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The Barber and the Board: Constitutional Aspects of Administrative Regulation of a Student's Hairstyle

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THE BARBER AND THE BOARD: CONSTITUTIONAL ASPECTS OF ADMINISTRATIVE REGULATION OF A STUDENT'S HAIRSTYLE

I. Introduction and Background

Concern with the length of hair is no longer limited to Broadway plays near insolvent barbers. Although federal district courts have recently been deluged with suits having as their purpose the implementation of total desegregation, these courts have been called upon frequently to determine the comparative rights of students and public school administrative bodies in the area of personal grooming. In 1969, there were at least nine cases in federal courts contesting the authority of public schools, at both the secondary and collegiate levels, to restrict the length or manner in which male students wore their hair.[1] The results of these cases have created an increased awareness that the issue is not so frivolous as it may appear at first glance[2] and have produced a split of decisions which may ultimately call for resolution by the Supreme Court of the United States.

Since most states have statutes which give broad powers to superintendents and boards of education to "have charge of the public schools . . . [and] make regulations as to attendance therein,"[3] state courts have had little trouble in upholding pub-

1. Stevenson v. Board of Educ., 306 F. Supp. 97 (S.D. Ga. 1969); Brick v. Board of Educ., 305 F. Supp. 1316 (D. Col. 1969); Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), Crew v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Griffen v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969).

2. Chief Judge Wyzanski stated in *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969):

> [T]he issues here presented with respect to arbitrary official orders as to hair style are serious in the eyes of a very large proportion of our society (though perhaps the degree of concern varies according to age levels) and that that serious concern is not purely emotional. It has a rational core. And it is, quite literally a fighting issue to some. To belittle the issue might reveal judicial prejudice, not perceptiveness.

304 F. Supp. at 456.

3. Mass. Gen. Laws ch. 71, § 37 (Supp. 1969). Further, board of education in Massachusetts are given power to make "reasonable regulations . . . as to school matters as . . . [they] shall from time to time prescribe." Mass. Gen. Laws ch. 76, § 5 (Supp. 1969).

In South Carolina, school trustees have the power to "[p]romulgate rules prescribing . . . standards of conduct and behavior that must be met by all pupils as a condition to the right . . . to attend public schools . . . ." S.C. Code Ann., § 21-230 (Supp. 1969). This statute has been read as giving validity to regulations regulating the length of hair. *See* 1965-66 Ops. Att'y Gen., No. 2051, p. 134.

lic school regulations which require closely-shorn locks upon the heads of students. In *Leonard v. Committee of Attleboro*,[4] the Supreme Judicial Court of Massachusetts upheld a regulation which prohibited "extreme haircuts or any items which are felt to be detrimental to classroom decorum."[5] Although young Leonard was an otherwise well-groomed, conscientious student and although his success as a professional musician was to some extent related to his long hair, the court stated:

> We are of the opinion that the unusual hair style of the plaintiff *could* disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus, as with any unusual, immodest or exaggerated mode of dress, conspicuous departures from accepted customs in the matter of haircuts *could* result in the distraction of other pupils.[6]

This decision, of course, was based solely upon Massachusett's construction of its school laws[7]; nevertheless, the powers of the school committee were held to be superior to any rights which a student might have in regard to the length of his hair.[8] Therefore, a school committee might anticipate that a particular hairstyle or mode of dress would be disruptive, and regulations calculated to dispel such disruption would be valid.[9] This view has been accepted with little qualification in other state courts.[10]

Further impetus was given to the above view when, in *Ferrell v. Dallas Independent School District*,[11] the Fifth Circuit Court

4. 212 N.E.2d 468 (Mass. 1965), 14 A.L.R.3d 1192 (1967).
5. *Id.* at 470, 14 A.L.R.3d at 1195
6. *Id.* at 472, 14 A.L.R3d at 1198 (emphasis added).
7. MASS. GEN. LAWS ch. 71, § 37, ch. 76 § 5 (Supp. 1969).
8. Leonard had also argued that the requirement of short hair invaded the privacy of his home and family life. The court summarily answered that the "domain of the family must give way . . . [to] a regulation reasonably calculated to maintain school discipline . . . ." Leonard v. Committee of Attleboro, 212 N.E.2d 468, 473 (Mass. 1965) 14 A.L.R.3d 1192, 1199 (1967).
9. The court intimated that the Committee's discretionary powers were so broad that it could have concluded that only the strictest application of the rule could insure success, regardless of detriment to plaintiff Leonard.
10. *See, e.g.*, Akin v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. den.* 393 U.S. 1041 (1969). (Restraint imposed upon high school student's freedom to grow beard by district's policy requiring students to be clean shaven was rationally and reasonably related to enhancement of free public education). *But see* Meyers v. Arcata Union High School Dist., 75 Cal. Rptr. 68 (1968). (Dress code stating that "extremes" of hair styles were not acceptable was unconstitutionally vague and unreasonable).
11. 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd* 393 F.2d 697 (1968), *cert. den.* 393 U.S. 856 (1968). (Note the dissent of Mr. Justice Douglas.)

of Appeals affirmed a Texas district court's determination that a group of student musicians should be suspended until they complied with a mandate of their principal that they cut their hair.[12] Assuming, without deciding, that an individual's hairstyle was a constitutionally protected mode of expression, the district and circuit courts determined that the plaintiffs were not denied substantive or procedural due process of law as provided by the fourteenth amendment. Noting that the students had exhaustive administrative remedies which they had used, the circuit court justified the principal's actions, saying:

> The compelling reason for the state infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes [with] or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.[13]

In concluding that the principal's order was reasonable, great weight was given to the recitation of certain individuals concerning incidents which the plaintiffs' long hair incited.[14] Thus, at this stage, the budding rock performer could not wear his hair with the abandon of a Mick Jagger,[15] nor could the dapper young Fauntleroy[16] sport his fashionable locks.[17] Yet hope was in sight.[18]

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12. The action was brought under that section of the Civil Rights Act of 1871 which reads in part as follows:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983 (Supp. 1969).

13. Ferrell v. Dallas Independent School Dist., 393 F.2d 697, 703 (1968).

14. The principal, for instance, said that the plaintiffs were often the victims of obscene remarks and were frequently referred to the females' toilet facility. Furthermore, plaintiffs made a recording which bemoaned, in song, their plight. The sound track was played on local radio stations.

15. The lead vocalist of a notorious rock group, "The Rolling Stones."

16. The hero of a novel by Frances Hodgson Burnett, *Little Lord Fauntleroy.*

17. The circuit judge in *Ferrell v. Dallas Independent School Dist.*, 393 F.2d 697 (1968), suggested, apparently not in jest, that the plaintiffs wear wigs while performing on stage. 392 F.2d at 704.

18. *See Comment*, 17 J. PUB. LAW 151 (1968).

II. HAIR AND THE CONSTITUTION—THE IMPACT OF TINKER

In February, 1968, with the Supreme Court of the United States' decision in *Tinker v. DesMoines Community School District*,[19] courts began to take a more objective view of tonsorial matters. Although the *Tinker* Court specifically disavowed the relevance of its decision to the hairstyle cases,[20] it broadly stated the proposition that a student does not leave his constitutional rights at the schoolhouse door.[21] In relation to a student's constitutional rights in general, the Court stated:

> [W]here there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[22]

In our society, therefore, constitutional rights may not be abrogated merely because there is an apprehension that certain behavior may lead to unpopular results. Such a proposition seems to propound constitutional grounds for allowing students to wear their hair at the length which they desire.[23]

Courts are as yet not inclined to find that hirsute matters constitute expression which so nearly approaches pure speech that the full protection of the first amendment to the United States Constitution should be given.[24] Concededly, hairstyle is more a matter of one's personal preference than of one's ideological beliefs. Yet, if a public institution promulgates a rule which prohibits a certain hairstyle with the intention of excluding certain individuals from that institution, then the first amendment may invalidate the rule.[25] Generally, the length and style of a student's hair is considered to be a symbolic expression of his individuality only, divorced from sym-

19. 393 U.S. 503 (1968).
20. The Court stated that "[t]he problem presented by the present case [did] not relate to . . . hair styles or deportment. Compare Ferrell v. Dallas Independent School District, 392 F.2d 697 (1968) . . . ." *Id.* at 507-08.
21. *Id.* at 506.
22. *Id.* at 509.
23. *Cf.* Keyishan v. Board of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 203 (1952). Both of these cases involved the attempts of states to place unreasonable restrictions upon the teaching profession.
24. *See, e.g.*, Crew v. Cloncs, 203 F. Supp. 1370 (S.D. Ind. 1969).
25. In *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969), school officials determined that long hair and beards were the badges of undesirables ("hippies"). Thus, they promulgated a rule designed to exclude such undesirables from their institution. This rule was held to be violative of the plaintiff's first amendment rights.

bolic expression of his religious, political, economic, or moral values which would be protected by the first amendment.[26] There can be little doubt that, if one's religious or political beliefs *required* that he wear his hair at a certain length, the first amendment would support his right to so wear his hair. Nevertheless, the first amendment argument in support of long hair in public schools has lost its appeal with the development of other valid and more readily applicable federal standards.[27]

A student's right to wear long hair is easily brought within the fourteenth amendment. Procedural due process will rarely be at issue since federal courts are not bound to wait for final determinations by state administrative or judicial bodies before reviewing a case.[28] Although a board of education may still make rules regulating the conduct and appearance of its students, the due process clause of the fourteenth amendment requires such regulations be reasonable and explicit.[29] Therefore, the requirement that a public school show that the regulation prohibiting hair of a certain length must set a standard which is *necessary* to insure that the goals for which the school is created will be attained is more in line with modern constitutional development. In other words, school officials must demonstrate affirmatively that long hair is in fact disruptive of school procedures,[30] or establish that such a standard or rule is necessary to deal with activities which may materially and substantially interfere with the requirements of appropriate discipline.[31] Such a burden of proof of necessity or disruption might be sustained by showing that the long hair would present difficult problems of health, sanitation, safety, or disci-

26. Brick v. Board of Educ., 305 F. Supp. 1316 (D. Col. 1969). *But see* Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969).

27. As Chief Judge Wyzanski noted in *Richards v. Thurston*, 304 F. Supp. 449 (D. Miss. 1969), state remedies are undesirable because they are not attainable with enough speed to be reasonably effective. 304 F. Supp. at 455.

28. 42 U.S.C.A. § 1983 (Supp. 1969).

29. *Cf.* Keyishan v. Board of Regents, 385 U.S. 589 (1967); Wieman v. Updegraff, 344 U.S. 203 (1952). Previously, it was proposed that the right to attend public schools was subject to any restrictions. The hypothesis has yielded to the proposition that restrictions must be reasonable and necessary.

30. Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969). *Contra* Crew v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969). One should note that at the time of the *Ferrell* case, "Beatle" style hair cuts had been in vogue for some three years. Furthermore, ten students from the school which expelled the plaintiffs testified that such haircuts were "generally accepted." Thus, doubt is raised as to the disruptive nature of the plaintiffs' hairstyles. Ferrell v. Dallas Independent School Dist., 261 F. Supp. 545, 552 (N.D. Tex. 1966).

31. Griffen v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969).

pline.[32] Nevertheless, regulation should be aimed at the reasonable solution of the problem, and the cutting of the student's hair seems patently unreasonable. An example of a reasonable solution or standard might be: if a student's long hair endangered or could endanger the safety of other students in a chemistry lab, then the long-haired student should be required to wear some device, such as a hair net, to alleviate the problem.[33]

The equal protection clause of the fourteenth amendment speaks even more pertinently to the problem of the regulation of hair length and styles in the schools. In *Richards v. Thurston*,[34] Chief Judge Wyzanski noted that:

> Whether hairstyles be regarded as evidence of conformity or of individuality, they are one of the most visible examples of personality. This is what every woman has always known. And so have many men, without the aid of an anthropologist, behavioral scientist, psychiatrist, or practitioner of any of the fine arts or black arts.[35]

Since, in theory, women are constitutionally guaranteed rights equal to those of men, the question should not be whether the regulations apply equally to all males,[36] but should be whether the regulations apply equally to *all* students—male and female alike. Any attempt to classify students with respect to appearance is a classification upon an unreasonable basis, in violation of the equal protection clause. In *Zachry v. Brown*,[37] the Alabama district court used the equal protection clause to strike down a haircut regulation since it was obvious that the school administrators were personally indignant of people with long hair. Although the court further stated that the administrators could have prevailed by showing moral or social reasons for their actions,[38] the *Zachry* case demonstrates the applicability of the equal protection clause. Extending that concept one step

32. Thus, a case such as *Carr v. Dighton*, 229 Mass. 304, 118 N.E. 525 (1918), may still be applicable. There, pupils were excluded from school activities, because they had "head lice."

33. In *Griffen v. Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969), the rule was promulgated because boys were late to class because they were grooming themselves. The court stated that a solution other than the requirement of short hair must be found, 300 F. Supp. at 63. *See also* Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969).

34. 304 F. Supp. 449 (D. Mass. 1969).

35. *Id.* at 451.

36. This was a fallacy in *Akin v. Board of Education*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968).

37. 299 F. Supp. 1360 (N.D. Ala. 1969).

38. *Accord*, Crew v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).

farther and assuming that female students are permitted to wear their hair in any manner or at any length they wish, classification with respect to sex would seem to be classification upon an unreasonable basis. More simply, there are no more hazards in a male wearing his hair long than in a female doing so. No court has spoken specifically to the issue of whether restrictions of males' hair styles violate the equal protection clause because women's are not restricted at all. One must admit that the issue is relevant and valid, especially in light of recent developments relating to discrimination because of sex.

A most appealing and most rational argument has been developed by an analogy to *Griswold v. Connecticut*.[39] In that case, Justice Goldberg propounded in a concurring opinion the theory that the Bill of Rights, as an entity, radiates a general right of privacy which gives full force and effect to the protections therein.[40] Certainly this right of privacy or even the Constitution itself leaves a great deal of room for a right of individuality and personality. Furthermore, it follows that hair is *unique* in this area. For example, if a girl wishes to wear an extremely short skirt to her high school, the possibility of disruption is obvious. To require her to wear a longer skirt to school is not *per se* unreasonable because she may wear a miniskirt anywhere she desires, except to school. The state's interest in orderly school procedure is protected with a minimal infringement upon the rights of the young girl. Once a male cuts his hair, however, he may not replace it. The requirement that the male cut his hair not only affects his activities at school, but will also affect his activities outside of school. The school has imposed its desires upon the student by totally removing any right the student may have to express his individuality or personality by wearing his hair at a certain length. Thus, any requirement that the male student cut his hair is *per se* unreasonable unless the state demonstrates and proves that there is a substantial necessity that he cut his hair. The above formulation was rejected in *Crew v. Clones*[41] by restricting *Griswold* to its facts. *Griswold* spoke to the privacy of marriage—a fundamental and basic right of American society. The *Clones* court considered hairstyles as a choice of grooming, not as a manifestation of one's individuality or personality.

39. 381 U.S. 479 (1965).
40. *Id.* at 486.
41. 303 F. Supp. 1370 (S.D. Ind., 1969).

III. CONCLUSION

Even in light of the above discussions, some courts still refuse to review the constitutional aspects of hair length regulation by the public schools on the theory that school officials and not judges should run the schools or that any constitutional right may be subjected to reasonable infringement.[42] Nevertheless, the question is ripe for review by the Supreme Court of the United States. District courts in six judicial circuits heard cases on this issue in 1969. Of the nine reported cases dealing with restrictions upon hairstyles by public school officials, five held such restrictions unconstitutional on federal constitutional grounds, four upheld the restrictions, mainly by skirting the constitutional issues.[43] The general state of the law seems to be that restrictions may be made upon the length of a student's hair regardless of the constitutional right infringed upon. The new element, injected by *Tinker*,[44] seems to be the requirement of a substantial showing by the school that the hairstyle is disruptive of school procedures or that the regulation is necessary for the efficient operation of the school. This view takes more cognizance of the rights of students and manifests a realization that the high school classroom is the source of tomorrow's citizens. As Justice Douglas, dissenting upon the denial of *certiorari* in *Ferrell* wrote:

> It comes as a surprize in a country where the States are restrained by an Equal Protection Clause, a person can be denied education in a public school because of the length of his hair. I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.[45]

42. *See, e.g.*, Stevenson v. Board of Education, 306 F. Supp. 1370 (S.D. Ga. 1969).
43. *Id.*
44. Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1968).
45. Ferrell v. Dallas Independent School Dist., 393 U.S. 856 (1968).

That the present Court would go so far as to adopt the above is doubtful[46]; however, adequate and less far-reaching grounds are available which will protect the student's rights and the school's interests.

JOSEPH T. MCELVEEN

46. *See* 39 U.S.L.W. 3141 (Oct. 13, 1970). The Supreme Court there denied certiorari to a "hair" case very similar to those cited in this article; Jackson v. Dorrier, 424 F.2d 213 (1970).