting the GDPR, with its exception for national security matters, will actually protect people from the consequences of mass surveillance?

### 3. Deeper questions – “living together”, masking and human nature

This leads us to deeper questions about masking and human society. The pandemic has, for good or bad, given us a lesson on the social effects of masking. Mask wearing can make it harder to discern emotions – at least what is conveyed through a smile or frown. Mask wearing can also be physically uncomfortable, and an opening for discrimination – for example, if the wearer is stigmatised as being “sick” or from a foreign culture. But if mask wearing is scary in some situations, what is one to make of societies in East Asia where mask wearing has a long history, and in which hiding one’s emotions behind a mask is seen as positive – at least in some situations? (See Horii, 2014, describing Japanese masking culture.) Is culture a more powerful force than we have previously imagined? Is mask wearing more limited in Japan, China and other parts of the Far East than we have been led to suppose? Or is the message of the *SAS* court – “living together” requires showing one’s face – an incomplete account of what modern society is all about?

Here, once more, it is tempting to fall back upon the Islamic foil. If European society is distinctly modern, then casting masking (and the burqa) as pre-modern might make symbolic sense.<sup>27</sup> My concern, however, is that whatever the origins of the “living together” argument, it has been primed for success in Europe – in part because rejecting “living together” might require facing up to the anti-Muslim motives behind many of the face veil bans. Not only that, the extent we accept the “living together” rationale as a serious statement of social reality, it might become reality. After all, courts have the power to educate the masses. Could what began as an attempt to provide a plausible defence of mask bans enacted for other reasons over time become a generally accepted truth of human nature?

This section of the paper probes these questions. If “living together” is the future of Europe, what makes it tick? Here I explore two possibilities: 1. “living together” is primarily a rejection of masking; and 2. “living together” rests on a shared understanding that, in Europe at least, it is safe to show one’s face.

#### 3.1. Why Europeans might reject masking

Masks are not popular. Since March 2020, we have had the burden of wearing masks. The emergence of vaccines in April and May 2021 raised the joyous possibility of taking our masks off. A world emerging where we can finally see the faces of shopkeepers, jogging partners, students, teachers, police officers, friends and family. We can see smiles

<sup>27</sup> This is largely the approach taken by Stephane Mechoulan, who casts Islam as a civilisational threat to Europe (Mechoulan, 2018, p. 16).

and frowns. This is a positive development. Yet my argument here is not about mask mandates (hopefully they will wither away), or the part of the debate over the burqa that involves compulsion. Nobody should be forced to wear an article of clothing against their will without a good reason. In this regard, *SAS v. France* corresponds to a basic fact of human nature – people generally do not like wearing masks.

My interest, instead, is about a deeper dislike of masks. Consider Fox News host Tucker Carlson, who wants you to take off your masks because they make *him* feel uncomfortable (Mastrangelo, 2021). One does not have to agree with Carlson's rationale – that mask wearing is a symbol of obedience that unnerves him<sup>28</sup> – to see broader issue here: Does one have a right to complain that someone else – a Klan member, an anarchist or a Muslim woman – is wearing a mask? To read *SAS*, and some of the other local court cases upholding European face veil bans, the answer to this question is “yes”. It is worth going through some of these objections to masks.

A first set of objections concerns identification. A mask wearer is unidentified. As such, this person is scary. As the Georgia Supreme Court stated in *State v. Miller* upholding that State's anti-Klan mask ban, a masked figure can strike terror in the heart.<sup>29</sup> Moreover, burglars wear masks to conceal their identity. Finally, masks by concealing identity can hinder communication. The speaker cannot “see” who they are dealing with.

As strong as these objections are, however, there are some difficulties. First, there are some instances where the mask does not conceal the wearer's identity. For instance, if everyone knows that X wears a burqa, and she is one of the few Muslim women who veil, has her identity actually been concealed? A larger problem is with the scope of mask and face veil bans. While some bans have been interpreted to only cover mask wearing that intimidates others, a blanket mask ban covers a much broader range of conduct. Not every mask wearer is a Klan member or Antifa supporting eco-terrorist. In *Daniel v. State* a Georgia appeals court upheld the conviction of a man wearing a wrestling mask to entertain neighbourhood children.<sup>30</sup> While the Georgia Supreme Court reversed,<sup>31</sup> the lower court ruling shows the extent of the problem. Or, to return to Carlson, his concern with mask wearers is not that they will cause harm, or break the law. His fear is that mask wearers are too “obedient” (Mastrangelo, 2021).

The objection to masking has to have deeper roots than potential intimidation or fear of criminal activity. One possibility, raised by the Belgian Supreme Court in its ruling upholding that country's mask ban, is that the mask is a symbol of the absence of freedom.<sup>32</sup> Someone who masks is unfree, even if they are unfree by their own choice. While the “choice” question may seem obscured in the case of some burqa wearers,<sup>33</sup>

<sup>28</sup> Ibid.

<sup>29</sup> 598 S.E.2d 547, 549.

<sup>30</sup> *Daniels v. State*, 438 S.E.2d 99, 101–102 (Ga. App. 1993).

<sup>31</sup> *Daniels v. State*, 448 S.E.2d 185 (Ga. 1994).

<sup>32</sup> See Belgian Constitutional Court, Decision of 6 December 2012, para. B.21. (cited in *SAS*, para. 42) (masks deprive wearer of “any possibility of individualisation by facial appearance”). Ironically, choosing to wear a mask itself might be a form of “individualisation”.

<sup>33</sup> On the other hand, some burqa wearers don the garment of their own accord. See Brems et al. (2014, pp. 6–7).



masking is a choice. The lack of freedom is less about the wearer’s state of mind than with the role the mask plays as a symbol of bondage. But is this a fair reading of the mask? After all, many mask wearers (myself included) wear masks to avoid Covid, not to take part in a project of social control.

Finally, there is the vague sense of unease many feel in dealing with someone wearing a mask. One sees this in the 2006 comments of British Home Secretary Jack Straw who disliked veils because, when he took his customary evening strolls, he wanted to see the faces of the Muslim women he passed in the street (Strucke, 2006). While in the “me too” age, one can critique this as an example of a male, orientalist gaze, there is something to the argument that seeing one’s face adds to daily life. In the virtual world of Zoom classes, teachers often ask that students turn their cameras on – in order to see their faces. On the other hand, the Zoom students are preparing for a social interaction; turning one’s camera off might be considered rude. By contrast, the burqa wearers encountered by Straw were not anticipating an encounter with the Home Secretary; rather, like him, they were simply taking a walk.

Indeed, it is unclear just how many mask wearers Straw encountered during his walks. If showing one’s face is part of a European project of “living together”, okay. But how necessary is it to punish all instances of mask wearing in a society if most people show their faces most of the time? Moreover, anthropological work on burqa wearers in the Netherlands and Belgium suggest that, contrary to the argument that showing one’s face is necessary for social communication, burqa wearers in those countries could communicate quite well with others in society.<sup>34</sup> This brings us back to our original set of questions. If masks are not usually intimidating, are not always a symbol of bondage, and do not routinely hamper human communication, then maybe the reason Europe has rejected the mask has less to do with the harms of the mask, and more to do with a sense of trust about showing one’s face – a sense of trust that I, as someone from the United States, struggle with a little bit. To that question, we now turn.

### 3.2. Why Europeans may feel comfortable showing their faces

Perhaps, then, “living together” came about because, in Europe, showing one’s face is not a big deal, in part because of European conceptions of privacy – especially the idea about being private in public. Perhaps, in other words, Europe is a place where because of the right to be forgotten, and other privacy protections, the right to obscure one’s identity is not necessary.

Let me address an initial objection, namely that the real concern was with the burqa, not “living together”. I am not sure this changes things. Assume for argument’s sake the *SAS* court did fashion “living together” to avoid offending European Muslims by offering their “real” reasons for allowing face veil bans.<sup>35</sup> Even if this is true, *SAS* still

<sup>34</sup> Ibid. 18–20.

<sup>35</sup> These reasons – including concerns about gender equality and security – were raised by the parties and rejected by the *SAS* Court. *SAS n. France*, paras. 118 (rejecting gender equality concerns), 137 (rejecting security concerns).

thought little enough of the mask to sacrifice the right to wear one (even for nonreligious purposes).

The deeper question is whether the premise hinted at in *SAS* – that showing one’s face is a not only customary but (from a privacy perspective) safe – is actually true. Before exploring this question in a European context, let me return briefly to the United States. During the 1970s, 1980s and 1990s, American courts repeatedly held that fear of retaliation could justify masking. Two cases involved Iranian students protesting the Shah of Iran,<sup>36</sup> and another case turned on Klan members who faced harassment in Indiana (including leaving a Barbie doll’s severed head in a jar of gasoline on a member’s doorstep).<sup>37</sup> These cases show how showing one’s face can be dangerous in the United States. This reflects, in part the highly charged political context of the cases in question – the Shah of Iran’s repression and the animosity triggered (justifiably so) by the Klan.

Meanwhile, those who chose to show their faces and were photographed found themselves out of luck. This was true as early as 1953 when the California Supreme Court decided that a couple working a stand at a farmer’s market captured in an embrace by a photographer had no standing to challenge the running of the photo in *Harper’s Bazaar*.<sup>38</sup> Explaining why the photo of the couple in an “amorous pose” could run in a national magazine, the Court explained that the couple had “voluntarily exhibited themselves”.<sup>39</sup> A few years later, the New York Court of Appeals reached a similar result, concluding that a man dressed in a green outfit on St. Patrick’s Day had “voluntarily became part of the spectacle”.<sup>40</sup> More recently, the appellate court in New York held that photos taken across the courtyard of an apartment building were “art” and therefore fell outside New York’s appropriation law which prohibits the use of one’s image for trade or advertising purposes.<sup>41</sup>

One can agree or disagree with these outcomes. For its part, the California Supreme Court argued that ruling for plaintiffs would make it possible for periodicals to run pictures of parades and street scenes.<sup>42</sup> But the common approach in the United States to the privacy implications of picture taking might lead one to want to wear a mask.

This is especially true given that, sometimes, the pictures are sometimes not accurate. Consider for example, *Finger v. Omni*, in which a photo of plaintiffs – a large, healthy looking family of six – accompanied an article discussing the relationship between caffeine consumption and in vitro fertilisation.<sup>43</sup> The only link to the family

<sup>36</sup> See *Aryan v. Mackey*, 462 F.Supp. 90 (N.D. Tex. 1978) (upholding the right of anti-Shah protesters to conceal their identities); *Ghafari v. Mun. Court for S.F. Judicial Dist.*, 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978) (same).

<sup>37</sup> *Am. Knights of the Ku Klux Klan v. City of Gospen*, 50 F. Supp. 2d 835, 839 (N.D. Ind. 1999). Cf. *People v. Aboaf*, 721 N.Y.S.2d 725, 728 (N.Y. Crim. Ct. 2001) (rejecting harassment claim of anarchists due to lack of evidence).

<sup>38</sup> *Gill v. Hearst Publishing Co.*, 253 P.2d 441, 444 (Cal. 1953).

<sup>39</sup> *Ibid.* 443, 444.

<sup>40</sup> *Murray v. New York Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971).

<sup>41</sup> *Foster v. Svenson*, 7 N.Y.S.3d 96 (App. Div. 2015).

<sup>42</sup> *Gill v. Hearst Publishing Co.*, 444.

<sup>43</sup> *Finger v. Omni Int’l Ltd.*, 564 N.Y.S.2d 1014, 1015 (N.Y. 1990).

and the content of the article was its size.<sup>44</sup> Or *Arrington v. New York Times Co.*, in which a picture of African American plaintiff wearing a suit accompanied an article about how “the Black middle class” had “been growing more removed from its less fortunate brethren”.<sup>45</sup> The plaintiff claimed that the article did not represent his views and was insulting and degrading – he lost his case.<sup>46</sup> Or *Sipple v. Chronicle Publishing Co.*, in which the plaintiff broke up an assassination attempt against President Gerald Ford in San Francisco was outed as gay – at a time when his family did not know it.<sup>47</sup> He also lost his case.<sup>48</sup>

If Oliver Sipple, Clarence Arrington or the Finger family had been wearing masks, or obscured their identity in some other way, they would have avoided the public gaze, and the lack of privacy that flowed from it. So, from a privacy law perspective, there may be good reasons why a person out and about in society (or, as *Foster* suggests, in front of a window), might be leery of showing their face.

Europe has a different feel. Privacy is explicitly protected by Article 8 of the European Convention on Human Rights, and the European Court of Human Rights, in *Von Hannover v. Germany (No. 1)*,<sup>49</sup> held that pictures of Princess Caroline of Monaco riding her horse, dining at a restaurant, and tripping over an obstacle and falling down,<sup>50</sup> could not run in German newspapers given that she exercised “no official function”, and “the photos and articles related exclusively to her private life”.<sup>51</sup> This applied, even though Princess Caroline was “a public figure of contemporary society ‘par excellence’”.<sup>52</sup> Instead, to be worthy of publication, the Court will consider “the contribution that the published photos make to a debate of general interest”.<sup>53</sup> If even a public figure like Princess Caroline has the right to be “private in public”, one assumes private figures, like Arrington, or the embracing couple whose photo ran in *Harper’s Bazaar* would have even greater privacy protection – and, therefore, less of a need to don a mask, or otherwise obscure their identity.

On the other hand, the European Court’s balancing test might not help the Klan members in *Goshen*, or a participant in the 6 January 2021 insurrection, or a Black Lives Matter rally. Here, perhaps, European and American perspectives on privacy diverge less than one might expect. The unlucky tiki torch carrier, who after marching Charlottesville, Virginia to protect Robert E. Lee, was fired from their job at Subway (Judkis, 2017), has

<sup>44</sup> Ibid. 1017. For their part, plaintiffs maintained that none of their children were born through in vitro fertilisation and that they never participated in research on the impact of caffeine on fertility.

<sup>45</sup> 449 N.Y.S.2d 941, 942 (N.Y. 1982).

<sup>46</sup> Ibid. 944 (noting that, given the plaintiff’s “race, educational background, professional status, personal poise and habit of dress”, he could be perceived to be a member of the Black middle class).

<sup>47</sup> *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 666–667 (Ct. App. Cal. 1984).

<sup>48</sup> Ibid. 669. The Court of Appeals noted that Sipple’s sexual identity had already been disclosed by local magazines and, as such was not private. Ibid. While true, had Sipple been masked, or otherwise unseen when he saved President Ford’s life, it is highly unlikely that his identity would have been revealed.

<sup>49</sup> *Von Hannover*, paras. 79–80.

<sup>50</sup> Ibid. para. 11.

<sup>51</sup> Ibid. para. 76.

<sup>52</sup> Ibid. para. 74.

<sup>53</sup> Ibid. para. 76.

both inserted themselves into the spectacle<sup>54</sup> as well as “contributed ... to a debate of general interest”.<sup>55</sup> Moreover, even in Europe an individual walking the streets is at risk of being photographed by another person with a cell phone – or by closed circuit TV. These photos might also make their way to the internet. So Europeans too might have a good reason to don a mask.

Here a second doctrinal difference between the United States and Europe helps our hypothetical European walker feel more comfortable about baring their face – namely the right to be forgotten.<sup>56</sup> In the United States, once a photo is public, it will be there for a while. This provides a great incentive to cover one’s face – at least when showing one’s face would be embarrassing. By contrast, in Europe there is at least the possibility of removing links to past photos. So, while you are out strolling, and come across not only Straw, but also someone with a cell phone, you have the recourse of having the photo that sooner or later will emerge removed from Google, and other search engines. At least in theory.

The Court promises to balance the right to be forgotten with “the role played by the data subject in public life”<sup>57</sup> – a balancing act cast through the lens of *Von Hannover*. Indeed, the data subject does not even need to show that the photo is “prejudicial”,<sup>58</sup> merely that it is outdated, irrelevant or excessive.<sup>59</sup> While there are inherently vague terms, they offer hope that the right to be forgotten will apply to routine photographs of ordinary people – even when the photos are not offensive, or harmful but merely unwanted. This in turn suggests, at least in theory, that it is possible to “live together” without facing harm from showing one’s face. This is all the more true given the broad scope given to data processing in Europe<sup>60</sup> and the right to retract information about oneself under the General Data Privacy Regulation.<sup>61</sup>

## 4. Conclusion

The argument that European conceptions of privacy allow one to show one’s face in public with less fear than might occur in the United States is not a complete explanation for the rise of the “living together” concept as a response to the burqa. Even if the “private in public” concept from *Von Hannover* and the right to be forgotten give the typical European a measure of control over what information is shared with the public, privacy also has a decisional element. The face veil bans enacted across the Continent do not merely ban face veils worn for the purpose of concealing identity so as to avoid

<sup>54</sup> *Murray v. New York Magazine Co.*, 258.

<sup>55</sup> *Von Hannover*, para. 76.

<sup>56</sup> *Google Spain, S.L. and Google, Inc. v. Agencia Española de Protección de Datos and Mario Consteja González*, Cases C-131/12 (13 May 2014).

<sup>57</sup> *Ibid.* para. 97.

<sup>58</sup> *Ibid.* para. 89.

<sup>59</sup> *Ibid.* para. 94.

<sup>60</sup> Criminal Proceedings Against Bodil Lindqvist, European Court of Justice, 11 June 2003 (the church catechist’s list of names, addresses and hobbies of church employee’s is data processing under the European Data Directive).

<sup>61</sup> See General Data Privacy Regulation, Art. 17 (describing “a right to erasure”).

being photographed, they punish covering one’s face *for any reason at all*, and as such restrict decisional privacy (as well as privacy in the sense of giving the individual control over what they decide is public or private; see Westin, 1967).

This brings us back to my original question about “living together” and privacy. Is there something about European culture that explains the lack of concern about decisional privacy? In Europe, one can be private in public. So, even if someone snaps your photo, most likely it will not run in a newspaper (at least in theory). Even if you are unlucky, and your photo does appear on a website or newspaper, you can restrict public access via Google by invoking the right to be forgotten. A rational data subject, acknowledging these conditions, would surely choose to unveil their face. But does the European conception of personal privacy have a place for the person who – for whatever reason, no matter how irrational, silly or idiosyncratic – would prefer to cover their face? I have some doubts here, ones I would like to take up in future work.<sup>62</sup>

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<sup>62</sup> There is a lot more to say here. In addition to the possibility that a connection dating back to the French Revolution, connects showing one’s face and revolutionary transparency, see Johnson (2001), let me bring up restrictive European rules about naming children, and changing one’s name. See Shakargy (2020, pp. 659–667) describing restrictive naming practices in France, Germany and Spain.

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