



Exposing Overreach: Harris County

by Shelby Sterling, JD

Policy Analyst

Michael Haugen

Policy Analyst

Key Points

- Chapter 418 of the Texas Government Code grants state and local authorities temporary emergency powers to protect public health and safety.
- In some cases, these emergency powers have given rise to government overreach, as was evidenced by Harris County's executive order criminalizing not wearing a mask in public.
- Failing to wear a face covering could have cost some people as much as \$1,000 per violation.
- The effectiveness of wearing a mask in public is uncertain.

During the COVID-19 pandemic, state and local officials have been operating under the broad authority granted under [Texas Government Code 418](#). Under this authority, many new rules and restrictions have been placed on Texans and their engagement in everyday activities. Some of these restrictions, such as social distancing guidelines, are grounded in reason and advance a meaningful public health objective. However, some constraints have been less reasonable and more constrictive than necessary.

By and large, the most egregious examples of government overreach have occurred at the local level, with well-intentioned but misguided city and county leaders making controversial decisions. One concerning example unfolded in Harris County, Texas.

On April 22, 2020, the Harris County Judge issued an executive order ([Exec. Order of County Judge Lina Hidalgo, 2020a](#)) imposing several new demands on the public, including

- A mandate that all persons over the age of 10 wear a cover¹ on their nose and mouth when in public places. Few exceptions applied;²
- A requirement that residents observe social distancing guidelines when outside of their residence and in a public place;
- An order that residents wash their hands before leaving their residence and upon their return; and
- An order that residents avoid touching their noses and faces after leaving their residence.

The order was set to last 30 days, but the most concerning part was the criminalization of noncompliance. The order contained a provision stipulating that violators could be subject to “a fine not to exceed \$1,000.” Before these new requirements could go into effect, it was amended to be a recommendation with no penalties ([Exec. Order of County Judge Lina Hidalgo, 2020b](#)). While this particular order criminalizing the failure to wear a face mask was short-lived, its initial encroachment raises important policy concerns.

1 Under the terms of the [executive order](#), a face covering could have taken the form of “a homemade mask, scarf, bandana, handkerchief and other cloth masks.”

2 Mandatory face mask requirements were to be observed except on the following occasions:

- “Exercising outside or engaging in physical activity outside alone;
- Alone in a separate single space, whether indoors or outdoors;
- In the presence only of other members of one’s residence, whether inside or outside the residence;
- When doing so poses a greater mental or physical health risk, including exacerbating a pre-existing medical condition or including, but not limited to, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance;
- When doing so poses a security or safety risk, such as impairing the ability to drive or to be inspected at a security checkpoint; or
- When eating or drinking.”

Can You Really Be Fined \$1,000?

The Texas Disaster Act of 1975, codified as [Texas Government Code Chapter 418](#), grants special authority to state and local governments to protect against “damage, injury, and loss of life and property resulting from natural or man-made catastrophes, riots, or hostile military or paramilitary action”. This authority only exists in times of crisis, and while some of the powers granted to state and local governments are necessary, exertion of others have raised concerns during the current pandemic.

Case in point: the ability to impose penalties for violating emergency orders. While certain situations require reasonable enforcement mechanisms to gain public compliance, allowing local governments to impose the maximum fine on individuals for violating emergency orders is unreasonable and raises serious concerns.

Section 418.173 of the Texas Government Code authorizes a penalty for violating an emergency management plan. Accordingly, a state or “local ... emergency management plan may provide that failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is an offense”. An offense may be punishable by a fine not to exceed \$1,000 or confinement in jail for a term no longer than 180 days.

Harris County’s order was issued pursuant to a local emergency plan, which qualifies to contain a penalty for a violation. In addition, the penalty prescribed in Harris County’s order (“a fine not to exceed \$1,000”) falls within the permissible penalty options listed in the statute.

While there is no indication that a citation was ever issued for violating this Harris County face mask order, the threat of receiving such a fine was real, and so could have been the consequences of failing to pay it. Failure to pay fines can lead to a number of unintended consequences. In Texas, unpaid fines can lead to community service or added fines and late fees. The worst-case scenario—which many judges try to avoid—is an arrest and jail time.

The punishment does not fit the crime. Just because the law provides an enforcement mechanism for violations of emergency orders does not mean that it ought to be wielded. Statements during the announcement of this new order made it clear that using the enforcement mechanism was the only way to gain public compliance. Among the statements, the Harris County Judge commented, “We have to make clear, it’s not a recommendation” ([Hansen, 2020, para. 4](#)). Further exposing the intent to enforce this order, Harris County provided a 5-day grace period before the order would take effect in order “to give everyone a chance to catch on and get or make masks” ([Gowdy, 2020,](#)

[para. 4](#)). These statements made one thing clear: enforcing this order was a necessity, not an option. Fortunately, this particular order never went into effect and was amended as a recommendation.

Still, the criminalization of not wearing a face mask showcases an ill-advised policy fraught with implementation concerns that lead to one question: should such mundane behavior be criminalized?

It Is Ill-Advised Policy

The Harris County face covering requirement was riddled with questions and concerns from the community, even from the police officers charged with enforcing it. These concerns should not go unnoticed, and the order’s initial encroachment needs to be addressed.

First, the face mask requirement is borderline unenforceable, a concern that comes from police officers, firefighters, and marshals who have voiced their opinions. One concern is that attempted enforcement of this order would divert finite resources of law enforcement away from real crime. The president of the Houston Police Officers’ Union (HPOU) issued a statement echoing this concern among officers, saying, “officers were already stretched too thin with rising crime rates that include a 35 percent increase in murders and a 30 percent increase in burglaries” ([Hansen, 2020, para. 6](#)).

An overloaded police force, stretched thin with an increased crime rate, is dangerous to both the community and law enforcement. Although there is encouragement for everyone to wear face masks, Dr. Derek Cohen ([2020](#)), director of Right on Crime, rightly points out that perhaps “putting police, deputy sheriffs, and corrections officers in harm’s way to do so is an incredibly ill-advised approach to gaining compliance.” The Policing Project at New York University School of Law emphasized that enforcement of COVID-19 orders “poses its own risks,” including “physical interactions that can spread the virus to the public and police,” devastating fines, and discriminatory enforcement ([n.d., p. 2](#)).

Enforcement of this order may also breed distrust in the community. Self-regulation and voluntary compliance—coupled with a steady drumbeat of advocacy from public-health authorities—should be the primary enforcement mechanisms of these health recommendations, which requires community trust. The Policing Project ([n.d.](#)) further recommended that law enforcement agencies should aim for voluntary compliance, adding that “issuing citations should be considered carefully given the catastrophic financial impact of the pandemic” ([p. 4](#)). This sentiment was echoed by the president of Harris County Deputies Organization’s statement in which he said, “[t]he citizens

of Harris County are working hard together through this pandemic and do not need the added stress and fear of being fined or arrested for failing to wear a mask/face covering they may not have” ([Hansen, 2020, para. 10](#)).

At a time when criminal-justice reformers are actively questioning the propriety of using law enforcement to combat many petty offenses that are of dubious import for public safety and can harm community relations ([Petersen, 2019](#)), wielding police officers as de facto hall monitors for mask wearing undercuts that laudable goal in service of a bizarre double standard ([Haugen, 2020](#)).

Secondly, as health experts and researchers learned more about COVID-19, their recommended guidelines on face masks have evolved. As a result of a handful of these updated recommendations, this has created some confusion among the public regarding how effective face masks could be and who should wear them. The back and forth recommendations and conflicting opinions of various health experts made it difficult for people to know what to do or who to listen to, especially since local, state, and federal officials have continued to rely on the opinions of health experts.

Although the wearing of face masks could help slow the spread of COVID-19, it is not a panacea to getting infected or infecting others. According to a study published in April by Nature Medicine ([Leung et al., 2020](#)), the use of surgical-level face masks by ill patients may help reduce their transmission to others. Surgical face masks, which are being saved for front-line healthcare workers, may help reduce transmission with no guarantee of full protection, but the full effectiveness of homemade face coverings of the sort that the Centers for Disease Control and Prevention (CDC) has recommended still remains unknown ([Greenhalgh et al., 2020](#)).

Other public health experts point out that masks are less effective than washing your hands or social distancing because “coronaviruses often enter the body through the eyes” ([Siegel, 2020, para. 4](#)). Still others suggest that wearing a mask gives individuals a false sense of security. Reusing a face mask, with or without properly cleaning it, may be dangerous and spread the virus ([para. 5](#)).

With the full effectiveness of face masks still in question, even those that are medical grade, and the back and forth recommendations by healthcare experts, the efficacy of mandating a one-size-fits-all requirement must also be questioned. Without further evidence, mandating face masks may actually do more harm than good.

Lastly, criminalizing someone for failing to wear a mask makes scofflaws out of otherwise law-abiding citizens. Under ordinary circumstances, certain actions are considered crimes under the law. However, under extraordinary times, when the rules are changing nearly every week according to executive and emergency orders, regular activities should not constitute criminal activity, especially when they do not qualify under ordinary times.

This type of behavior was evidenced by the jailing of three Texas women—Ana Isabel Castro-Garcia, Brenda Stephanie Mata, and Shelley Luther—for offering beauty and cosmetic services in defiance of state and local emergency orders ([Rodriguez, 2020](#)). Salons were not deemed essential businesses during the shutdown, but that does not mean that making an income was not essential to the individuals providing those services. Haircuts and manicures are regular activities and as such, should not result in jail time or excessive fines for those who provide such services, especially in a time when so many are facing financial hardship.

In Harris County’s case, that is especially a concern considering the initial draft of the Harris County face mask order is alleged to have included the possibility of a criminal penalty of confinement in addition to the \$1,000 fine ([Scherer, 2020](#)). However, upon issuance of the final draft, only the fine remained intact. Nonetheless, a criminal penalty or a \$1,000 fine, especially in light of the current unemployment rate, are harsh punishments for failing to wear a face mask.

An order that requires the wearing of a face mask and punishes those who do not comply turned mundane behavior into criminal activity. Unfortunately, this is what Harris County’s face mask order did. If this order had been enforced, it could have changed the lives of individuals forever. The public letter sent by HPOU contained a statement worth considering in light of this situation: “The last thing any of us need to do is kick our community while they are down” ([Houston Police Officers’ Union, 2020](#)).

Policy Recommendations

In times of crisis, state and local authorities are granted certain special powers to protect public health and safety. But while circumstances may warrant their use, emergency powers are not unlimited, nor are authorities allowed to create their own extrajudicial concepts. Americans enjoy certain fundamental protections, even during disasters.

Some of these protections appear to have been jeopardized by Harris County’s face mask order, which required all persons over the age of 10 to wear a face covering in public (with few exceptions). While this requirement was amended to be a recommendation with no penalties, the initial order proves worrisome.

Due to these concerns, it is important that the Texas Legislature take certain actions to uphold the rule of law and strengthen civil liberties. One way to do so is to clarify the authority granted to local governments under Texas Government Code 418.108(g), especially whether county judges or mayors have the ability to mandate particularized activities such as mask wearing. This is an important and crucial next step as current state law is vague and open to interpretation.

Another recommendation worth considering is to amend local authority as it pertains to the imposition of criminal penalties or certain fees. Two options can achieve this: eliminating the authority of local governments to criminalize certain actions or requiring the presiding officer to obtain approval from the governing body prior to issuing the new rules. This recommendation is especially pertinent under emergency powers. As general policing powers rightfully rest with the state itself, not in its political subdivisions, it is a more legitimate exercise of authority to provide a single statewide standard for criminal law. As COVID-19 has demonstrated, it is proper to allow localities some carefully limited discretion to address challenges unique to one area that may not happen in other parts of the state. However, *criminalizing* an activity—if necessary—should be left to the state, which is better positioned to more carefully deliberate, debate, and detail behaviors prohibited by law for the entire population at once, thereby avoiding capricious enforcement statewide (especially when transparency and accountability of local governments may be lacking).

There's no appreciable reason for an activity so anodyne as failing to wear a mask to be unlawful in Houston, but not in Muleshoe. Only state government can legitimately criminalize such a behavior should it deem it necessary.

Lastly, the Texas Legislature should consider requiring political subdivisions acting under a disaster declaration to cite every statute that authorizes a potentially coercive or hostile action. Without citing a specific statute of authority, a political subdivision's claim of authority is just a statement, not a fact backed by law.

Provided the continued questionable nature of this issue, it may also be in the best interest of the state for the Texas Legislature to address similar issues of state and local authority during times of disaster. This issue, along with others that have emerged during these extraordinary times, warrant the review and amendment of Texas Government Code Chapter 418 in the upcoming legislative session so that this confusion may be avoided in future situations. ★

References

- Cohen, D. [@CohenAtTPPF]. (2020, April 27). *Great call by @GovAbbott prohibiting fines and fees for failing to wear a mask. OF COURSE everyone should wear a* [Image attached] [Tweet]. Twitter. <https://twitter.com/CohenAtTPPF/status/1254883005199499267>
- Exec. Order of County Judge Lina Hidalgo. (2020a, April 22). <https://agenda.harriscountytexas.gov/2020/20200422Order.pdf>
- Exec. Order of County Judge Lina Hidalgo. (2020b, April 28). <https://agenda.harriscountytexas.gov/2020/20200428Order.pdf>
- Gowdy, S. (2020). *Harris County Judge Lina Hidalgo orders masks or face coverings in Harris County*. The Texan. <https://www.houstonchronicle.com/news/houston-texas/article/Hidalgo-Harris-County-mask-order-30-days-COVID-19-15218998.php>
- Greenhalgh, T., Schmid, M. B., Cypionka, T., Bassler, D., & Gruer, L. (2020). Face masks for the public during the covid-19 crisis. *British Medical Journal*, 369:1435. <https://www.bmj.com/content/bmj/369/bmj.m1435.full.pdf>
- Hansen, H. (2020, April 22). *Harris County Judge Hidalgo mandates wearing face coverings in public for 30 days*. The Texan. <https://thetexan.news/harris-county-judge-hidalgo-mandates-wearing-face-coverings-in-public-for-30-days/>
- Haugen, M. (2020, June 23). *On mask wearing, don't use law enforcement as hall monitors*. Right on Crime. <http://rightoncrime.com/2020/06/on-mask-wearing-dont-use-law-enforcement-as-hall-monitors/>
- Houston Police Officers' Union [@HPOUTX]. (2020, April 22). *HPOU response to @LinaHidalgoTX draconian mask order: "Now we want to be very clear, HPOU believes everyone should be wearing* [Letter attached] [Tweet]. Twitter. <https://twitter.com/HPOUTX/status/1252982197428027402/photo/1>
- Leung, N., Chu, D., Shiu, E., Chan, K., McDevitt, J., Hau, B., Yen, H., Li, Y., Ip, D., Peiris, J., Seto, W., Leung, G., Milton, D., & Cowling, B. (2020). Respiratory virus shedding in exhaled breath and efficacy of face masks. *Nature Medicine*, 26, 676-680. <https://www.nature.com/articles/s41591-020-0843-2>
- Petersen, R. (2019, January 17). *Let's reconsider traffic enforcement*. Right on Crime. <http://rightoncrime.com/2019/01/lets-reconsider-traffic-enforcement/>
- Policing Project at NYU Law. (n.d.). *Stay-at-home and social distancing enforcement for COVID-19*. <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5ec2d5b357350760ab575a3d/1589827004676/Policing+Project+COVID+Enforcement+Guidance.pdf>
- Rodriguez, C. (2020, May 7). *Gov. Abbott issues order after two Laredo women arrested for home beauty services amid pandemic*. *LMTonline*. <https://www.lmtonline.com/local/article/Gov-Abbott-issues-order-after-two-Laredo-women-15253855.php>
- Scherer, J. (2020, April 22). *What gives Hidalgo the authority to require masks? State law, the county attorney says*. *Houston Chronicle*. <https://www.houstonchronicle.com/news/houston-texas/houston/article/What-gives-Hidalgo-the-authority-to-require-15219816.php>
- Siegel, M. (2020, May 18). *Will a face mask protect you?* *Wall Street Journal*. <https://www.wsj.com/articles/will-a-face-mask-protect-you-11589842953>

ABOUT THE AUTHORS



Shelby Sterling, JD

Shelby Sterling, JD, is a policy analyst for the Government for the People campaign at the Texas Public Policy Foundation.

Sterling is a licensed attorney in the state of Texas with a JD from Texas A&M University School of Law in Fort Worth. She participated in the law school's residency externship program and graduated with a concentration in public policy. Sterling received her BA in Letters from the University of Oklahoma, a combination study of philosophy, history, and literature on the U.S. Constitution and the Founding Fathers.

Outside of work, Sterling enjoys spending time with family and friends, working out, and reading.



Michael Haugen

Michael Haugen is a policy analyst with the Right on Crime campaign. His work for the Foundation has focused primarily on criminal justice reform topics, particularly civil forfeiture, prison reform and justice reinvestment, *mens rea* reform, occupational licensing, and various law enforcement and privacy issues. He's also written about federal corporate subsidies, school choice, and gun rights.

Haugen's writing has appeared in *National Review*, *The Hill*, *Townhall*, *Washington Examiner*, *El Paso Times*, *TribTalk*, *RedState*, *Ricochet*, and *Breitbart Texas*.

Haugen is a graduate of Eastern Washington University (EWU) with a B.S. in biology with pre-medicine option and a minor in chemistry. At EWU, he spent two years investigating genetic virulence factors and pathophysiology in microbes. He also holds an A.A. in general studies from North Idaho College.

About Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation promotes and defends liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

