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### Cover Page Footnote

I would like to thank some of those whose input has helped to shape this final product. My wife, Debra R. Comer, Ph.D., provided the verbal juxtaposition that allowed the current title to replace my original "Hair Today, Gone Tomorrow." There is, after all, a hierarchy of puns, despite their status as the lowest form of humor. I am also grateful to those who, in advising me in one fashion or another that "clean-shaven" is preferable, have helped to focus my attention on a relatively minor matter of personal liberty that is all too often overlooked, both literally and figuratively.

## NOTES

### SUITS FOR THE HIRSUTE: DEFENDING AGAINST AMERICA'S UNDECLARED WAR ON BEARDS IN THE WORKPLACE

JAMES M. MALONEY\*

#### INTRODUCTION

If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question.

—Justice Thurgood Marshall<sup>1</sup>

Notwithstanding the attempt at humor in the above title, the right of the people to be free from government restrictions on such personal decisions as whether to wear a beard gives rise to a set of rather serious constitutional questions.<sup>2</sup> These questions, including the most basic (where in the Constitution this right is to be found), have been addressed neither adequately nor consistently during the nearly two decades following Justice Marshall's pronouncement, articulated in his dissent in *Kelley v. Johnson*,<sup>3</sup> that the right is "so clear as to be beyond

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1. *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting). Justice Marshall's dissenting opinion went on to note that "[h]istory is dotted with instances of governments regulating the personal appearance of their citizens. For instance, in an effort to stimulate his countrymen to adopt a modern lifestyle, Peter the Great issued an edict in 1698 regulating the wearing of beards throughout Russia." *Id.* at 253 n.4. "It is inconceivable to me," Justice Marshall concluded, "that the Constitution would offer no protection whatsoever against the carrying out of similar actions by either our Federal or State Governments." *Id.* at 254 n.4.

2. *See New Rider v. Board of Educ. of Indep. Sch. Dist. No. 1*, 414 U.S. 1097, 1098 (1973) (Douglas, J., dissenting from denial of certiorari) (noting that regulations of expressive aspects of personal appearance present "an issue of particular personal interest to many and of considerable constitutional importance").

3. 425 U.S. 238 (1976). *Kelley* declined to find a right of police officers to be free from departmental grooming standards that restricted length of hair and banned beards, using a substantive due process analysis. *Id.* at 244-45. The Court, however, did not analyze any First Amendment claims. *See id.* at 249 ("The regulation challenged here did not violate any right guaranteed respondent by the Fourteenth Amendment to the United States Constitution . . .") (emphasis added); *id.* at 251 n.2 (Marshall, J., dissenting) ("While the parties did not address any First Amendment issues in any detail in this Court, governmental regulation of a citizen's personal ap-

question."<sup>4</sup> Both before and since *Kelley*, which held grooming standards for police officers (including a ban on beards) to be constitutional,<sup>5</sup> federal courts have heard numerous "beard cases" dealing with the rights of prison inmates, usually in relation to free exercise rights under the First Amendment.<sup>6</sup> But there have been inconsistent results in cases following *Kelley* that have examined the power of government to mandate absence of facial hair among its employees.<sup>7</sup> Inconsistent results imply a need for better law, which will, it is hoped, be fostered by framing the issues in a way that more adequately describes their relationship to specific constitutional protections. This Note proposes that the appropriate source of the right of citizens to decide whether to wear a beard is to be found within the mantle of freedom of expression, an approach taken by the California courts since the 1960s.<sup>8</sup>

As a starting point, it is worth observing that facial hair has unique attributes that distinguish it from other aspects of personal appearance and grooming. In contrast to uniforms or other clothing, beards cannot be donned and removed at the beginning and end of one's work shift. Thus, any mandates regarding facial hair affect employees both on and off the job.<sup>9</sup> Unlike rules about the length of head hair,

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pearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well."). Citizens suing in federal court after *Kelley* in response to government mandates that employees shave their beards seem to obtain differing results given similar facts depending upon which provision in the Constitution is cited as the source of the putative right. Compare *Hottinger v. Pope County*, 971 F.2d 127, 128-29 (8th Cir. 1992) (holding that county ambulance department's grooming policy prohibiting beards was not "truly irrational" and therefore not violative of substantive due process rights under the Fourteenth Amendment) with *Nalley v. Douglas County*, 498 F. Supp. 1228, 1229 (N.D. Ga. 1980) (holding that a similar grooming standard applied to county personnel infringed plaintiff's freedom of expression and was therefore unconstitutional).

4. 425 U.S. at 251 (Marshall, J., dissenting).

5. *Id.* at 248-49; see also *infra* part I (discussing *Kelley*).

6. See Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kasher Food, Skullcaps, and Beards*, 21 Am. J. Crim. L. 241, 250-59 (1994) (discussing case law that has balanced prisoners' free exercise rights against government's penological interests). Such cases now arise primarily under state prison rules, because inmates in federal prisons are permitted to wear beards. 28 C.F.R. § 551.2 (1994).

7. See *supra* note 3 (discussing two post-*Kelley* cases with different results and similar facts); see also *infra* notes 91-103 and accompanying text (pointing out other inconsistencies, especially a particularly egregious one between the Fifth and Seventh Circuits).

8. See *King v. California Unemployment Ins. Appeals Bd.*, 101 Cal. Rptr. 660, 664 (Ct. App. 1972) (holding that the wearing of a beard is symbolic conduct entitled to the constitutional protection of the First Amendment); *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 527 (Ct. App. 1967) (noting that "the wearing of a beard is a form of expression of an individual's personality"). *Finot* went on to describe a beard as a symbol, noting that "symbols, under appropriate circumstances, merit constitutional protection." *Id.* at 528 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943)).

9. See *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 855 (Meskill, J., dissenting) ("One who is forced . . . to shave his beard . . . is forced to appear that

regulations of facial hair apply in the overwhelming majority of cases only to males,<sup>10</sup> although equal protection arguments based on gender discrimination would probably be unsuccessful.<sup>11</sup> Also in contrast to head hair and clothing regulations, beard bans mandate the *face* that one presents to the world, which seems an especially personal and expressive aspect of one's appearance. Perhaps most importantly, the decision whether to wear a beard or other facial hair may be motivated by one's ethnic identity,<sup>12</sup> ideology,<sup>13</sup> or religious beliefs.<sup>14</sup> Additionally, and probably relatedly,<sup>15</sup> there exists in our culture a subtle yet pervasive prejudice against those who choose not to shave their faces,<sup>16</sup> perhaps best evidenced by our language. The term used to

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way off as well as on the job . . ."); *Finot*, 58 Cal. Rptr. at 528 ("[A] beard cannot be donned and doffed for work and play as wearing apparel generally can, and therefore the effect of a prohibition against wearing one extends beyond working hours.") (citation omitted). Regulations are sometimes worded as if to deny the existence of this obvious fact. For example, one county grooming policy applying to emergency medical technicians ("EMTs") contained the following sentence: "No employee will wear a beard or mustache *while in EMT uniform.*" *Hottinger v. Pope County*, 971 F.2d 127 & n.2 (8th Cir. 1992) (emphasis added). However such regulations are worded, there can be no doubt that work rules that affect employees' off-duty lives are a serious threat to personal autonomy. See Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway—Employer Control of Off-Duty Behavior*, 13 St. Louis U. Pub. L. Rev. 645 (1994).

10. A woman recently alleged that she was fired from her job as an audio-visual technician because she had facial hair (a mustache), and she has filed a complaint with the Equal Opportunity Employment Commission. Kara Swisher, *Her Mustache or Her Job*, *The Washington Post*, March 25, 1994, at B1, B4. The article notes that "[w]hile a discrimination case concerning excessive facial hair on a female is unusual, discrimination in the workplace over personal appearance has become a growing legal issue in recent years." *Id.* See also Tony McAdams et al., *Employee Appearance and the Americans with Disabilities Act: An Emerging Issue?*, 5 *Employee Resp. & Rts. J.* 323 (1992) (discussing "appearance discrimination" and possible statutory sources of protection against it).

11. See, e.g., *Rafford v. Randle E. Ambulance Serv.*, 348 F. Supp. 316, 317 (S.D. Fla. 1972) (holding that "dismissal of male employees based upon their refusal to remove beards and moustaches is not sex-based discrimination proscribed by Title VII of the Civil Rights Act of 1964").

12. *Braxton v. Board of Pub. Instruction of Duval County*, 303 F. Supp. 958, 959 (1969) (finding goatee worn by African-American school teacher to be an expression of heritage, culture, and racial pride).

13. See *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 529 (Ct. App. 1967) (noting that plaintiff's beard may have been worn "as a gesture of nonconformity to the prevailing custom of this generation of clean-shaven male adults").

14. *Abramovsky*, *supra* note 6, at 249-50 & n.83.

15. If the wearing of a beard is motivated by African-American pride, Jewish (or other) religious beliefs, or nonconformity, it would follow that such a display of facial hair would elicit a negative response on the part of anyone unfavorably inclined toward any of those groups. But that is not to say that prejudices against beards do not derive from other than such racist, anti-Semitic, or ideological sources.

16. An article in a popular magazine notes that beards were more common (and therefore more acceptable) a century ago, largely because the safety razor had yet to be invented and shaving (with a "straight razor") was therefore a riskier venture. Lynn Snowden, *Facial Attraction*, *Cosmopolitan*, June 1992, at 216. The article goes on to list some of the modern prejudices regarding beard wearers—that they "have

describe those males who adhere to the preferred standard is "clean-shaven." The reasonable inference, if not the clear implication, is that the *unshaven* must also be *unclean*.<sup>17</sup>

Anti-beard sentiment seems to be a relatively recent phenomenon, at least in America,<sup>18</sup> perhaps due in part to the post-1960s association of beards with nonconformity or rebellion,<sup>19</sup> as well as to the perceptions that beards are unclean or that their wearers are trying to hide something.<sup>20</sup> Before the invention of the safety razor, beards were more socially acceptable, largely because few men were willing to use the dangerous "straight razor."<sup>21</sup> Professionals, able to pay the daily cost (in terms of both time and money) of a shave at a barber shop, and not as likely as laborers to benefit from the protection from the elements that facial hair provides, probably fostered the development

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something to hide," are "rebels who refuse to play by our rules," or are "freethinkers." *Id.* at 219. See also *Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973) (acknowledging that "prejudice against people with beards" may have been harbored by jurors, but refusing to extend constitutional protection to defendant who may have suffered from such prejudice in light of the Court's "inability to constitutionally distinguish possible prejudice against beards from a host of other possible prejudices"); *id.* at 530 (Douglas, J., concurring in part and dissenting in part) (noting, in response to defendant's argument that jurors should have been questioned about prejudices against beards, that "prejudices invoked by the mere sight of non-conventional hair growth are deeply felt," and that such growth may symbolize "rebellion against traditional society"); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 798 (8th Cir. 1993) (noting that a public opinion survey had indicated that "up to twenty percent of customers would 'have a negative reaction' to a delivery person wearing a beard").

17. It is odd that in an era of politically correct speech the profound impact of this phraseology goes largely unnoticed. "Is he bearded or clean-shaven?" is generally assumed to be a perfectly acceptable question. But why, aside from the historical fact that this nation's "settlers" displaced and/or enslaved millions of persons originally native to North America or Africa, should the above question be any less offensive than, "Is he clean and white, or dark-skinned?" Either phrasing reflects some degree of conscious or subconscious prejudice (an irrational association of, respectively, facial hair or skin pigment with uncleanness), but the latter blatantly carries with it the baggage of centuries of cruel oppression and is therefore both more readily apparent and more readily condemned. In any event, the phrase "clean-shaven," when used in this Note, will be kept within quotations to foster awareness of the underlying prejudice.

18. Justice Thurgood Marshall described Peter the Great's "beard tax," imposed on all Russians in 1698 in an attempt at modernization. Those peasants too poor to pay the tax kept their shorn beards after cutting them off in order to have them placed in their coffins, believing that they could not enter heaven without them. *Kelley v. Johnson*, 425 U.S. 238, 253 n.4 (1976) (Marshall, J., dissenting).

19. See *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 528 (Ct. App. 1967) ("A beard . . . has been interpreted as a symbol of nonconformity and rebellion."); Snowden, *supra* note 16, at 219. For a more complete quotation of the passage from *Finot*, see *infra* text accompanying note 270. The association of beards with rebellion is perhaps best illustrated by the title chosen for "a book about the history of Youth Revolution." Anthony Esler, *Bombs, Beards and Barricades: 150 Years of Youth in Revolt* 7 (1971).

20. Snowden, *supra* note 16, at 219.

21. *Id.* at 218.

of the association between "clean-shaven" faces and professionalism that survives to the present day.<sup>22</sup>

Whatever its sources, anti-beard sentiment does appear to be on the rise. For example, the last decade has shown an about-face in long-standing policy regarding beards in two of the armed services. In both the Navy and the Coast Guard, the time-honored and pragmatic nautical tradition of not shaving off one's facial hair has given way to mandates prohibiting beards and goatees.<sup>23</sup> Additionally, the federal courts, never particularly protective of facial-hair rights, have recently weakened some of the protections that existed: as Professor Abraham Abramovsky has noted, the Second and Ninth Circuits, once willing to strike down (on free exercise grounds) prison directives requiring Orthodox Jews, among others, to shave or trim their beards, have since concluded that "restrictions on beards are constitutionally valid."<sup>24</sup>

But it is particularly disturbing that working Americans who are neither prisoners, servicemen nor police have been fired from their government jobs for refusing to shave off their beards and have subsequently been denied damages, reinstatement, and even the right to a hearing.<sup>25</sup> Private employers, of course, are even less subject to con-

22. One psychological study has indicated that faces without facial hair appear "more sociable than those with facial hair." Michael S. Wogalter & Judith A. Hosie, *Effects of Cranial and Facial Hair on Perceptions of Age and Person*, 131 J. of Soc. Psychol. 589, 590 (1991). This may also help to explain the preference among most professionals for the "clean-shaven" look. Notably, in one professional practice—psychology—beards are favored among male practitioners, perhaps, as one author notes, because Sigmund Freud had one. See Snowden, *supra* note 16, at 218.

23. The Chief of Naval Operations, Admiral James D. Watkins, in late 1984 signed an order banning beards among Navy personnel effective January 1, 1985. Mel Jones, *Little Reaction to Navy Beard Ban*, Navy Times, Dec. 31, 1984, at 4. The article noted that active-duty servicemen's response to the ban was not as strongly negative as many had expected, but that Reservists were more outspoken against the change than were active duty personnel. *Id.* The same article quoted Coast Guard officials as stating that they did not expect to follow the Navy's lead. *Id.* But the Coast Guard apparently did just that 18 months later, banning beards effective June 15, 1986. Rosemary Purcell, *Ban on Beards Ends Tradition in Coast Guard: Some See Move Hurting Morale*, Navy Times, June 23, 1986, at 8. The Coast Guard beard ban was apparently a high priority for its new commandant, Admiral Paul A. Yost, who commented that he wanted his troops to adhere to the same standards as the other armed services and to "present a neat and professional military appearance." *Id.*

24. Abramovsky, *supra* note 6, at 250. *But see* 28 C.F.R. § 551.2 (1994) (providing that "[a]n inmate may wear a mustache or beard or both" in federal prisons, and thereby relieving federal courts of the need to adjudicate cases that might otherwise have arisen from within federal prisons).

25. *See, e.g.,* Ball v. Board of Trustees, 584 F.2d 684, 685 (5th Cir. 1978) (holding that high school teacher who was fired for refusing to shave his beard was not entitled to a hearing on the merits of his case because "the claim of violation of a liberty interest by the Board's action is 'wholly insubstantial and frivolous'" and because "[f]ederal courts do not sit to entertain such claims"); Hottinger v. Pope County, 971 F.2d 127, 127-28 (8th Cir. 1992) (affirming summary judgment in favor of county ambulance department that fired the three plaintiffs, all emergency medical technicians, for refusing to comply with county rule prohibiting facial hair).

stitutional limitations than are government employers,<sup>26</sup> which renders particularly insidious an attack that one federal agency seems to have launched on beards in the workplace.<sup>27</sup>

This Note will explore the constitutional sources of "a citizen's right to choose his own personal appearance,"<sup>28</sup> with particular emphasis on the issues related to decisions about facial hair. Part I examines *Kelley*, the only Supreme Court case to have directly addressed the rights of government employees to make choices regarding personal appearance, a decision that focused exclusively on substantive due process sources of the right but did not consider any First Amendment challenges.<sup>29</sup> Part I also evaluates lower court cases that have applied the substantive due process standards to various government employees. Part II explores the expressive elements inherent in the decision to wear a beard, questioning whether restrictions on beards are not by definition mandates of expressive behavior. Part II then introduces a theory of First Amendment analysis that derives from established Supreme Court precedent. Part III discusses a federal regulation promulgated by the Occupational Safety and Health Administration that apparently affects beards in the private workplace, and considers several challenges to the regulation. This Note concludes that the decision to wear a beard is a protected First Amendment freedom of expression and that the existing case law under *Kelley*, which provides almost no protection of that freedom, should be cause for concern in a society that purports to value individual liberty.

## I. THE SUPREME COURT SPEAKS

Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like "green pastel redness."

—John Hart Ely<sup>30</sup>

*Kelley v. Johnson*<sup>31</sup> evaluated, under a substantive due process analysis, the constitutionality of Suffolk County Police Department regulations that provided grooming standards for members of the police force, prescribing the lengths of the officers' hair, mustaches, and sideburns, and banning beards or goatees except when shaving was inad-

26. See, e.g., Gerald Gunther, *Constitutional Law* 1347 (12th ed. 1991) ("Ordinarily, First and 14th Amendment guarantees limit only government . . .").

27. The Occupational Safety and Health Administration has promulgated a regulation that would appear to ban beards in many private workplaces. See *infra* part III.

28. *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting); see also *supra* note 1 and accompanying text (quoting at greater length from this portion of Justice Marshall's dissenting opinion).

29. See *supra* note 3.

30. John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980).

31. 425 U.S. 238 (1976).



visible for medical reasons.<sup>32</sup> The regulations were initially challenged<sup>33</sup> as violative of the patrolmen's rights of free expression under the First Amendment and of their rights to due process and equal protection under the Fourteenth Amendment.<sup>34</sup> The district court originally dismissed the complaint,<sup>35</sup> but on remand from the Second Circuit<sup>36</sup> granted the declaratory and injunctive relief sought.<sup>37</sup> On appeal to the Supreme Court, the parties did not address First Amendment issues in any detail,<sup>38</sup> and the case was decided solely on the basis of the Fourteenth Amendment challenge.<sup>39</sup>

The majority opinion focused on substantive due process rather than on equal protection, noting that the Due Process Clause<sup>40</sup> "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State."<sup>41</sup> The Court noted further that "whether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance."<sup>42</sup> Assuming "an affirmative answer for purposes of deciding th[e] case,"<sup>43</sup> the majority opinion proceeded to distinguish the police officers from members of the public at large<sup>44</sup> and found that the appropriate test in deciding the constitutionality of the regulations was "whether respondent can demonstrate that there is no rational connection between the regulation . . . and the promotion of safety of persons and property."<sup>45</sup> Declining to "weigh the policy arguments in

32. *Id.* at 239 n.1, 240-41.

33. The action, against a state governmental entity, was brought pursuant to 42 U.S.C. § 1983. See *Kelley*, 425 U.S. at 239. The same is true of other cases discussed herein in which state regulations have been challenged.

34. 425 U.S. at 240-41.

35. *Id.* at 239.

36. *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973), *rev'd sub nom. Kelley v. Johnson*, 425 U.S. 238 (1976).

37. *Kelley*, 425 U.S. at 239.

38. *Id.* at 251 n.2 (Marshall, J., dissenting).

39. *Id.* at 249.

40. U.S. Const. amend. XIV, § 1.

41. 425 U.S. at 244. *But see infra* note 105 (noting criticisms of the doctrine of substantive due process).

42. 425 U.S. at 244. For Justice Marshall's response to the majority's comment about the lack of precedent regarding liberty in matters of personal appearance, see *supra* text accompanying note 1.

43. 425 U.S. at 244.

44. *Id.* at 245. The majority opinion noted:

The . . . regulation here touches respondent as an employee of the county and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large.

*Id.*

45. *Id.* at 247.

favor of and against [the] rule,"<sup>46</sup> the Court found that either the need to make police officers recognizable to the public or the "desire for the esprit de corps which such similarity [of appearance] is felt to inculcate within the police force itself" would provide a rational basis for the grooming regulations.<sup>47</sup> Thus, the Court reversed the Second Circuit and held the regulations constitutional.<sup>48</sup>

As noted, *Kelley* contained dicta indicating that any protections to be found in the Due Process Clause that applied to decisions about personal appearance would be more readily applicable to members of the general public than to police officers or, perhaps, than to any "member of a uniformed civilian service."<sup>49</sup> Thus the case left open the question of where the line is drawn between government personnel who may benefit from such a liberty interest and those who may not. Although *Kelley* tells us that policemen fall into the latter category, it does not clearly draw the distinction between the two classes of government employees. Perhaps one may extrapolate from the opinion a rule that government may prescribe grooming standards upon uniformed employees but no others,<sup>50</sup> but this would appear to be inconsistent with the "rational basis" standard articulated elsewhere in the opinion.<sup>51</sup> One can certainly imagine both uniformed employees for whom there is no apparent rational basis for prohibition of beards (e.g., trash collectors) as well as non-uniformed employees for whom such a "rational basis," as articulated in *Kelley*, may be present (e.g., police detectives).

Lower court opinions have only rarely found exceptions to government's ability to mandate the "clean-shaven" standard for its employees, at least when analyzing the employees' rights under substantive

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46. *Id.* at 248.

47. *Id.*

48. *Id.* at 249. Interestingly, the Second Circuit noted on remand: "We have been informed that the regulation involved has been repealed." *Dwen v. Barry*, 543 F.2d 465, 465 (2d Cir. 1976) (per curiam). It is possible that the unsuccessful suit nevertheless convinced the Suffolk County authorities of the seriousness of the police officers' claims, thereby bringing about the desired change. Cf. Derrick Bell, *Confronting Authority: Reflections of an Ardent Protester* 74 (1994) (describing a suit against Harvard Law School brought by a student group who, despite their virtual certainty that they would not prevail, felt empowered by the action, in part because of the opportunity to "convince Harvard of the seriousness and sincerity of their claims").

49. 425 U.S. at 248-49 (declining to find a "liberty" interest protected by the Fourteenth Amendment that applies to "a member of a uniformed civilian service" to the same degree that it applies to "a member of the general public"). See also *id.* at 245 (noting that "demands upon members of the police force . . . have no counterpart with respect to the public at large").

50. See *id.* at 248-49.

51. See *id.* at 247-48 (holding that the "liberty" interest would protect respondent only against "irrational" or "arbitrary" regulations, and finding that either the need for recognizability of police officers or for "esprit de corps" provided a "sufficiently rational justification").

due process.<sup>52</sup> Both high school teachers<sup>53</sup> and emergency medical technicians (“EMTs”)<sup>54</sup> have been deemed to be subject to facial hair regulations, although the former do not wear uniforms and neither performs police work. In *Hottinger v. Pope County*,<sup>55</sup> the case denying EMTs any constitutional protection from a grooming policy that prohibited mustaches, beards, or long hair,<sup>56</sup> the Eighth Circuit refused to find the policy “‘wholly arbitrary,’”<sup>57</sup> noting that “EMTs are uniformed public employees who need to be easily recognizable.”<sup>58</sup>

It is difficult, given this rationale, to imagine how *any* uniformed employee could be entitled to protection under the Eighth Circuit’s interpretation of the *Kelley* test. As the court noted,<sup>59</sup> the holding in *Hottinger* flowed naturally from the Eighth Circuit’s earlier decision in *Lowman v. Davies*,<sup>60</sup> which held that grooming regulations were applicable to park naturalists.<sup>61</sup> Interestingly, the *Lowman* court had stated that *Kelley* was controlling “[b]ecause the park naturalist has law enforcement duties.”<sup>62</sup> But the *Hottinger* court rejected arguments that the question of whether employees exercised law enforcement duties was dispositive,<sup>63</sup> noting that “[w]hatever difference there may be between the duties of police officers and park naturalists in contrast to EMTs, this difference does not make grooming regulations ‘truly irrational’ when applied to the latter group.”<sup>64</sup> Accordingly, the three EMTs who had been terminated for refusing to shave off facial hair<sup>65</sup> were denied a trial on the merits, with the Eighth Circuit affirming the district court’s grant of the defendants’ motion for summary judgment.<sup>66</sup>

Recently, *Kelley*’s holding that police departments may regulate hair length and prohibit beards and goatees has been extended to sus-

52. See *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir.) (holding that regulations of hair and facial hair among college professors have no rational basis), *aff’d on reh’g*, 522 F.2d 204 (5th Cir. 1975); *Nalley v. Douglas County*, 498 F. Supp. 1228 (N.D. Ga. 1980) (applying the *Kelley* substantive due process analysis as well as an inquiry into the plaintiff’s freedom of expression); see also *infra* text accompanying notes 117-27 (discussing *Nalley*).

53. *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100 (5th Cir. 1982); *Ball v. Board of Trustees*, 584 F.2d 684 (5th Cir. 1978).

54. *Hottinger v. Pope County*, 971 F.2d 127 (8th Cir. 1992).

55. 971 F.2d 127 (8th Cir. 1992).

56. *Id.* at 127 n.2 (setting forth county policy). See also *supra* note 9 (quoting one oddly worded provision in its text).

57. 971 F.2d at 128 (quoting *Lowman v. Davies*, 704 F.2d 1044, 1046 (8th Cir. 1983)).

58. 971 F.2d at 129.

59. *Id.* at 128 (“Our decision in *Lowman* should easily dispose of this case.”).

60. 704 F.2d 1044 (8th Cir. 1983).

61. *Id.* at 1046.

62. *Id.*

63. 971 F.2d at 128.

64. *Id.* at 128-29.

65. *Id.* at 127-28.

66. *Id.* at 129.

tain a Massachusetts Department of State Police prohibition on *all* facial hair, including mustaches, in *Weaver v. Henderson*.<sup>67</sup> The departmental order at issue in *Weaver* allowed beards, mustaches, or goatees only for undercover officers or for those with “[m]edical problems verified by a medical practitioner” and properly documented.<sup>68</sup> The regulations were challenged by six veteran officers who had worn mustaches throughout their careers.<sup>69</sup> The First Circuit affirmed the district court’s denial of injunctive relief,<sup>70</sup> finding that the regulations cleared the “rather modest hurdle” imposed by *Kelley* because either the goal of maintaining similarity of appearance among the officers or that of promoting a sense of “esprit de corps” would provide a sufficiently rational justification for the total ban on facial hair.<sup>71</sup> Nor was the court persuaded by the plaintiffs’ argument that other organizations, including the United States Marine Corps and other state police forces, managed to achieve those objectives without banning mustaches.<sup>72</sup> The court noted that “rules are not irrational simply because they differ from the rules employed by other organizations with similar goals.”<sup>73</sup> Thus, *Weaver* found no greater protections for mustaches than for other matters of personal grooming under its interpretation of *Kelley*, at least in the context of police officers.

One of the few federal cases applying the *Kelley* test and finding employees’ rights to wear facial hair protected<sup>74</sup> was, like *Weaver*, a “mustache case,” which at least suggests that beards and mustaches may be viewed differently outside the police employment context. In *Pence v. Rosenquist*,<sup>75</sup> the Seventh Circuit held that a public high school’s “policy of not permitting a person with a mustache, no matter how neatly trimmed, to drive a school bus lacks any rational relationship with a proper school purpose.”<sup>76</sup> The court thus reversed a grant of summary judgment for the defendant school and, in the process, overruled an earlier Seventh Circuit case, *Miller v. School District No. 167*,<sup>77</sup> that had, according to the *Pence* majority, “h[e]ld categorically that a government employee’s interest in choosing a style of appear-

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67. 984 F.2d 11 (1st Cir. 1993).

68. *Id.* at 12 n.1.

69. *Id.* at 12.

70. *Id.* at 14.

71. *Id.* at 13.

72. *Id.*

73. *Id.* (citing *Kelley*, 425 U.S. at 246, for the proposition that the constitutional validity of an organization’s rules “does not depend . . . on any doctrine of historical prescription”).

74. See also *Nalley v. Douglas County*, 498 F. Supp. 1228 (N.D. Ga. 1980) (applying the *Kelley* substantive due process analysis as well as an inquiry into the plaintiff’s freedom of expression). *Nalley* directly addressed the plaintiff’s right to wear a beard but, as noted, seems not to have been confined to a substantive due process analysis. See also *infra* text accompanying notes 117-27 (discussing *Nalley*).

75. 573 F.2d 395 (7th Cir. 1978).

76. *Id.* at 398.

77. 495 F.2d 658 (7th Cir. 1974).

ance is not significant enough to raise a constitutional issue when he is discharged or excluded from government employment because the employer requires a different style."<sup>78</sup>

It would seem, then, that *Kelley's* rational basis test, as applied to facial hair among government employees, will afford protection of an individual's putative right to make decisions regarding his<sup>79</sup> personal appearance only in rare cases, despite language in *Kelley* that indicated that police officers were a special category of government employees.<sup>80</sup> This assessment of the degree of protection afforded under *Kelley* is supported by two cases from the Fifth Circuit that have extended *Kelley's* denial of substantive due process protection to a broader class of government employees. In 1978, the majority in *Ball v. Board of Trustees*<sup>81</sup> found a high school teacher's claim that a liberty interest guaranteed by the Constitution had been violated when he was fired after refusing to shave off his beard to be "wholly insubstantial and frivolous."<sup>82</sup> A concurring opinion, which would have affirmed the district court's dismissal of the plaintiff's claim on other grounds,<sup>83</sup> noted that the Fifth Circuit's case law regarding the rights of students and high school teachers in relation to state-mandated grooming standards had all been developed before the Supreme Court decided *Kelley*.<sup>84</sup> Accordingly, the concurrence found that the plain-

78. *Pence*, 573 F.2d at 399 (explaining and overruling *Miller v. School Dist. No. 167*, 495 F.2d 658 (7th Cir. 1974)). *But see id.* at 400 (Pell, J., concurring) (disagreeing with the majority's interpretation of *Miller*).

79. Given the rather gender-specific nature of facial hair, exclusive use of male pronouns has been retained in appropriate contexts in this Note.

80. *See Kelley v. Johnson*, 425 U.S. 238, 245 (1976). The Court noted:

The hair-length regulation here touches respondent as an employee of the county and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large.

*Id.*

81. 584 F.2d 684 (5th Cir. 1978) (per curiam).

82. *Id.* at 685. The plaintiff did, however, recover damages in state court after having originally sought relief in federal court, where his claim was dismissed without prejudice with the invitation "to reinstate whatever federal claim remained after the state proceedings." *Id.* (citing *Ball v. Board of Trustees*, 442 F.2d 408 (5th Cir.), *cert. denied*, 404 U.S. 865 (1971)). The plaintiff's subsequent federal claim was for reinstatement, a remedy he had not received in state court. *Ball*, 584 F.2d at 685.

83. *See Ball*, 584 F.2d at 686-87 (Godbold, J., concurring). Judge Godbold would have affirmed on the basis that the damages awarded in the state court judgment would have covered "the full period that, in all good sense, [plaintiff's] reinstated status would have lasted." *Id.* at 687.

84. *Id.* at 686. The concurrence relied on: *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.) (en banc) (holding that high school students have no constitutional protections against "hair regulations"), *cert. denied*, 409 U.S. 989 (1972); *Lansdale v. Tyler Junior College*, 470 F.2d 659, 662-64 (5th Cir. 1972) (holding that college students are entitled to such protection), *cert. denied*, 411 U.S. 986 (1973); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 276 (applying *Lansdale* to a college-level teacher), *aff'd on reh'g*, 522 F.2d 204 (5th Cir. 1975). The concurrence further noted that "this court has never ruled on whether a teacher at the high school level may have an equal protec-

tiff "would be entitled to his day in court" under *Kelley*.<sup>85</sup> As it would soon turn out, though, an application of *Kelley* would make no difference in the result.

Four years after *Ball*, another plaintiff got "his day in court" when the Fifth Circuit *did* apply *Kelley* in the high school context, upholding a public school board's dress code that prohibited beards not only among teachers but among *all high school employees*.<sup>86</sup> In *Domico v. Rapides Parish School Board*<sup>87</sup> the court found that a high school's "no-beard" regulation passed *Kelley*'s rational basis test because, "[i]n the high school environment, a hairstyle regulation is a reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority, and compelling uniformity."<sup>88</sup> The court, relying on previous Fifth Circuit cases,<sup>89</sup> articulated a bright-line rule:

[A]t the public college level, hairstyle regulations cannot, absent exceptional circumstances, be justified by the school's asserted educational and disciplinary needs, while in the public elementary and secondary schools, such regulations are always justified by the school's needs. . . . [D]espite plaintiffs' assertions, this distinction turns upon the difference between the high school and college environments, not between adolescents and adults.<sup>90</sup>

Interestingly, the *Domico* court went on to quote approvingly from the Seventh Circuit's opinion in *Miller*,<sup>91</sup> which, as noted above,<sup>92</sup> had

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tion claim of constitutional dimension arising from discrimination against him based upon his having a beard or upon the length of his hair." *Ball*, 584 F.2d at 686 (Godbold, J., concurring).

85. *Ball*, 584 F.2d at 687 (Godbold, J., concurring).

86. *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100 (5th Cir. 1982).

87. 675 F.2d 100 (5th Cir. 1982).

88. *Id.* at 102. One wonders whether the court displayed some degree of prejudice itself in finding "teaching hygiene" an interest that would be furthered by banning beards. The pervasive distinction between "clean-shaven" and its logical opposite, like other prejudices, is often manifested subtly. See *supra* notes 16-17 and accompanying text (discussing prejudices against beards).

89. See cases cited *supra* note 84.

90. *Domico*, 675 F.2d at 102 (citations omitted). The Fifth Circuit had already drawn a distinction between state employees at high schools and those at colleges, in *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir.), *aff'd on reh'g*, 522 F.2d 204 (5th Cir. 1975). The court in *Hander* (which was decided before *Kelley*) noted that "the maturity of college students and the marginal relation of a college student's hirsute appearance to administrative and educational processes rendered grooming restrictions in institutions of higher learning constitutionally impermissible." 519 F.2d at 276. The court found that the college's discharge of a professor who had refused to shave off his beard violated the professor's rights under the Fourteenth Amendment. *Id.* at 275. Applying a test in keeping with the yet-to-be-articulated *Kelley* standard, the court found that "it is illogical to conclude that a teacher's bearded appearance would jeopardize his reputation or pedagogical effectiveness with college students." *Id.* at 277.

91. *Domico*, 675 F.2d at 102 (quoting *Miller v. School Dist. No. 167*, 495 F.2d 658, 667 (7th Cir. 1974), *overruled by Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978)).

92. See *supra* note 78 and accompanying text.

already been overruled.<sup>93</sup> The case overruling *Miller, Pence v. Rosenquist*,<sup>94</sup> which was decided in 1978, had specifically found that a school's policy of banning mustaches among school bus drivers lacked "any rational relationship with a proper school purpose."<sup>95</sup> Surprisingly, the Fifth Circuit in *Domico*, which was decided in 1982, noted immediately after quoting *Miller* that *Miller's* rationale, which by its own terms applied only to teachers,<sup>96</sup> was also applicable to "other school system employees, such as *bus drivers*, who also come into regular or substantial contact with the students."<sup>97</sup> Thus, the *Domico* court put itself in the unenviable position of quoting approvingly from a case that had already been overruled by another that in turn had yielded results at odds with *Domico's*, and of then pointing out that the overruled case could be extended to fit *Domico's* present holding.

In summary, it may be said that *Kelley*, as interpreted by the lower federal courts, allows the prohibition of beards among high school bus drivers in the Fifth Circuit,<sup>98</sup> but not of mustaches among high school bus drivers in the Seventh Circuit,<sup>99</sup> and of beards among all high school employees<sup>100</sup> but not college professors<sup>101</sup> in the Fifth Circuit, and of all facial hair among state police officers in the First Circuit<sup>102</sup> and EMTs in the Eighth Circuit,<sup>103</sup> but not necessarily of beards among EMTs nor mustaches among police officers in circuits that have not yet decided these issues. All these hair-splitting distinctions<sup>104</sup> are the result of a "rational basis" analysis of government reg-

93. The full passage in *Domico* quoting from *Miller* appears below:

In the high school environment, the school board "undoubtedly may consider an individual's appearance as one of the factors affecting his suitability for a particular position. . . . If a school board should correctly conclude that a teacher's style of dress or plumage has an adverse impact on the educational process, and if that conclusion conflicts with the teacher's interest in selecting his own lifestyle, we have no doubt that the interest of the teacher is subordinate to the public interest."

*Domico*, 675 F.2d at 102 (quoting *Miller*, 495 F.2d at 667).

94. 573 F.2d 395 (7th Cir. 1978).

95. *Id.* at 398.

96. *Miller v. School Dist. No. 167*, 495 F.2d 658, 667 (7th Cir. 1974); see also *supra* text accompanying note 93 (quoting *Miller*).

97. *Domico*, 675 F.2d at 102 (emphasis added).

98. See *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100 (5th Cir. 1982).

99. See *Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978).

100. See *Domico*, 675 F.2d 100.

101. See *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir.), *aff'd on reh'g*, 522 F.2d 204 (5th Cir. 1975). *Hander*, as noted, did not rely on *Kelley*, having been decided before the Supreme Court rendered that decision, but its analysis was compatible with that in *Kelley*. See *supra* note 90 (discussing same).

102. See *Weaver v. Henderson*, 984 F.2d 11 (1st Cir. 1993).

103. See *Hottinger v. Pope County*, 971 F.2d 127 (8th Cir. 1992).

104. The Ninth Circuit seems to have relieved itself of the problem shortly after *Kelley* was decided by finding that a rational basis would exist for regulations affecting any state employees, at least as regards regulations of the length of head hair. See *Jacobs v. Kunes*, 541 F.2d 222, 224 (9th Cir. 1976). The Ninth Circuit apparently interpreted *Kelley* as a deferral to legislative choice, and not as a basis for finding such

ulations of employees' grooming standards where the employees' rights are analyzed under the Fourteenth Amendment's Due Process Clause. If the distinctions seem inconsistent or even ridiculous, perhaps it is because they are. But this should not be particularly surprising, for it seems relatively clear that substantive due process, which Professor Ely reminds us is akin to "green pastel redness,"<sup>105</sup> is not really a very good place to look for "a citizen's right to choose his own personal appearance."<sup>106</sup> Indeed, there has existed all along, much like Dorothy's ruby slippers,<sup>107</sup> a better fitting constitutional source of that right, one that has received barely any attention at all.

## II. THE NEGLECTED FIRST AMENDMENT

[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.<sup>108</sup>

There has been no shortage of First Amendment "beard cases" that have evaluated the rights of the unshaven under the Free Exercise Clause.<sup>109</sup> The focus here, however, will be on the more generally

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regulations unconstitutional: "This type of test has generally been used in substantive areas where the Court felt it ought to defer to legislative choice. Its use in *Kelley* seems to indicate that the hair length of public employees is such an area." *Id.* (footnote omitted). The Ninth Circuit also claimed that the Court in *Kelley* "rejected a first amendment claim on its merits." *Id.* (citing *Kelley v. Johnson*, 96 S. Ct. 1440, 1444 (1976)). But the Court seems not to have considered First Amendment claims at all in deciding *Kelley*. See *Kelley v. Johnson*, 425 U.S. 238, 251 n.2 (1976) (Marshall, J., dissenting) ("While the parties did not address any First Amendment issues in any detail in this Court, governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well."); see also *supra* text accompanying notes 31-39 (discussing *Kelley*).

105. Ely, *supra* note 30, at 18. For a more complete quotation of the passage, see *supra* text accompanying note 30. Substantive due process, of course, has been criticized much more severely, particularly by those who believe that it permits judges simply to impose their own values under the false sanction of constitutional authority. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 31-32 (1990) (tracing the origins of substantive due process in American jurisprudence and characterizing the doctrine as "an ever flowing fount of judicial power"). If it is true that rights that depend upon substantive due process sources are particularly susceptible to the imposition of judges' own values, it should be unsurprising that results vary.

106. *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting).

107. See *The Wizard of Oz* (Metro-Goldwyn-Mayer 1939).

108. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

109. U.S. Const. amend. I. See, e.g., Abramovsky, *supra* note 6, at 250-59 (discussing case law that has balanced prisoners' free exercise rights against government's penological interests). The right to wear a beard for religious reasons has also been considered in other contexts. See, e.g., *Geller v. Secretary of Defense*, 423 F. Supp. 16, 17 (D.D.C. 1976) (finding that the wearing of a beard by a Jewish Air Force chaplain was protected by the Free Exercise Clause); see also Capt. Thomas R. Folk, *Mili-*



applicable right to wear a beard or other facial hair that may derive from that amendment's protection of freedom of expression.<sup>110</sup>

### A. Preliminary Considerations

Nonverbal conduct has, of course, been recognized as protected expression,<sup>111</sup> but there are dangers in extending that recognition too far into such areas as personal appearance. As one commentator has noted:

[E]ven if personal appearance has meaning associated with it, the wearer must intend to communicate. The problem is that everyone, by definition, has some personal appearance. If we hold that everyone communicates simply by virtue of having a personal appearance, we would be forced to conclude that all people are constantly communicating a message in this way, whether they want to or not. Even discarding one's clothing or shaving one's head would communicate something. But because communication requires intent, the view that personal appearance automatically sends a message cannot be seriously entertained, lest the very notion of communication become virtually meaningless.<sup>112</sup>

According to this view, the wearing of a beard could not be deemed "communication" or "expression" unless the wearer in doing so intended to convey a message. Of course, decisions about whether to shave off facial hair derive from a number of motives, including expressive and religious ones<sup>113</sup> as well as more pragmatic reasons, such as the desire to keep the face warm in the winter<sup>114</sup> or to prevent infection and inflammation around the hair follicles.<sup>115</sup> Nor is there any good reason to suppose that an individual with a beard has opted

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*tary Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53 (1982) (discussing *Geller* and related case law).

110. U.S. Const. amend. I.

111. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (burning of U.S. flag); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (wearing of black armband); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (saluting flag).

112. Peter M. Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 Wis. L. Rev. 1525, 1582 (1993).

113. See *supra* notes 12-14 and accompanying text (proposing and supporting the premise that the decision to wear a beard may derive from motives related to ethnic identity, ideology, or religious belief).

114. See *Nalley v. Douglas County*, 498 F. Supp. 1228, 1229 (N.D. Ga. 1980) (noting that plaintiff "has grown a beard every winter since he has been old enough to grow one" and that his stated motive for growing a beard during the colder months was "to protect his face while working outside and while hunting").

115. A condition known as pseudofolliculitis barbae ("PFB"), a bacterial infection caused by shaving, may affect as many as 50% of African-American males, half of whom cannot shave at all without suffering its effects. *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 796 (8th Cir. 1993). A well-known medical reference notes that "[t]he only consistently effective treatment is to have the patient grow a beard." *The Merck Manual* 2434 (16th ed. 1992). Recent cases in which plaintiffs suffering from PFB have sought protection against shaving requirements imposed by their employers have had varied results. Compare *Bradley*, 7 F.3d at 799 (granting the relief sought)

against shaving for a single reason—a multitude of motives may be present. Parsing out a given individual's reasons for deciding to grow a beard is, to say the least, a difficult task for factfinders, which may be one reason that few courts have started down the obstacle-strewn path of locating the putative right to wear a beard within the mantle of freedom of expression.<sup>116</sup>

Paradoxically, one federal court that has done just that, the Northern District of Georgia, in *Nalley v. Douglas County*,<sup>117</sup> found that a no-beard regulation “infringed [plaintiff]’s freedom of expression and [wa]s therefore unconstitutional”<sup>118</sup> despite the plaintiff’s statement that his motive for growing a beard was “to protect his face while working outside and while hunting.”<sup>119</sup> The court nonetheless stated that it was adhering to the standards of *Kelley v. Johnson*,<sup>120</sup> noting that *Kelley* was “the controlling case, or at least the most relevant United States Supreme Court opinion.”<sup>121</sup> This choice of language is significant, for *Kelley* notably excluded any First Amendment consideration of the issues.<sup>122</sup> *Nalley* was thus decided on the *Kelley* ground that the regulation was “unconnected to any legitimate state goal,”<sup>123</sup> as well as on the much more thought-provoking basis that “the beard regulation infringed Nalley’s freedom of expression and is therefore

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with *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) (denying firefighters a trial on the merits).

116. That is not to say that courts have been entirely unwilling to find a protected freedom of expression in the decision to wear a beard. See, e.g., *Thornton v. Department of Human Resources Dev.*, 107 Cal. Rptr. 892, 896 (Ct. App. 1973) (holding that employee discharged by private employer for refusing to shave off beard was not discharged for misconduct and was therefore eligible for unemployment benefits); *King v. California Unemployment Ins. Appeals Bd.*, 101 Cal. Rptr. 660, 664 (Ct. App. 1972) (holding that the wearing of a beard is symbolic conduct entitled to the constitutional protection of the First Amendment); *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 527 (Ct. App. 1967) (noting that “the wearing of a beard is a form of expression of an individual’s personality”); *id.* at 528 (describing a beard as a symbol and noting that “symbols, under appropriate circumstances, merit constitutional protection”) (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943)). California’s *Finot-King-Thornton* line of cases has made protection of the rights of the bearded in that state something better sought in state than in federal court. See *supra* note 104 (discussing the Ninth Circuit’s treatment of *Kelley*).

117. 498 F. Supp. 1228 (N.D. Ga. 1980).

118. *Id.* at 1229.

119. *Id.*

120. 425 U.S. 238 (1976). *Kelley* and lower courts’ interpretations of it are discussed *supra* part I.

121. *Nalley*, 498 F. Supp. at 1230.

122. See *Kelley*, 425 U.S. at 249 (“The regulation challenged here did not violate any right guaranteed respondent by the Fourteenth Amendment to the United States Constitution . . .”) (emphasis added); *id.* at 251 n.2 (Marshall, J., dissenting) (“While the parties did not address any First Amendment issues in any detail in this Court, governmental regulation of a citizen’s personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well.”); see also *supra* text accompanying notes 31-39 (discussing *Kelley*).

123. *Nalley*, 498 F. Supp. at 1230.

unconstitutional as applied to him."<sup>124</sup> On these combined bases, the court granted summary judgment for the plaintiff.<sup>125</sup>

The *Nalley* court's mention of freedom of expression, as noted,<sup>126</sup> seems particularly inappropriate given that Nalley himself had stated that his reason for wearing a beard was to keep his face warm during the winter.<sup>127</sup> But perhaps the court was thinking not so much about the wearer's motive as about the reasons for which the county may have sought to prohibit beards.<sup>128</sup> Whatever its unstated rationale, the *Nalley* court seems to have opened the door to a different means of analyzing these cases from that employed in *Kelley*, in that *Nalley* considered freedom of expression where *Kelley* did not.<sup>129</sup> Similarly, the California courts have struck down beard restrictions under a freedom of expression analysis,<sup>130</sup> which tends to support the notion that such an analysis is at least viable, even if fraught with certain difficulties. Not the least among these is the danger that recognizing freedom of expression rights in personal appearance would allow the First Amendment to "expend[] its resources on conduct that contributes little, if anything, to robust political debate."<sup>131</sup>

Yet, paradoxically, the very courts that have recognized freedom of expression implications in the decision whether to wear a beard have eschewed inquiries into the wearers' motives. This was, of course, exactly what was done in *Nalley*<sup>132</sup> and is characteristic of California's line of cases as well.<sup>133</sup> As one California appellate court noted in the context of examining a beard-wearer's motive for the purpose of assessing its impact on First Amendment protection, "the essential fact is the wearing of a beard, not the reason for it, and that the beard

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124. *Id.* at 1229.

125. *Id.* at 1231.

126. *See supra* text accompanying notes 117-19.

127. *See supra* note 114 (quoting from Nalley's statement about his reasons for growing a beard).

128. Arguably, cases should not turn on such difficult-to-verify facts as a given wearer's reasons for deciding not to shave. For one thing, such motives may be multiplex. *See supra* text preceding note 117 (discussing beard-wearers' motives). For another, such a stated-motive-based jurisprudence would reward those who, whatever their true motives, are capable of stating calmly in open court that their choice to wear a beard is for expressive reasons, at the expense of those who, like Nalley himself, admit that the motive is purely a pragmatic one. A focus on the relation of the regulation itself to First Amendment freedoms would obviate the need for such inquiries.

129. *See supra* note 122.

130. *See cases cited supra* note 116.

131. Tiersma, *supra* note 112, at 1584. *See also supra* text accompanying note 112 (articulating the related proposition that protected nonverbal expression should be limited to that in which communication is intended).

132. *See Nalley*, 498 F. Supp. at 1229 (noting that plaintiff's motive for growing a beard was "to protect his face" but nonetheless holding "the beard regulation infringed Nalley's freedom of expression and is therefore unconstitutional").

133. *See cases cited supra* note 116.

itself, as such, entitles the wearer to constitutional protection."<sup>134</sup> This approach gives rise to the question whether a cohesive freedom of expression theory can be articulated that reconciles the apparent dissonance between the insignificance of the wearer's motive and the granting of First Amendment protection. How, it may be asked, can freedom of expression be protected before it is shown that expression is intended? Of equal practical importance is whether such a theory would comport with the Supreme Court's own First Amendment precedent. It is the thesis of this Note that a theory satisfying both criteria may be developed.

B. *Toward a Freedom of Expression Approach to Facial Hair Regulations*

The Supreme Court has held that freedom of expression under the First Amendment includes the right not to be the "courier" of a message promoted by the government.<sup>135</sup> This right to decline to carry the government's message includes the right to refuse to engage in symbolic conduct such as the saluting of a flag.<sup>136</sup> To the extent that mandates to be "clean-shaven" are mandates of expressive behavior, the First Amendment is implicated. The motive of the beard-wearer becomes relatively unimportant when one examines regulations from this perspective: what matters is simply that the individual does *not* wish to present the face the government requires, and thereby carry the government's message, by being "clean-shaven." Thus, the statement that "the beard itself . . . entitles the wearer to constitutional protection"<sup>137</sup> makes sense.

For purposes of illustration, this approach may be developed by engaging in a reexamination of *Kelley*. It will be remembered that the *Kelley* majority found that the two possible rational bases for the grooming standards were the need to make police officers recognizable to the general public and to promote "esprit de corps" within the department.<sup>138</sup> As the Court put it:

The overwhelming majority of state and local police of the present day are uniformed. This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself.

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134. *King v. California Unemployment Ins. Appeals Bd.*, 101 Cal. Rptr. 660, 664 (Ct. App. 1972) (citing *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520 (Ct. App. 1967)).

135. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

136. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

137. *King*, 101 Cal. Rptr. at 664 (citation omitted).

138. *Kelley v. Johnson*, 425 U.S. 238, 248 (1976).

Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment.<sup>139</sup>

But either of these rational justifications may as readily be described as a mandate of expressive behavior. If beardlessness and short haircuts are, like uniforms, means by which the general public is informed that the person exhibiting those traits is a member of the police force, requiring a police officer to exhibit those traits is tantamount to requiring that officer to make a nonverbal statement.<sup>140</sup> Similarly, banning beards to promote "esprit de corps" is a mandate of expressive behavior addressed to a different audience—fellow members of the police force. The uniformed, "clean-shaven" officer with a short haircut is communicating the following message to his fellows: "I, like you, wear a uniform. I, like you, keep my hair cut short and shave my face each morning before coming to work."<sup>141</sup> Most significantly, and in marked contrast to uniform requirements, bans on facial hair mandate the expressive behavior during the employees' *off-duty* hours.<sup>142</sup>

The "rational bases" that overcame the officers' Fourteenth Amendment liberty interests in *Kelley* may thus be characterized as mandates of expressive behavior that carry over into the officers' off-duty lives. Therefore, the First Amendment's protection of freedom of expression is implicated, even if only minimally. The important question then becomes the extent to which governmental interests may override the protected freedom. But before reaching the issue of whether and to what extent government may mandate expressive behavior in the *workplace*, it is necessary to examine the government's power to mandate expressive behavior in the *first* place.

### C. *The Jurisprudence of State-Mandated Expressive Behavior*

In *Wooley v. Maynard*,<sup>143</sup> which was decided almost exactly one year after *Kelley*,<sup>144</sup> the Court held that the State of New Hampshire could not constitutionally require the Maynards to display the state

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139. *Id.*

140. Of course, there is no First Amendment problem with requiring an officer to wear his uniform, but that is, as noted, not a requirement that continues into the officer's off-duty hours. See *supra* note 9 and accompanying text; see also *infra* text accompanying notes 157-59 (discussing uniforms and the related principle that the state may generally mandate employees' speech while on the job).

141. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (stating that "[s]ymbolism is a primitive but effective way of communicating ideas" and mentioning "uniforms and black robes" as examples of state symbols of "rank, function, and authority").

142. See *supra* note 9 and accompanying text.

143. 430 U.S. 705 (1977).

144. *Kelley* was decided on April 5, 1976. 425 U.S. at 238. *Wooley* was decided on April 20, 1977. 430 U.S. at 705.

motto, "Live Free or Die," on their vehicle license plates.<sup>145</sup> The Court decided that First Amendment protection of the right *not* to display a government-sponsored message was constitutionally necessary because "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."<sup>146</sup> The *Wooley* Court, in reaching that conclusion, was quite rationally applying a recognized principle dating back at least as far as the 1943 case of *West Virginia State Board of Education v. Barnette*,<sup>147</sup> which held that a state school board could not constitutionally compel a student to salute the flag.<sup>148</sup>

Police or other government employees required to present a "clean-shaven" face, like students compelled to salute the flag, are fostering an ideology.<sup>149</sup> Anti-beard regulations, whether adopted ostensibly to promote "esprit de corps" or to facilitate recognition of police officers by the public, are thus nonetheless regulations of a form of symbolic expression.<sup>150</sup> Indeed, common sense (never entirely inappropriate in legal scholarship) would suggest that such regulations are adopted by departments primarily to "make a statement" to the public about the government employees, even if the stated reasons for adopting the regulations are phrased somewhat differently.<sup>151</sup> The high school

145. *Wooley v. Maynard*, 430 U.S. 705, 717 (1976). Interestingly, the Court noted, in addressing an objection by the dissent, that the majority holding could not readily be extended to the national motto, "In God We Trust," that appears on currency, because currency "is passed from hand to hand," whereas an automobile "is readily associated with its operator." *Id.* at 717 n.15. Faces, of course, are even more readily associated with those behind them.

146. *Id.* at 714.

147. 319 U.S. 624 (1943). The following rather famous passage eloquently supports the rationale employed in *Wooley*:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Barnette*, 319 U.S. at 642 (emphasis added) (footnote omitted).

148. *Id.*; see also *Wooley*, 430 U.S. at 714 (explaining, citing, and applying *Barnette*).

149. See *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 527 (Ct. App. 1967) (noting that "the wearing of a beard is a form of expression of an individual's personality"); *id.* at 528 (describing a beard as a symbol and noting that "symbols, under appropriate circumstances, merit constitutional protection") (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943)).

150. See *supra* text accompanying note 140.

151. See *Ham v. South Carolina*, 409 U.S. 524, 530 (1973) (Douglas, J., concurring in part and dissenting in part) (noting that "prejudices invoked by the mere sight of non-conventional hair growth are deeply felt" and that such growth may symbolize "rebellion against traditional society"); *Bradley v. Pizzaco of Nebraska*, 7 F.3d 795, 798 (8th Cir. 1993) (noting that a public opinion survey had indicated that "up to twenty percent of customers would 'have a negative reaction' to a delivery person wearing a beard"). It stands to reason that such negative associations would influence management decisions to ban beards, especially among employees who deal with the public.

teachers, the bus drivers, the park naturalists, and the EMTs, no less than the police officers in *Kelley*, are required to be "clean-shaven" in large part because "clean-shaven" faces send those messages described above, or, more precisely, because those faces do not convey the messages that viewers with "beard prejudices" are likely to infer.<sup>152</sup> The government employer wants its employees to "look" a certain way that "tells" the public (or other government employees) something "good" about that government employer. Like the Maynards in *Wooley*, who attempted to remove or cover up the state motto displayed on their license plates,<sup>153</sup> the public employee who would grow a beard in violation of facial hair regulations does not wish to be "the courier for [the government's] message."<sup>154</sup>

At least three objections to this application of *Wooley* to the regulations at issue in *Kelley* are readily apparent. The first is that the plaintiffs in *Kelley* were police officers who, unlike the Maynards, have assumed a rather special relationship with the government. Indeed, this is itself a legitimate objection, given that police officers must enforce the laws of the state, exert authority over its citizens, and, perhaps most importantly, exercise duties for which the state is answerable to an extent unequaled in most other government employment contexts. The response to this objection is that a First Amendment analysis would quite possibly offer the same result as *Kelley* in the case of police officers.<sup>155</sup> But it must be remembered that the *Kelley* doctrine has been expanded to permit regulations of facial hair among such employees as teachers, bus drivers, and EMTs, none of whom enforce the law. It is reasonable, therefore, to conclude that, even if the identical result in *Kelley* were to be reached under a First Amendment analysis, the results of some applications of *Kelley* would still be deserving of reevaluation.<sup>156</sup>

The second objection to the application of the *Wooley* doctrine to any public employees, whether police, teachers, or whomever, is that the state has considerable authority to mandate speech among its employees while they are on the job. It would be ludicrous, for example, to assert that a police officer's First Amendment freedoms were being jeopardized because she was required to recite *Miranda* warnings to arrestees,<sup>157</sup> or for a high school history teacher to claim that his rights

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152. See Wogalter & Hosie, *supra* note 22, at 590-91 (summarizing results of scientific study that found that persons with beards were perceived as, among other things, less sociable); see also *infra* text accompanying notes 162-65 (discussing nonverbal messages that may be sent by the "clean-shaven" face in light of prejudices against beards).

153. *Wooley v. Maynard*, 430 U.S. 705, 708 & n.4 (1977).

154. *Id.* at 717.

155. See *infra* text accompanying notes 187-89 (reexamining the issue in *Kelley* under a freedom of expression analysis).

156. See *infra* part II.E (reevaluating *Kelley's* progeny).

157. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

under *Wooley* were being violated because he had been ordered by the school administration to discuss the American Revolution in class.<sup>158</sup> Similarly, uniforms and dress codes are somewhat beyond serious First Amendment scrutiny, or at least are unlikely to be struck down on free speech grounds.<sup>159</sup> Uniform and dress code requirements, however, as well as mandates of "pure speech," are readily distinguishable from regulations of facial hair by virtue of the fact that the latter mandate the same expressive behavior *off* the job as at the workplace.<sup>160</sup>

The third and probably most significant objection to the application of *Wooley* to the regulations at issue in *Kelley* relates to the distinction between "speech" and "symbolic conduct" or "expressive behavior." The state-mandated message in *Wooley*, "Live Free or Die,"<sup>161</sup> was one expressed in words. It was, therefore, more readily perceived as "speech." By contrast, facial hair regulations, even if they are at root mandates of expressive behavior, do not command that those who are to obey them actually utter or display any words. The message promoted by "clean-shavenness" is symbolic and nonverbal. The beardless face may say, "I am not a nonconformist,"<sup>162</sup> or "I am clean,"<sup>163</sup> or "I have nothing to hide."<sup>164</sup> Indeed, it may say to the viewer, about the person behind the face, precisely the *opposite* of whatever precon-

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158. *Cf. Palmer v. Board of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (holding that public school teacher had no free exercise right to disregard the prescribed curriculum).

159. *See, e.g., East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838 (2d Cir. 1977) (en banc) (holding that dress code requiring that teacher wear a necktie did not impermissibly infringe his First Amendment right to free expression). *But see Board of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (listing "uniforms and black robes" as examples of communicative symbolism).

160. A secondary distinction between facial hair regulations and uniform requirements is that the face is the principal focus of nonverbal expression. Indeed, we refer to such facial movements as the frown or smile as "expressions." Studies suggest that meanings of facial expressions may be universally understood, transcending cultural and linguistic boundaries. *See generally* James A. Russell, *Is There Universal Recognition of Emotion From Facial Expression? A Review of the Cross-Cultural Studies*, 115 *Psych. Bull.* 102, 102-41 (1994) (reviewing data from numerous studies over several decades). Regulations affecting such an essential aspect of one's face as whether it is bearded thus implicate freedom of expression (albeit not necessarily of political expression) to a greater extent than do dress codes and uniform requirements. *Cf. Wogalter & Hosie, supra* note 22, at 590 (comparing perceptions of bearded and "clean-shaven" faces).

161. *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

162. *See supra* notes 13, 16, 19, and accompanying text (discussing the association of beards with nonconformity).

163. *See supra* note 17 and accompanying text (commenting on the association of beards with uncleanliness).

164. *See supra* notes 16, 20, and accompanying text (discussing the perception that men with beards "have something to hide").



ceived notions the viewer may have about people with beards.<sup>165</sup> But it does not say these things in words.

And so the question remains: Why should state-mandated expressive behavior (i.e., "symbolic conduct") be subject to the same First Amendment scrutiny as the state-mandated "pure speech" at issue in *Wooley*? Perhaps the best answer offered by the Supreme Court lies not in *Wooley* itself nor even exclusively in *Barnette*, although the latter did involve state-mandated expressive behavior. But the expressive behavior in *Barnette*, the saluting of the flag in public schools, was arguably connected with another, "purer" form of speech, the recitation of the "Pledge of Allegiance."<sup>166</sup> A better source (or at least another source) of authority for the proposition that state-mandated expressive behavior is subject to First Amendment analysis is found in a case decided nine years *before Wooley*. That case is *United States v. O'Brien*.<sup>167</sup>

#### D. *The O'Brien Test and its Application*

*O'Brien* upheld the application of a statute prohibiting the wilful destruction or mutilation of Selective Service certificates, or "draft cards," against protesters who had publicly burned their draft cards to protest the Vietnam Conflict, an act of symbolic conduct or expressive behavior.<sup>168</sup> The Court set up a four-part test for analyzing government regulations that incidentally infringe on First Amendment freedoms:

[W]e think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3]

165. Perhaps the best evidence that such prejudices exist is that the overwhelming majority of male politicians are "clean-shaven." Politicians as a group are, almost by definition, extremely sensitive to public opinions and attitudes. See Snowden, *supra* note 16, at 219; cf. Wogalter & Hosie, *supra* note 22, at 591 ("Clean-shaven faces were regarded more favorably than bearded faces. They appeared younger, more attractive, and more sociable.") (summarizing results of scientific study).

166. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (explaining *Barnette* and noting that the state statute at issue therein "required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures"). It should be noted, however, that *Barnette* explicitly mentioned only one exception (members of the armed forces) to its declared principle that "no official . . . can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word *or act* their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 & n.19 (1943) (emphasis added). The Court's use of the phrasing "by word or act," as opposed to "by word or word combined with act," would seem to indicate that the state-mandated act of the flag salute was being considered independently of the accompanying verbal pledge. Moreover, the single exception to the general principle did not contemplate non-military government employment. Thus, *Barnette* could quite reasonably be read as subjecting any government-mandated expressive behavior in the workplace to First Amendment scrutiny.

167. 391 U.S. 367 (1968).

168. See *id.* at 386.

if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>169</sup>

The state's power to regulate being plenary (in contrast, supposedly, to that of the federal government, which is said to be limited to enumerated powers),<sup>170</sup> the first hurdle is rather easily overcome when applying the *O'Brien* test to the regulations at issue in *Kelley*: such regulations are within the state's constitutional power. The second hurdle, that the regulations further an important or substantial government interest, is scarcely any greater an obstacle. One can easily accept that recognition of police officers by the public and "esprit de corps" are both important state interests. It is upon reaching the third part of the *O'Brien* test that the *Kelley* regulations, at least those banning beards, come up against a rather imposing wall. For, as we have seen, the state's interest is entirely related to the suppression of free expression.<sup>171</sup> The regulations banning beards do so to "send a message" to the public, ostensibly to achieve recognizability but probably also to inform the public that the police officer is neither unclean,<sup>172</sup> a nonconformist,<sup>173</sup> nor trying to hide something.<sup>174</sup> In either case, whether the "message" is mandated to promote recognizability

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169. *Id.* at 377 (bracketed numbers added). This quoted passage was characterized as the "crux of the Court's opinion." *Id.* at 388 (Harlan, J., concurring).

170. It is widely accepted that the commerce power has brought the federal government to a stage where the scope of its regulatory authority is nearly plenary. *See, e.g.,* Bork, *supra* note 105, at 158 ("[T]he expansion of Congress's commerce, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1234 (1994) (contrasting the language of the Commerce Clause with its current scope); *see also infra* note 239 (discussing the commerce power specifically as a source of authority to regulate work conditions). As this Note went to press, a Supreme Court case deciding the constitutionality of a federal statute regulating the intrastate possession of firearms, enacted pursuant to the commerce power, awaited decision. *See* *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (U.S. Apr. 18, 1994) (No. 93-1260). For commentary on the scope of the modern commerce power, its history, and the *Lopez* case, see James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 Fordham L. Rev. 1795 (1994) [hereinafter *Shooting*]. This author predicts, optimistically, that *Lopez*, which held the statute to be beyond the commerce power, will be affirmed. *Cf. infra* note 276 and accompanying text (discussing Bill of Rights protections in relation to the expansion of the commerce power).

171. *See supra* text accompanying notes 139-40, 162-65.

172. *See supra* note 17 and accompanying text (commenting on the association of beards with uncleanness).

173. *See supra* notes 13, 16, 19, and accompanying text (discussing the association of beards with nonconformity).

174. *See supra* notes 16, 20, and accompanying text (discussing the perception that men with beards "have something to hide").

or to negate possible prejudiced responses to cops on the beat,<sup>175</sup> the regulation is nonetheless a mandate of expressive behavior.

Nor is it acceptable to counter that this third part of the *O'Brien* test does not apply to state *mandates* of expressive behavior but only to state *infringements* of free expression, for the explicit rationale articulated in *Wooley* is that “[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant *right to decline* to foster such concepts.”<sup>176</sup> Or, as the *Barnette* Court put it: “To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”<sup>177</sup> This, of course, the Court refused to do.<sup>178</sup> Thus, freedom of expression and freedom to decline to express are part and parcel of the same right.

The objection that the *O'Brien* test does not apply to state mandates of expressive behavior is thus without merit. It will be recalled that *O'Brien* was introduced into the discussion to refute the premise that state-mandated expressive behavior is for some reason subject to less scrutiny than was the state-mandated “pure speech” of *Wooley*.<sup>179</sup> Although in *O'Brien* the Court found that the statute in question met all the requirements imposed by its test,<sup>180</sup> including that the governmental interest in enacting the statute be “unrelated to the suppression of free expression,”<sup>181</sup> the test itself was nonetheless formulated in a case *addressing expressive behavior* (the burning of draft cards). *Wooley*, decided after *O'Brien*, presumably took into account the foregoing “symbolic conduct” jurisprudence of *O'Brien*’s clearly articulated four-prong test.<sup>182</sup> The third prong, that “the governmental

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175. Arguably, the state’s interest in maintaining the public’s respect for the authority of police officers may be sufficient to overcome any First Amendment objections. Indeed, attitudes toward beards may affect public perceptions to the extent that police displaying them may receive less public respect. Additionally, a beard that is allowed to grow too long becomes something of a liability in a combat situation, when it may provide a convenient handle for an opponent. Most importantly, police officers exercise the authority of the state over citizens to an extent virtually unparalleled in other areas of public employment. But while all of these considerations may necessitate balancing in favor of the state’s interests, none provides a sound reason for avoiding the First Amendment inquiry.

176. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added).

177. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

178. *Id.* at 642.

179. See *supra* text accompanying note 167.

180. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

181. *Id.*

182. Further, *O’Brien* was decided after *Barnette*, which had already applied First Amendment protection to mandates of expressive behavior. The formulation of the *O’Brien* test was therefore temporally surrounded by Supreme Court recognition that mandates of expression are subject to First Amendment scrutiny. The third part of the *O’Brien* test could not, therefore, have been limited to “suppression” at the expense of “compulsion” without containing an explicit provision indicating that its meaning was so restricted.

interest [be] unrelated to the suppression of free expression,"<sup>183</sup> must therefore apply with equal force to mandates of expression and to suppression of free expression. The two are simply complementary manifestations of the same right, with the consequence that a law enacted to further an interest related to the *compulsion* of free expression is just as unable to surmount the obstacle imposed by the third part of the *O'Brien* test as one enacted to further an interest related to the *suppression* of free expression. Such a law would thus *not* be subject to the same deferential standard of review applied to the statute at issue in *O'Brien*.

It should not matter that a given public employee's reason for wanting to wear a beard is not itself related to free expression, as was the case with Mr. Nalley, whose sole reason for cultivating facial hair was to protect his face from the cold. Put another way, the police officer or other government employee who would decline to foster the ideological concepts inherent in "clean-shavenness"<sup>184</sup> need not, one would hope, prove his own motives for wanting to grow a beard. All he really need establish under the *Wooley* rationale<sup>185</sup> is that he does *not* wish to be forced to foster the state's viewpoint at his own expense. Indeed, this is precisely the approach taken by the California courts that have recognized freedom of expression rights for the bearded.<sup>186</sup>

A finding that government restrictions on beards are unable to surmount the third part of the *O'Brien* test does not, however, *necessarily* make the regulations unconstitutional as applied to police officers. The Court has not said that a regulation that fails the *O'Brien* test is unconstitutional; rather, it has said that one that passes the test *is* constitutional.<sup>187</sup> This is an especially important distinction where the regulations affect police officers or other public employees, because even First Amendment protections may sometimes be balanced away in the context of public employment. Indeed, *Kelley*, after citing cases that had restricted the freedom of expression of government employ-

183. *O'Brien*, 391 U.S. at 377.

184. See *supra* text accompanying notes 162-65; see also *supra* notes 13, 19, and accompanying text (discussing the perception that those who wear beards are nonconformists).

185. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1976) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

186. See *King v. California Unemployment Ins. Appeals Bd.*, 101 Cal. Rptr. 660, 664 (Ct. App. 1972) ("[T]he essential fact is the wearing of a beard, not the reason for it, and that the beard itself, as such, entitles the wearer to constitutional protection.") (citation omitted); see also *supra* note 116 (describing the line of cases in the California Court of Appeal that have recognized beards as constitutionally protected under freedom of expression); note 134 and accompanying text (discussing the *King* language and its implications in the context of formulating a cohesive freedom of expression theory).

187. See *supra* text accompanying note 169 (setting forth the *O'Brien* test).

ees,<sup>188</sup> reasoned that, because “state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.”<sup>189</sup> Although *Kelley* analyzed the police officers’ rights under substantive due process, it implied that the same result may have been reached, at least as to police officers, under a freedom of expression analysis.

But if the proffered First Amendment analysis<sup>190</sup> were to be used in analyzing beard regulations of other government employees, one would expect different results from those that the lower courts’ application of *Kelley* have yielded.<sup>191</sup> The all-or-nothing rational basis standard has produced inconsistent results and has arguably subjected many government employees to restrictions on their personal appearance that infringe their protected freedom of expression in the hope of obtaining a public benefit that is, at best, of questionable value.

#### E. Reevaluating *Kelley*’s Progeny Under a First Amendment Analysis

A freedom of expression analysis in *Kelley* may well have yielded the same results as did the substantive due process analysis that was actually employed. But the similarity of results under the two approaches is not as likely to occur in other government employment contexts. In the case of teachers, for example, bans on beards have been justified on the basis that such regulations further the school’s interest “in teaching hygiene, instilling discipline, asserting authority, and compelling uniformity.”<sup>192</sup> Although these purposes arguably “provide a rational basis for a rule limiting [the teacher’s] liberty”<sup>193</sup> under a *Kelley* substantive due process analysis,<sup>194</sup> a First Amendment analysis would require a balancing of the state’s legitimate goals against the teacher’s protected “right to decline to foster such concepts.”<sup>195</sup> Although regulations that require the teacher to shave his

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188. *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *United States Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

189. *Kelley*, 425 U.S. at 245.

190. This analysis was not employed in *Kelley*, perhaps in part because *Kelley* was decided before *Wooley*. See *supra* note 144 and accompanying text (discussing the chronological order of the two cases).

191. See *supra* part I.

192. *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 102 (5th Cir. 1982); see also *supra* note 88 (discussing this passage from *Domico* and questioning whether the acceptance of the “hygiene” rationale does not indicate anti-beard prejudice).

193. *Domico*, 675 F.2d at 102.

194. See *id.* (citing *Kelley v. Johnson*, 425 U.S. 238, 248 (1976)).

195. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); see also *supra* note 188 and accompanying text (citing cases in which government employees’ First Amendment rights have been balanced against governmental interests).

face each day and present the appearance that the school requires are mandates of expressive behavior, they are not necessarily unconstitutional, and may be upheld if the state's interest is great in relation to the infringement of free expression.<sup>196</sup> A particularly important consideration would be whether means less restrictive of the teachers' freedom of expression were available to foster the concepts promoted by the school, as articulated in the fourth part of the *O'Brien* test.<sup>197</sup>

Considering that dress code requirements, like uniforms, could achieve adequate results with far less infringement,<sup>198</sup> and that teachers neither enforce the laws of the state nor ordinarily engage in dangerous encounters with suspects,<sup>199</sup> the balance would probably be struck in favor of the teachers' rights.<sup>200</sup> Similar results could be expected in the cases of such employees as school bus drivers and others "who also come into regular or substantial contact with the students."<sup>201</sup>

The application of a First Amendment analysis to the EMTs in *Hottinger v. Pope County*<sup>202</sup> would probably also yield a decision favorable to the plaintiffs, upholding their right to be bearded. In *Hottinger*, the court found the ban on beards rationally related to the promotion of "esprit de corps" and the presentation to the public of "a uniform, professional image."<sup>203</sup> While noting that the regulation was not necessarily the best way to meet the stated goals,<sup>204</sup> the court nonetheless upheld the regulation under its interpretation of the *Kelley* standard, concluding that the "policy may be mistaken or even silly, but it doesn't violate the Fourteenth Amendment."<sup>205</sup> Thus, the

196. See cases cited *supra* note 188; see also *supra* text accompanying note 187 (clarifying the significance of the *O'Brien* test).

197. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

198. See *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 846 (2d Cir. 1977) (en banc) (holding that dress code requiring teacher to wear a necktie did not impermissibly infringe his First Amendment right to free expression). *But see id.* at 865 (Oakes, J., dissenting) (criticizing the majority's treatment of the First Amendment claim and noting that when a First Amendment interest is asserted, the analysis should not proceed along the lines of the *Kelley* rational relationship test). In any event, dress codes for teachers, like uniforms for other government employees, are limited in their infringement to the hours of employment, in contrast to regulations of facial hair.

199. See *supra* note 175 and accompanying text (noting some special aspects of police work that distinguish it from other government jobs). Of course, it could be countered that in some urban areas, teachers face dangers not entirely unlike those faced by police.

200. See *East Hartford Educ. Ass'n*, 562 F.2d at 865 (Oakes, J., dissenting) (noting that when a First Amendment interest is asserted, the analysis should not proceed along the lines of the *Kelley* rational relationship test but should involve an actual balancing of the interests at stake).

201. *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 102 (5th Cir. 1982).

202. 971 F.2d 127 (8th Cir. 1992).

203. *Id.* at 128.

204. *Id.*

205. *Id.* at 129.

court affirmed the district court's grant of summary judgment in favor of the defendant, Pope County.<sup>206</sup>

Notably, both of the stated objectives clearly translate into state-mandated expressive behavior. "Esprit de corps," as has been discussed,<sup>207</sup> is an effect derived from nonverbal communication. The "professional image" objective not only is a mandate of expressive behavior but also is a rather blatant submission to the prejudice that "clean-shavenness" equates with professionalism.<sup>208</sup> The regulation, which survived the deferential *Kelley* standard, was enacted to achieve stated goals that could be achieved by far less restrictive means. A "professional image" and "esprit de corps" can be obtained by means of uniforms without affecting the EMTs' off-duty behavior and appearance. Indeed, the court itself characterized the regulation at issue as "mistaken or even silly,"<sup>209</sup> which would seem to indicate that the "rational basis" for the regulation would not likely survive if balanced against First Amendment freedoms.

In the case of EMTs, teachers, and many other government employees, analyzing restrictions on beards as state-mandated expressive behavior would trigger inquiries deriving from First Amendment jurisprudence, as opposed to the ineffectual substantive due process analysis employed in *Kelley*. This First Amendment analysis would indeed seem to be required when one considers the third prong of the *O'Brien* test, that "the governmental interest [be] unrelated to the suppression of free expression,"<sup>210</sup> together with the rationale articulated in *Wooley* that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."<sup>211</sup>

The appropriate standard for evaluating beard regulations that have been adopted to promote an "image" is, therefore, one that takes account of existing First Amendment jurisprudence regarding mandates of expressive behavior and that examines both the degree of the government's interest and whether the interest may be advanced by less restrictive means. The competing needs of the government and the individual would thereby be reconciled following the degree of judicial inquiry that is required when important individual rights are at stake. The existing standard, as established in *Kelley* and applied broadly in various government employment contexts, contrasts markedly with this mode of analysis.

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206. *Id.*

207. See *supra* text following note 140.

208. See *supra* text accompanying note 22 (discussing the origins of this association).

209. *Hottinger v. Pope County*, 971 F.2d 127, 129 (8th Cir. 1992).

210. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

211. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

But even if one accepts that this *Wooley-O'Brien* standard is the appropriate one in the case of the facial hair regulations examined above, some lingering questions remain. The suitability of employing a First Amendment analysis would remain uncertain if and when regulations of facial hair were adopted with the stated goal being entirely unrelated to expressive behavior. For example, such regulations may be said to be imposed solely for safety reasons, as with the too-long beard that may catch in machinery. Also, the effect, if any, of the proffered First Amendment analysis on private employers seeking to ban beards in the workplace remains an open question. Lastly, relatedly, and perhaps most significantly, remains the question of how to evaluate federal administrative rules that appear to regulate facial hair in the private workplace. The question is not hypothetical, for the regulation exists.

### III. FACIAL HAIR AND THE ADMINISTRATIVE STATE

Liberty is too priceless to be forfeited through the zeal of an administrative agent.<sup>212</sup>

Thus far this Note has examined the regulation of facial hair only in the *government* employment context, first in terms of substantive due process under *Kelley*,<sup>213</sup> then under a free expression standard deriving from *Barnette*, *O'Brien*, and *Wooley*.<sup>214</sup> But government has now begun to regulate facial hair in the *private* workplace, based on interests related to the safety and health of the workers themselves. In an effort to reduce employee exposure to airborne health hazards, regulations have been adopted that require employers to provide any employees who may be exposed to such hazards with respirators, which often involve the use of face masks. The regulations also require that employers provide training in the use of the respirators and that the employees use the respirators as trained. Significantly, the training standards have been interpreted as providing that employees must be "clean-shaven" in order to maximize the effectiveness of the seal between the mask and the face. This part will evaluate the federal regulation in detail, examining its ambiguities and, under several approaches, its validity.

#### A. *The Regulation and its Ambiguities*

The Department of Labor's Occupational Safety and Health Administration ("OSHA") has made, and enforces, rules affecting workplace safety, including rules that require that respirators be provided to protect employees from "occupational diseases caused by breathing

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212. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting).

213. *See supra* part I.

214. *See supra* part II.



air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors.”<sup>215</sup> The rules apparently place responsibilities on both employers *and* employees. Subparagraphs two and three of paragraph (a) of 29 C.F.R. § 1910.134 provide:

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

(3) *The employee* shall use the provided respiratory protection in accordance with instructions and training received.<sup>216</sup>

After providing standards by which the employer must establish a “minimal acceptable program,”<sup>217</sup> section 1910.134 goes on to provide for the selection of respirators,<sup>218</sup> to set minimal requirements for air quality related to respirator use,<sup>219</sup> and, finally, at paragraph (e), to describe standards for use and training.<sup>220</sup> Subparagraph (5)(i) is particularly relevant:

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. *Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check.*<sup>221</sup>

Despite the use of the passive voice in the italicized section immediately above, it appears that “the worker’s diligence in observing these factors”<sup>222</sup> is to be checked periodically *by the employer*. Indeed, no other meaning could be intended, because section 1910.134 in its entirety is directed exclusively to employers and employees and because it would be ludicrous to interpret the sentence as imposing a require-

215. 29 C.F.R. § 1910.134(a)(1) (1994).

216. 29 C.F.R. § 1910.134(a)(2)-(3) (1994) (emphasis added). Congress apparently intended to delegate the regulatory authority to reach the employees themselves. See 29 U.S.C. § 651(b), (b)(2) (1988) (declaring the purpose and policy to be “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . by providing that employers *and employees have separate and dependent responsibilities and rights with respect to achieving safe and healthful working conditions*”) (emphasis added).

217. See 29 C.F.R. § 1910.134(b) (1994).

218. See *id.* § 1910.134(c).

219. See *id.* § 1910.134(d).

220. See *id.* § 1910.134(e).

221. *Id.* § 1910.134(e)(5)(i) (emphasis added).

222. *Id.*

ment that workers check themselves. This, in turn, begs another question: Does the sentence then require that employers mandate that employees mitigate "conditions [that] prevent a good face seal[?]"<sup>223</sup> Must an employer require that employees refrain from wearing a "beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses,"<sup>224</sup> while on the job? At first glance, the literal language would seem to indicate otherwise: the sentence only requires that the employer make a "periodic check" to ascertain the "worker's diligence in observing these factors."<sup>225</sup> But the word "observe" is troubling, implying as it does that some duty has been imposed upon the employee. Indeed, if one looks to section 1910.134(a)(3),<sup>226</sup> one finds that such a duty *has* been imposed: the employee is required to use the respirator that the employer has provided "in accordance with instructions and training received."<sup>227</sup> Given that subparagraph (e)(5)(i) provides for "fitting instructions" and requires that "[r]espirators shall not be worn when conditions prevent a good face seal,"<sup>228</sup> the logical inference is that any employees who may be required to wear respirators are prohibited by federal regulation from reporting to work with a "beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses,"<sup>229</sup> at least if any of those accoutrements prevents a good face seal. Further, because the employer is to evaluate "the worker's diligence in observing these factors . . . by periodic check,"<sup>230</sup> subparagraph (e)(5)(i) seems, after closer scrutiny, to require the employer to enforce employee compliance in mitigating these factors. In any event, at least one federal appellate court has expressed the opinion that the provision should be construed as directly regulating employees' personal appearance.<sup>231</sup> Moreover, the requirement seems to be that the face be completely "clean-shaven"—even a bit of stubble has been said to interfere with the seal between the face and the mask in a mask-type respirator.<sup>232</sup>

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223. *Id.*

224. *Id.*

225. *Id.*

226. *See supra* text accompanying footnote 216 (quoting regulation).

227. *Id.* § 1910.134(a)(3).

228. *Id.* § 1910.134(e)(5)(i) (1994).

229. *Id.*

230. *Id.*

231. *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1272 (D.C. Cir. 1988) ("OSHA has even regulated matters of personal appearance. Thus, it has required that workers trim their beards to allow a good face-seal when using respirators.") (citing 29 C.F.R. § 1910.134(e)(5)(i)).

232. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1120 & n.8 (11th Cir. 1993) (holding that 29 C.F.R. § 1910.134(e)(5)(i) provides "evidence that safety concerns necessitate the ban on shadow beards" of extremely short length). The court noted, however, that the OSHA regulation did not directly apply to the government employer in *Fitzpatrick*. *See id.* at 1121. Thus, paradoxically, the court's interpretation of the regulation was arguably dictum as applied to situations in which the regulation

Skullcaps and eyeglasses are items that may be adapted or removed at the workplace as needed in order to conform to the requirements of the regulations.<sup>233</sup> Once off the job, the employee is free to wear whatever skullcaps or eyeglasses he chooses. This is, however, hardly the case with beards.<sup>234</sup> Indeed, one formerly bearded employee, a carpenter, was displeased with OSHA's interpretation of the regulation and his employer's enforcement of it, as indicated by a letter to the editor that appeared in a Georgia newspaper. The author complained that OSHA had forced him, through his employer and under threat of losing his job, to shave off his beard.<sup>235</sup>

The letter, written by a carpenter employed by Habersham Mills, a textile manufacturer,<sup>236</sup> clearly indicates that someone (perhaps management at Habersham Mills, an OSHA inspector, or both) believed that private employers were required under section 1910.134(e)(5)(i) to prohibit beards in the workplace and acted accordingly. Presumably, the occurrence at Habersham Mills is neither unique nor isolated:

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actually applies, but a part of the court's holding in interpreting the regulation for evidentiary purposes in another context. In another appellate case, the court noted that the United States Air Force had interpreted the regulation as requiring employees to be "clean-shaven." *Federal Labor Relations Auth. v. United States Dep't of the Air Force*, 735 F.2d 1513, 1515 & n.4 (D.C. Cir. 1984). In that case, the regulations applied to the government employer through an executive order, but the court did not reach the issue of interpreting the regulations directly. *See id.*; *see also infra* notes 242-43 and accompanying text (discussing inapplicability of OSHA regulations to most government employers).

233. The section goes on to provide in detail for the problem of providing respiratory protection for individuals wearing corrective glasses. *See* 29 C.F.R. § 1910.134(e)(5)(ii)-(iii). There is no further discussion of the other factors.

234. *See supra* note 9 and accompanying text.

235. *See* David Turpin, *Federal Officials Would Make Santa Shave*, Atlanta JJA-Tlanta Const., Dec. 22, 1993, at A17 [hereinafter *Make Santa Shave*]. The full text of the letter appears below:

The Editors: The federal Occupational Safety and Health Administration, wants Santa to shave off his beard!

Can you imagine the horror of little children if they saw this headline in the paper? Yes, if OSHA—that fine government agency on safety—made a visit to Santa's workshop, it would condemn him for having a beard.

If OSHA made a visit to Bethlehem and saw Joseph and the three Wise Men, they, too, would have to shave.

In today's age and time, can you see Kenny Rogers without his beard? I believe even Abe Lincoln and several other presidents had beards.

Now OSHA says beards are a safety hazard. Who did such a study? Is this the way our hard-earned tax dollars are spent? When everyone else is concerned about the high cost of everything, they spend money on this? It's in the news that OSHA doesn't enforce its own rules in Washington, D.C., yet it can dictate how a person looks.

Well, that's the way we felt at Habersham Mills when those of us with beards were told we had to shave or be fired. *Fired because OSHA says we can no longer have a beard.* Lose our means of support and our chances of buying Christmas presents for our families. What's next? Shave our heads?

*Id.* (emphasis added).

236. *Id.*

given the interpretation of section 1910.134(e)(5)(i) proposed above,<sup>237</sup> it would be quite reasonable for both private employers and agency personnel to conclude that the regulations mandate the prohibition of beards in any workplace in which respirators may be required.<sup>238</sup>

But if this is so, several questions arise. The regulation's validity may first be questioned by asking whether Congress has the power to ban beards in the workplace, or, more specifically, to delegate to OSHA the power to do so.<sup>239</sup> Assuming that Congress does have this authority, the regulation may still violate substantive due process or the First Amendment.<sup>240</sup> But before proceeding to a direct examination of either of these questions, it would be worthwhile to outline the parameters of OSHA's rulemaking authority, and in so doing to examine briefly some possible challenges to the regulation that derive from administrative law principles.

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237. See *supra* text accompanying notes 221-30.

238. The following passage, which describes the application of section 1910.134(e)(5)(i) at a brick factory in Pennsylvania, indicates that OSHA inspectors have enforced the rule as clearly mandating the absence of facial hair:

During an inspection several years ago, an OSHA inspector noted that a worker wearing a dust mask had a beard, violating a rule that requires a close fit between face and mask. The dust was not heavy or of hazardous content, and, even when used over a beard, the mask filtered out most of what there was. But the rule was clear and, like most rules, did not distinguish among different situations. Nor did it matter that the worker was Amish and faced the choice of abrogating his religious convictions by shaving his beard or quitting. He quit.

Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* 13 (1994).

239. Congressional power to reach intrastate work conditions under the commerce power is quite broad. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941). Its power to reach even activity that is trivial in terms of its effect on interstate commerce is also well-established and seemingly unbounded. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); see also Lawson, *supra* note 170, at 1236 ("[I]n this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way regulated by the federal government."). But see *Shooting*, *supra* note 170, at 1827-28 (discussing apparent limitations on congressional power to regulate intrastate activities that are trivial in terms of their effect on interstate commerce); see also U.S. Const., art. I, § 8, cl. 3 (the Commerce Clause).

240. An application of *Kelley's* "rational basis" analysis to the regulations would probably easily hold the regulations valid, given that they are rationally related to a legitimate goal. Of course, if the right to choose one's own personal appearance derives from a more potent constitutional source than mere substantive due process, the analysis would involve a greater degree of balancing of government's objectives versus the individual's rights. The proffered First Amendment analysis would require some inquiry into whether banning beards was the means least restrictive of free expression that could achieve the goal of improving workplace safety. See *supra* part II.E; see also *infra* notes 255-59 and accompanying text (discussing application of *Kelley* to the regulation).

### B. Preliminary Considerations

OSHA has statutory authority to regulate employers that are “engaged in a business affecting commerce.”<sup>241</sup> But the definition of “employer” excludes “the United States or any State or political subdivision of a State.”<sup>242</sup> Thus, the regulations are not themselves applicable to government employers,<sup>243</sup> although an executive order has extended applicability to some federal governmental entities.

Like other federal agencies, OSHA is required to publish “proposed rule making . . . in the Federal Register,”<sup>244</sup> except that “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”<sup>245</sup> need not conform to this notice and comment rulemaking procedure.<sup>246</sup> This immediately raises the question of what is meant by an “interpretative” rule, as opposed to one that is, by contrast, “legislative” or “substantive.”<sup>247</sup> As one court has noted, that distinction “has proved to be one incapable of being drawn with much analytical precision.”<sup>248</sup> It would be beyond the scope of this Note to engage in a detailed analysis<sup>249</sup> as to whether the interpretation of section 1910.134(e)(5)(i) by OSHA as proposed above<sup>250</sup> would constitute a mere “interpretative” rule (i.e., one not subject to notice and comment and therefore valid) or, rather, a “substantive” one. It is sufficient to note that there is some degree of ambiguity in the regulation as to whether it imposes a requirement on employers to ban beards in the workplace and that “the impact [the] rule has on those to whom the rule applies” is substantial.<sup>251</sup> On this

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241. 29 U.S.C. § 652(5) (1988).

242. *Id.* See also *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1121 (11th Cir. 1993) (noting that states and their political subdivisions are excluded from the definition of OSHA employer). *But see* Exec. Order No. 12,196, 45 Fed. Reg. 12,769, *reprinted as amended* 5 U.S.C. § 7902 (1988) (making OSHA regulations applicable in certain federal government employment contexts).

243. This nonapplicability of OSHA regulations to government entities was probably the source of Mr. Turpin’s embittered comment: “It’s in the news that OSHA doesn’t enforce its own rules in Washington, D.C., yet it can dictate how a person looks.” *Make Santa Shave*, *supra* note 235.

244. 5 U.S.C. § 553(b) (1988).

245. *Id.* at § 553(b)(3)(A).

246. One court has observed that “[t]he essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.” *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

247. See *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1264 (3d Cir. 1994).

248. *Id.*

249. See *id.* at 1264-65 (presenting a variety of judicial approaches to the problem of distinguishing between “substantive” and “interpretative” rules).

250. See *supra* text accompanying notes 221-30.

251. *Ohio Dep’t of Human Services v. HHS*, 862 F.2d 1228, 1233 (6th Cir. 1988). The impact a rule has on those to whom it applies is relevant to its classification as a “substantive” or “interpretative” rule. See *id.*; see also *Dia Navigation*, 34 F.3d at 1265 (noting that the effect of a rule is a factor that courts should consider in making the distinction).

basis at least, the more restrictive interpretation of the rule could conceivably be challenged as being "substantive" and not adopted pursuant to the required notice and comment procedure.

It may be, however, that section 1910.134(e)(5)(i) actually does, of its own force, require employees who may at some time require a respirator to be "clean-shaven" and, in turn, require employers to enforce this provision. OSHA itself has apparently interpreted the regulation as imposing these requirements.<sup>252</sup> Further, courts have expressed agreement with this interpretation.<sup>253</sup> Lastly, such an interpretation is not a tremendous departure from the actual language of the rule, although the rule is by no means unambiguous.<sup>254</sup> In any event, these considerations having been introduced if not resolved, we may now inquire as to whether the rule as applied may be challenged on constitutional grounds.

### C. Constitutional Challenges

As noted previously,<sup>255</sup> the *Kelley* rationale would seem to find section 1910.134(e)(5)(i) valid because the regulation certainly has a rational basis, namely the protection of workers' health. On the other hand, the regulation affects *only* private employees,<sup>256</sup> who, as noted in *Kelley*, would have a greater liberty interest in matters of personal appearance than would government employees, especially police officers.<sup>257</sup> Lastly, there is the consideration that the liberty interest assumed to exist in *Kelley* was one deriving from the Due Process Clause of the Fourteenth Amendment.<sup>258</sup> Presumably, any liberty interest that derived from the Fifth Amendment's parallel provision<sup>259</sup> would provide the same protection against federal enactments that *Kelley* made applicable to state enactments.<sup>260</sup> But this proposition is not to be found in *Kelley*, which dealt exclusively with a state regula-

252. See *supra* note 235.

253. See *supra* notes 231-32 and accompanying text.

254. See *supra* notes 222-30 and accompanying text.

255. See *supra* note 240.

256. See *supra* note 242 and accompanying text (noting that the definition of "employer" for the purpose of OSHA regulations excludes government entities).

257. See *Kelley v. Johnson*, 425 U.S. 238, 244-45 (1976).

258. See *id.* at 244; see also *supra* note 43 and accompanying text.

259. U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

260. The extent to which Fourteenth Amendment provisions may be applied to the federal government is perhaps best illustrated by *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Equal Protection Clause to schools in the District of Columbia). Although this incorporation of the Fourteenth Amendment through the Fifth Amendment has been described as "gibberish both syntactically and historically," it has been explained as a "judicial unwillingness to hold the states to a higher constitutional standard than the federal government." Ely, *supra* note 30, at 32. Given *Bolling*, it would seem reasonable that the *Kelley* standard would be applicable to the federal government.

tion. Given all of the above, the best conclusion may be that *Kelley* is of little relevance in an evaluation of section 1910.134(e)(5)(i).

As noted at the end of part I,<sup>261</sup> however, substantive due process as applied to a liberty interest is hardly the best place in the Constitution to look for the right to decide one's own personal appearance. A First Amendment analysis was then proposed in part II, one that characterized regulations of facial hair as mandates of expressive behavior and that relied on *Barnette*, *Wooley*, and *O'Brien* as supporting precedent. As applied to the OSHA regulation, any proposal to apply such a First Amendment analysis would need to surmount the apparent obstacle that the regulation, unlike those examined in part II, was adopted not to promote "esprit de corps" or an "image," but for a *safety* reason "unrelated to the suppression of free expression."<sup>262</sup> The third part of the *O'Brien* test is thereby met, and no heightened degree of scrutiny would yet seem to be called for. But the regulation *incidentally* mandates expressive behavior that continues into the employees' off-duty lives. Thus, the *fourth* prong of the *O'Brien* test, which requires an examination of whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,"<sup>263</sup> would require an inquiry into any alternative means by which the objectives of section 1910.134(e)(5)(i) could be met.

Under an analysis that considers whether less restrictive means are available, the regulation, at least when taken as a whole,<sup>264</sup> would seem to contain the seeds of its own destruction, for section 1910.134(a)(1) provides:

- (1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases,

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261. See *supra* text accompanying notes 105-07.

262. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This is the "third prong" of the *O'Brien* test. See *id.* It has been noted that this part of the test "can . . . be interpreted in a way that will guarantee that its demand can always be satisfied." John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496 (1975). For example, the *Kelley* regulations could have been described as related to officer safety because discipline and public recognition promote that goal. It has been proposed that the meaning in *O'Brien* was to "include any interest that *reasonably* supports the regulation involved" in applying this third prong. 88 Harv. L. Rev. at 1496 n.57 (emphasis added).

263. *O'Brien*, 391 U.S. at 377.

264. One could, alternatively, consider section 1910.134(e)(5)(i) independently, thus confining the "less restrictive means" analysis to the respirator requirement and not to the broader goal of protecting employee health. This more specific approach is taken beginning at text accompanying note 267, *infra*. However, section 1910.134(e)(5)(i) must be considered in the context of the rest of the section in order to be construed as prohibiting beards and requiring employer enforcement. See *supra* part III.A. Therefore, it would seem appropriate to consider the regulation as a whole, as well as the specific provision in isolation, in assessing the regulatory goals and whatever less restrictive means are available to achieve them.

smokes, sprays, or vapors, *the primary objective shall be to prevent atmospheric contamination.* This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). *When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirements.*<sup>265</sup>

Thus, respirators are a *secondary* means by which the regulation's goal of protecting employees' health is to be met, the primary means being prevention of atmospheric contamination in the first place. If section 1910.134(e)(5)(i) does indeed require that employees be "clean-shaven" and that employers enforce this requirement, it should, by the terms of the regulation itself, do so only where such prevention is "not feasible" or during its implementation. A means less restrictive of employees' liberties is thus specifically proposed by the regulation itself, which should at least severely circumscribe the situations in which the no-beard mandate could be constitutionally applied. Further, if enforcement is delegated to the same employers responsible for implementing the "primary objective" of reducing atmospheric contamination, there exists an obvious disincentive to seek the least restrictive means: it is usually much cheaper to draft a company policy requiring that employees be "clean-shaven" for possible respirator use than it is to modify the workplace to reduce atmospheric contamination. If either will suffice to bring an employer into compliance with OSHA standards, it is difficult to imagine that many businesses would choose the more expensive option. Of course, the employers must pay for the cost of providing the respirators themselves, but they are given some latitude in choosing which respirators will be used,<sup>266</sup> and it seems reasonable to assume that the purchase of relatively inexpensive ones will still in many cases be less costly than implementing the primary objective of reduction of atmospheric contamination.

Most significantly, some respirators *can* provide adequate protection to employees with beards, but they are considerably more expensive than the others.<sup>267</sup> Thus, less restrictive means are available that would not result in infringement of employees' freedoms. Unfortu-

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265. 29 C.F.R. § 1910.134(a)(1) (1994) (emphasis added).

266. *See id.* at § 1910.134(c); *see also* Hanes Corp., 260 N.L.R.B. 557, 562 (1982) (finding by administrative law judge that employer had choice among several types of respirators, one of which could accommodate worker with beard, and that choice of respirator was matter subject to collective bargaining before no-beard rule could be implemented).

267. Hanes Corp., 260 N.L.R.B. at 562 (noting that a "space helmet" type of respirator, considerably more expensive than other types, had been provided to an employee who could not shave for medical reasons, but was denied to another who, "for undisclosed but obviously sincerely held reasons," refused to shave it off).



nately, nothing in the regulations provide that employers must choose the less restrictive means, and only those employees who are unionized will generally have any viable means by which to compel employers to opt for the less restrictive but more expensive alternative.<sup>268</sup>

Ultimately the regulation itself, and not the private employer's enforcement of it, should be challenged on free expression grounds.<sup>269</sup> If section 1910.134(e)(5)(i) does indeed require that employees be "clean-shaven" and that employers enforce this requirement, it is a mandate of expressive behavior, albeit one that is enforced through the delegation of responsibility and authority to private employers and that has been promulgated ostensibly to further goals unrelated to free expression. Moreover, that goal is the protection of the very individual for whom the wearing of a beard is proscribed. The paternalistic nature of such a regulation cannot go unobserved in balancing government's needs against those of the individual. But even assuming that we can accept this form of government infringement of individual freedoms for the protection of the individual, an examination of alternative means of attaining that goal is constitutionally required under the fourth prong of the *O'Brien* test.

#### CONCLUSION

A beard, for a man, is an expression of his personality. On the one hand it has been interpreted as a symbol of masculinity, of authority and of wisdom. On the other hand it has been interpreted as a symbol of nonconformity and rebellion. But symbols, under appropriate circumstances, merit constitutional protection.<sup>270</sup>

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268. Decisions of the National Labor Relations Board have found that facial hair regulations are a mandatory subject of collective bargaining under section 8(a)(5) of the National Labor Relations Act, and therefore may not be unilaterally imposed by the employer, even in an attempt to comply with OSHA regulations, unless the collective bargaining agreement gives the employer the power to impose such regulations. The unilateral change in conditions of employment that occurs when an employer imposes such regulations absent such a provision in the agreement is an unfair labor practice. See, e.g., *Equitable Gas Co.*, 303 N.L.R.B. 925 (1991) (finding unilateral imposition of "appearance guidelines" that banned beards to be an unfair labor practice); *Hanes Corp.*, 260 N.L.R.B. at 563 (finding unilateral ban on beards to achieve OSHA compliance to be an unfair labor practice, given that alternative respirator types could achieve same degree of protection without ban on beards). The airborne particulate matter in *Hanes* was cotton dust, see *id.*, just as at *Habersham Mills*. Telephone Interview with David Turpin, Carpenter, *Habersham Mills*, *Habersham*, Georgia (January 4, 1995). The crucial difference that resulted in the inability of the employees at the latter workplace effectively to contest the beard ban was the fact that the workforce there was not unionized. *Id.*

269. This seems not to have occurred yet, perhaps because challenges to facial hair regulations based on freedom of expression have not been widely explored in the federal courts.

270. *Finot v. Pasadena City Bd. of Educ.*, 58 Cal. Rptr. 520, 528 (Ct. App. 1967) (citing *Board of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943)).

It is easy, when such challenging issues as abortion and assisted suicide dominate the individual-rights landscape, to lose sight of the importance of so seemingly trivial an aspect of personal liberty as whether one may be prohibited by government from growing a beard. To many, the proposal that beards deserve significant constitutional protection seems strange or even laughable. But laughter at the thought of protection of individual liberties—of *any* individual liberties, but especially of those the exercise of which harms no one else—is itself a bit out of place in a nation that has claimed the title “the land of the free.”

Whether as employer or as regulator, the institutions of American government seem to have considerable power to compel the “clean-shaven” standard in the workplace, a power that has met comparatively little resistance. Given that those who would be inclined to resist this power (males subject to such regulations who would choose to grow beards) comprise a minority, it is unsurprising that the battle to retain that liberty against increasingly paternalistic governmental institutions remains largely yet to be fought, or at least to be fought with the appropriate weapons, in the legislatures and the courts.

Some jurists, including California’s Justice Cobey, who wrote the above quoted passage in 1967, have recognized the importance of this little-noticed aspect of personal liberty, and have, appropriately, located the constitutional source of the protection of that liberty within the scope of freedom of expression. But they, too, are in the minority.

The Supreme Court, in deciding *Kelley* in 1976, remained silent on the question of whether the freedom of expression protected by the First Amendment was in any way applicable to grooming regulations. When *Wooley* was decided a year later, the Court recognized that that protected freedom included the right to decline to carry government’s message. In *Wooley*, *Barnette* was logically extended to the realm of license plates but, perhaps paradoxically, has yet to be applied in the vastly more personal and expressive realm of faces.

But even assuming that the First Amendment’s protection of free expression does not extend quite so far as to provide an individual right to decide whether to be bearded or “clean-shaven,” the majority’s apparent preference for the latter standard, and its ability in a democracy to enforce that standard, should at least give pause. Additionally, Justice Marshall’s observation that the right to choose one’s own appearance is so clear as to be beyond question<sup>271</sup> comports quite well with the Ninth Amendment’s provision<sup>272</sup> indicating that the Bill of Rights was not meant to be an exhaustive list.

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271. See *supra* text accompanying note 1.

272. See U.S. Const. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

Nevertheless, one need not look to the Ninth Amendment, any more than to substantive due process,<sup>273</sup> penumbras and emanations,<sup>274</sup> or the prohibition against involuntary servitude,<sup>275</sup> to find a source of the right to present the face one chooses. Precedent, if not necessarily text, has located that source well within the First Amendment's protection of freedom of expression, much as precedent, if not necessarily text, has apparently located among the powers delegated to the federal government the ability to regulate facial hair in the private workplace.<sup>276</sup> This is not to say that two wrongs make a right, but merely that if a right is to be preserved a certain degree of judicial activism may be necessary to compensate for past judicial acquiescence.<sup>277</sup> One could hardly ask for a better example of the sort of encroachment upon individual liberties that could not *possibly* have issued from the originally conceived federal government of limited powers than the banning of beards among private citizens.<sup>278</sup> Yet it

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273. See *supra* note 105 and accompanying text (discussing criticisms of substantive due process and noting that the right to decide one's own appearance has a better source elsewhere).

274. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

275. See U.S. Const. amend. XIII.

276. See *supra* notes 170 and 239 (discussing the commerce power in the context of regulations banning beards in the workplace). The analogy between extending the scope of the First Amendment and extending the scope of the commerce power suffers from a fundamental flaw, albeit one that can only enhance arguments that the First Amendment should be given at least as broad a construction as has been given the Commerce Clause. For there is no provision that parallels the Ninth Amendment in providing: "The enumeration in the Constitution of certain powers delegated to the federal government shall not be construed to deny or disparage others that it may exercise."

Remarkably consistent with (although hardly probative of) the premise that First Amendment protections should be interpreted broadly in response to similar generosity in interpreting the Commerce Clause is the historical fact that *Barnette* was decided in 1943, not long after *Wickard v. Filburn*, 317 U.S. 111 (1942), had greatly expanded the commerce power. Interestingly, both opinions were authored by Justice Robert Jackson. See also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1397 (1987) (noting that an expansive interpretation of the Commerce Clause has done away with the protections afforded by the design of a federal government of limited powers and that the "necessary effect is that greater burdens are placed upon substantive limitations, such as the Bill of Rights"); William Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court*, 72 Iowa L. Rev. 1281, 1293-94 (1987) (proposing that "the general rule of constitutional construction begins with a strong presumption of generous construction" and noting that the general rule ought to be applied equally in interpreting both the First Amendment and the Commerce Clause).

277. See Lawson, *supra* note 170, at 1252-53 (introducing and discussing Peter McCutcheon's theory, which prescribes that unconstitutional institutions be counterbalanced by measures that would not necessarily be constitutional if considered in isolation).

278. The example of the OSHA regulation is also particularly appropriate because it is the result of the two main departures from constitutionalism that occurred during and following the New Deal: the expansion of the federal government's power under

*has* occurred. Those who opposed the addition of a Bill of Rights to the Constitution on the grounds that it was unnecessary given the limited powers of the newly formed Union would, were they alive today, probably be ready to change their minds. And if the drafters of those first ten amendments neglected to prohibit the federal government specifically from regulating the personal appearance of its citizens, perhaps the drafters may be excused for their omission on the grounds that they could not reasonably have foreseen the terrifying scope of power that would one day be exercised by the government they created.