

Can the Government Force Americans to Wear Masks?

"Ordinarily we would defend a citizen's right to engage in self-destructive behavior. But this is about more than any one person—defying the mask order is bad for everyone," write Stephen M. Duvernay and Brandon V. Stracener of the California Constitution Center at Berkeley Law.

By Stephen M. Duvernay and Brandon V. Stracener | June 29, 2020 at 07:04 PM

"Give me liberty or give me death" was a great slogan for rallying partisans to charge British muskets in 1776. It's a terrible public health philosophy in the 2020 coronavirus pandemic. State governors encouraging or ordering you to wear a mask are not liberty-thieving tyrants—they have your life and the public interest in hand and lawful powers to enforce their orders.

The public health expert consensus is that wearing a mask in public is a key countermeasure in combating the coronavirus pandemic because it helps slow the infection rate. Even cloth face masks can help curb community spread of coronavirus, in part by reducing transmission by people who are infected but experience no symptoms.

California Gov. Gavin Newsom has cajoled, pleaded, argued and chided—doing nearly everything in his power to get Californians to wear masks. Everything, that is, except ordering arrests for noncompliance. This has emboldened some citizens and even local officials to scoff at masks, question the state's authority, and all but dare state officials to enforce the directive. But the state public health officials aren't bluffing: to abate a public health menace, California can order its citizens to wear masks and enforce that order with criminal penalties. If the state of California can compel you to be involuntarily vaccinated or quarantined in your home (and it can), then those greater powers necessarily include the lesser directive of wearing a mask—a minor inconvenience that officials consider necessary not just for your self-preservation, but to protect your fellow Californians.

Some Californians may object that the mask order tramples their individual liberty and insist that it violates their constitutionally guaranteed personal autonomy. Ordinarily we would defend a citizen's right to engage in self-destructive behavior. But this is about more than any one person—defying the mask order is bad for everyone. The coronavirus pandemic is the kind of extraordinary circumstance when the public good outweighs individual inconvenience. During a viral plague, the state can limit otherwise sacrosanct constitutional rights when those limits are necessary to defend public health. And until public safety is restored, some individual civil liberties may yield to California's inherent police powers to combat a pandemic. It is settled law that "quarantine laws [and] health laws of every description" are valid state police power measures. *Gibbons v. Ogden*; *Farmers Ins. Exchange v. California*. Even severe state acts such as compulsory adult vaccination are lawful. *Jacobson v. Massachusetts*. And California courts have relied on the state's police power to uphold disease abatement measures against claims that they violate constitutional rights. *Stanislaus Dairymen's Protective Assn. v. Stanislaus County*; *Graham v. Kingwell*. The federal and California constitutions permit the state to order its citizens to wear masks when it is necessary to protect the public from a viral outbreak.

Beyond that, California statutory law gives the governor and state public health officials broad powers to battle public health emergencies—powers that would seem extreme on the average day. The Emergency Services Act authorizes a governor to assign the Department of Public Health duties to mitigate the effects of an emergency like the current pandemic. And DPH has independent statutory authority to take measures necessary to prevent the spread of a disease. DPH orders under either authority are enforceable by county sheriffs and any local peace officer. Failure to comply with public health orders—like disobeying a gubernatorial emergency directive—is a misdemeanor. County health officials also have clear statutory authority to order any preventive measure in their jurisdiction that is necessary to protect the public health, and to take any action they deem necessary to control the spread of communicable disease. Violating those orders also is a misdemeanor. There is no statutory objection to California ordering its citizens to wear masks; on the contrary, California law authorizes it.

That leaves only the policy question of how the state can best protect itself. Imagine you are the governor during a pandemic, and your staff urges you to deploy the National Guard on street corners to throw anyone without a mask in a stockade. That heavy-handed approach would only anger an already wary public and provoke a counterproductive backlash. A more moderate approach—one that relies on persuasion and reserves compulsion only as a last resort—is the better way to convince Californians to protect each other while the state’s medics struggle to hold the line. If the question is “are you going to make me?” the answer is “I can, but don’t make me.”

Newsom does have the law behind him, but whether he can compel mask wearing should not be the metric here. The governor is begging California citizens to use common sense and neighborly charity. Sadly, the mask has divided us into factions—the same division James Madison saw in his time that had “divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.” We need less faction and more cooperation here: temporarily bearing the minor burden of wearing a mask in public protects you and everyone you encounter against unintentionally spreading the virus. That includes your family, especially older relatives who face far higher mortality risks from a virus that has already claimed over 120,000 lives in the United States alone. The least we can do is wear a mask to keep our families and others from a potentially one-way trip to a grim hospital room. So this isn’t about whether the governor can order you to wear a mask or arrest you for ignoring him—it’s about saving yourself, your family and your fellow Californians.

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