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High School Hair Regulations

HIGH SCHOOL HAIR REGULATIONS

INTRODUCTION

The controversy over the length of male students' hair is becoming an increasing problem for today's high school administrators. School boards have invariably enacted student dress codes that expressly forbid long hair, requiring that it be "combed and worn so it does not hang below the collar line in the back, over the ears on the side . . . [and] above the eyebrows."[1] Students, however, have begun to assert their *right* to wear their hair at any length they deem appropriate.

To date, eight major cases involving dress codes which prohibit long hair have been decided. Four of the cases ruled in favor of the students,[2] while the other cases held for the school boards.[3] Each case involved a high school boy with long hair, generally of the "Beatle" style, who was suspended from school because of the length of his hair. A majority of the suspensions were based upon dress code violations, and in most of the cases the students were seeking readmission.

The purpose of this note is to reflect the current judicial attitude toward the students' assertions of their constitutional right to wear their hair at any length. Defiance, individualism and style constitute some of the motivational factors which influence the students' attitude toward these promulgated codes. These factors, however, should have little relevancy in determining the students' constitutional rights.

HISTORY OF SCHOOL BOARD DISCRETION

Since the inception of public education, those charged with the education of children have been authorized to use such power as they deemed necessary in the furtherance of a child's education.[4] This authority has been granted to administrators on the theory that without it

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1. Williams Bay High School Dress Code, Williams Bay High School, Williams Bay, Wisconsin.

2. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969).

3. Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).

4. He [the parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 374 (1883).

the attempted educational process would become decidedly ineffective. Generally, courts have held that parents, by sending their children to school, have impliedly consented to reasonable rules and regulations promulgated by the school authorities to ensure an orderly and academic atmosphere.[5]

The power to create and supervise schools and school systems is reserved to the states by the Tenth Amendment.[6] State legislatures, in turn, have delegated all matters of education to the states' departments of education.[7] Pursuant to such grants, these departments have been allowed a great degree of discretion in dealing with school administration and pupil conduct.[8] These statutes have been interpreted as evidencing an intent to minimize the number of school-student controversies reaching the courts.[9] Some controversies, however, have resulted in litigation, but the consensus of those cases appears to be that courts will not interfere with a school board's decision[10] unless there is a compelling reason for intervention.[11]

Courts have been reluctant to adjudicate school-student controversies

5. W. PROSSER, THE LAW OF TORTS 139 (3rd ed. 1964).

6. Cooper v. Aaron, 358 U.S. 1, 19 (1958); Hall v. Wisconsin, 103 U.S. 5 (1880); Gilman v. Philadelphia, 70 U.S. 713 (1865).

7. For example, New York has vested such power in the following manner:

> There shall continue to be in the state government an education department. The department is charged with the general management and supervision of all public schools and of all the educational work of the state . . . .

N.Y. EDUC. § 101 (McKinney 1953).

8. Illinois is fairly representative and has granted the following discretion to the school boards: "To adopt and enforce all necessary rules for the management and government of the public schools of their district." ILL. ANN. STAT. ch. 122, § 10-20.5 (Smith-Hurd 1961).

9. Bullock v. Cooley, 225 N.Y. 566, 122 N.E. 630 (1919); Van Allen v. McCleary, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

10. Robinson v. School Dist., 53 Cal. Rptr. 781 (Dist. Ct. App. 1966) (school prohibited school fraternities and sororities); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925) (student claims to have been maliciously expelled); Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963) (school prohibited pupil from participating in school sports); School Dist. v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) (school excluded married students from participating in extracurricular activities); Board of Educ. v. Luster, 282 S.W.2d 333 (Ky. Ct. App. 1955) (school prohibited students from eating at a local cafe); Watson v. Cambridge, 32 N.E. 864 (Mass. Sup. Jud. Ct. 1893) (student expelled for mental incapacity); Jones v. Day, 127 Miss. 136, 89 So. 906 (1921) (school required students to wear a khaki uniform to school); Richardson v. Braham, 125 Neb. 142, 249 N.W. 557 (1933) (students prevented from leaving school premises during school hours); Worley v. Allen, 12 App. Div. 2d 411, 212 N.Y.S.2d 236 (1961) (teacher fired for failure to follow school board regulations); Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931) (school prohibited heel taps); State v. Chamberlain, 30 Ohio Op. 2d 262, 175 N.E.2d 539 (C.P. 1961) (school refused to readmit pregnant student); Stanley v. Gary, 237 S.C. 237, 116 S.E.2d 843 (1960) (school principal permitted to yell at students); Moseley v. Dallas, 118 Tex. 461, 17 S.W.2d 36 (1929) (school required students to visit school health clinic).

11. Epperson v. Arkansas, 393 U.S. 97 (1968).

for several reasons.[12] First, school boards have been endowed with statutory authority to operate and manage learning institutions in any manner they deem necessary for the educational instruction of the students; the courts have recognized that the management of schools is not a judicial function.[13] In addition, the judiciary has refrained from encroaching upon the authority of school boards because of our governmental separation of powers doctrine.[14]

Another reason for judicial abstention is that school systems are managed by professional educators who are deemed more competent in educational matters than the courts. Commenting on this point, the court in *Robinson v. School District*[15] stated:

> School boards are professionals in this field knowing what will harm morals and discipline of students, the courts are laymen; the boards are close to the day-to-day affairs of the pupils of secondary schools and the problems which arise in a school community, courts are removed therefrom. Under the circumstances, we cannot superimpose our judgment over theirs and should not attempt to do so.[16]

School officials are familiar with a particular school's needs and problems. Their preparatory education and teaching experience have acquainted them with the more successful teaching techniques and the rules and regulations necessary to implement such techniques. The courts have realized this[17] and have refrained from passing judgment as to the wisdom of implemented school regulations.[18]

A third reason for judicial reluctance is the influence of stare decisis. Historically, school boards have been allowed broad discretion both from their statutory inception and from the well-established doctrine of *in*

12. In *Board of Educ. v. Bentley*, 383 S.W.2d 677 (Ky. Ct. App. 1964), the court declared: "Courts will not interfere with the school board's exercise of such discretion unless it appears the board has acted arbitrarily or maliciously." *Id.* at 679. Subsequently, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Supreme Court stated that "[c]ourts do not and cannot intervene in the resolutions of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104. *Accord, State ex rel. Evans v. Fry*, 11 Ohio Misc. 231, 230 N.E.2d 363 (C.P. 1967), where the court held: "No court has the authority to control the discretion vested in a board of education, unless there has been a gross abuse of discretion." *Id.* at 364.

13. Stanley v. Gary, 237 S.C. 237, 116 S.E.2d 843 (1960). The court stated that "[t]he maintenance of discipline and the standards of behavior in a body of students in a high school is a task committed to its faculty and officers and not to the courts." *Id.* at 846.

14. School Dist. v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967).

15. 53 Cal. Rptr. 781 (Dist. Ct. App. 1966).

16. *Id.* at 789.

17. Wilson v. School Dist., 190 S.W.2d 406 (Tex. Civ. App. 1945).

18. Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969).

loco parentis.[19] As a result, most cases have been decided in favor of the school boards.[20] This trend has been perpetuated by virtue of the doctrine of stare decisis[21] and has thereby become deeply imbedded in our judicial system.[22] Thus, courts are ordinarily reluctant to litigate school regulatory problems unless the deprivation of a constitutional right is in issue.[23]

The First Amendment Argument

Most of the students in the recent "hair" cases have maintained that their long hair is a manifestation of some cultural ideology[24] and have insisted that their right to wear it in such manner is secured by the free speech provision of the First Amendment.[25] While the courts have acknowledged the existence of a right to symbolic speech,[26] it has not yet been made clear exactly what type of conduct or action the right encompasses.

Of the recent "hair" cases, only two courts have expressly held that long hair did not fall within the protection of First Amendment symbolic speech.[27] The apparent reasoning was that long hair was not "a symbol of some easily identifiable idea."[28] *Miller v. Gillis*[29] held that it was nothing more than the "mere exercise of the wearer's choice of hairstyle."[30] The test espoused by *Miller* was that the objects seeking protection must be "symbols of movements or ideas easily expressed and readily identifiable."[31] The court arrived at this test after a study of previously decided "symbolic expression" cases, in particular *Tinker v. Des Moines Independent Community School District*.[32]

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19. Blackstone, *supra* note 4.
20. *See* note 10 *supra*.
21. Neff v. George, 364 Ill. 306, 4 N.E.2d 388 (1936); Moore v. Albany, 98 N.Y. 396 (1885).
22. W. Blackstone, Commentaries 42 (Gavit ed. 1892).
23. *See* note 11 *supra*.
24. The plaintiff in *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969), explained that his long hair was a symbol
> to indicate his association with some of the younger generation in expressing their independent aesthetic and social outlook and their determination to reject many of the customs and values of some of the older generation.

Id. at 455.
25. Miller v. Gillis, —— F. Supp. ——, —— (N.D. Ill. 1969).
26. Tinker v. School Dist., 393 U.S. 503 (1968); Board of Educ. v. Barnette, 319 U.S. 624 (1943); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
27. Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).
28. Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969).
29. *Id.*
30. *Id.* at ——.
31. *Id.* at ——.
32. 393 U.S. 503 (1969). For a full discussion of the *Tinker* decision *see* note 56 *infra* and accompanying text.

The court in *Davis v. Firment*[33] more specifically defined a symbol as being "a vehicle by which a concept is transmitted from one person to another. . . ."[34] In addition, the court stated that unless the "symbol" represents "a specific idea or viewpoint," it becomes meaningless and "in effect, not really a symbol at all."[35] To the court the meaning of long hair was ambiguous and, without discussion, it concluded that the student's long hair did not symbolize anything.[36] The court apparently desired a more concrete idea or viewpoint for a symbol. For example, it has been held that displaying a flag was symbolic of approval of that which the flag represented,[37] and that a Jehovah's Witness' refusal to salute a flag was symbolic of a religious belief.[38]

Leonard v. School Committee[39] was the only case which failed to respond to the First Amendment argument.[40] *Breen v. Kahl*[41] discounted the argument by stating that while long hair might be a mode of symbolish speech which evidences some form of youthful cultural revolt,[42] in their view of the matter it was unnecessary to decide the issue conclusively.[43] The contention that long hair constituted symbolic expression was also rejected in *Griffin v. Tatum*[44] where the court stated: "This Court does not find it necessary to reach or decide plaintiff's First Amendment contention. . . ."[45]

Two of the remaining three cases, *Ferrell v. Dallas Independent School District*[46] and *Crews v. Cloncs,*[47] did not expressly decide whether long hair constituted protected symbolic expression. They both assumed, *ad arguendo,* that long hair was a form of protected expression and then proceeded to reject the students' contention by pointing out that symbolic speech is not an absolute right and that it may be curtailed by the state if justified by compelling reasons.[48] The *Ferrell* court was zealous in protecting the authority of the school board and emphatic about its position.

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33. 269 F. Supp. 524 (E.D. La. 1967).
34. *Id.* at 527.
35. *Id.*
36. *Id.*
37. Stromberg v. California, 283 U.S. 359 (1931).
38. Board of Educ. v. Barnette, 319 U.S. 1178 (1943).
39. 349 Mass. 704, 212 N.E.2d 468 (1965).
40. The *Leonard* case was decided on non-constitutional grounds.
41. 296 F. Supp. 702 (W.D. Wis.), *aff'd,* 419 F.2d 1034 (7th Cir. 1969).
42. *Id.* at 705.
43. The court ultimately ruled in favor of the student maintaining that the regulation was violative of the due process clause. *See* note 79 *infra* and accompanying text.
44. 300 F. Supp. 60 (M.D. Ala. 1969).
45. *Id.* at 62. The court ultimately ruled in favor of the student holding that the hair regulation violated the due process clause.
46. 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).
47. 303 F. Supp. 1370 (S.D. Ind. 1969).
48. 392 F.2d at 703; 303 F. Supp. at 1375.

> 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 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.[49]

The *Crews*[50] court took essentially the same position,[51] but went one step further. In attempting to justify the curtailment of this right, the court took the position that " 'pure speech' [was] not involved but rather conduct which reflects or is imbued with speech or opinion."[52] The court seems to imply that "pure speech" occupies a "preferred position" over symbolic speech and, therefore, a lesser compelling reason might be sufficient to infringe one's right of symbolic expression than is necessary to infringe one's right of "pure speech."[53]

In the remaining case, *Richards v. Thurston,*[54] after hearing plaintiff's First Amendment contention, the court unenthusiastically stated that symbolic speech *might* be a valid argument. The court, however, proceeded with the case without further mention of this First Amendment contention.[55]

Three of the most important cases in the area of symbolic speech are *Tinker v. Des Moines Independent Community School District,*[56] *Burnside v. Byars*[57] and *Blackwell v. Issaquena County Board of Education.*[58] Each involved high school students, and in all but *Blackwell* the courts upheld the students' right of symbolic speech.

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49. 392 F.2d at 703. The court failed to discuss, however, the well-established doctrine which states that in reaching any lawful end that course of action must be taken which least infringes on the rights of the individual. *See* note 125 *infra* and accompanying text.

50. 303 F. Supp. 1370 (S.D. Ind. 1969).

51. [I]t is clear that the right to free expression is not absolute, and that it may be infringed by state authority upon a showing of a compelling reason . . . .

Here the interest of the state is in maintaining an orderly and efficient school system, an academic atmosphere in which knowledge can be peacefully transmitted to the pupils. The importance of this state interest cannot be overstated.

Id. at 1375.

52. *Id.*

53. It has been held that even "pure speech" rights are not absolute, but subject to restrictions. Feiner v. New York, 340 U.S. 315 (1951).

54. 304 F. Supp. 449 (D. Mass. 1969).

55. *See* note 24 *supra.* The court ultimately ruled in favor of the student and maintained that the regulation was violative of the due process clause.

56. 393 U.S. 503 (1968).

57. 363 F.2d 744 (5th Cir. 1966).

58. 363 F.2d 749 (5th Cir. 1966).

In *Tinker,* the students wore black armbands to school to protest the United States' involvement in Vietnam. Fearing that the conduct of the students would cause disruption in the school, the school authorities suspended the students. The Supreme Court upheld the students' right to wear the armbands maintaining that the exercise of symbolic expression was closely akin to "pure speech" and was thereby entitled to the comprehensive protection of the First Amendment.[59] The Court qualified this right, however, saying that it could only be exercised if it did not collide with the rights of others.[60] Since the wearing of armbands created no disorder or disturbances[61] the students' right to freedom of expression was honored. The Court, however, did intimate that if substantial school disruptions had resulted, their decision would have been otherwise.[62] The Court further restricted their holding by stating that "[t]he problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. . . . Our problem involves direct, primary First Amendment rights akin to 'pure speech'."[63] This would seem to imply that long hair is *not* a protected right "akin to pure speech."

Burnside and *Blackwell* were decided by the same court of appeals and dealt with high school students suspended for wearing "freedom buttons"[64] to school. In both cases the students wore the buttons "as a means of silently communicating an idea and to encourage the members of their community to exercise their civil rights."[65] Both courts held that the buttons constituted symbolic expression of the type secured by the First Amendment.[66] Although *Burnside* ruled in favor of the students,

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59. 393 U.S. 503, 505 (1968).

60. *Id.* at 513. The theory is that students are entitled to an education in a school with a healthy academic atmosphere with a minimum of disruptions.

61. *Id.* at 508.

62. The school officials banned and sought to punish petitioners for a silent, passive, expression of opinion, unaccompanied by any disorder or disturbances on the part of petitioners. There is no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone.

Id.

63. *Id.*

64. The buttons were circular, approximately 1½ inches in diameter, containing the wording "One Man One Vote" around the perimeter with "SNCC" inscribed in the center.

Burnside v. Byars, 363 F.2d 744, 746 (1966).

The buttons were about an inch in diameter depicting a black and white hand joined together with "SNCC" inscribed in the margin.

Blackwell v. Board of Educ., 363 F.2d 749, 750 (1966).

65. 363 F.2d 744, 747 (1966).

66. [T]he regulation forbidding the wearing of "freedom buttons" on school grounds is arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression . . . .

Id. at 748.

Blackwell held for the school board. The distinguishing factor was that no disruption was caused by the presence of the buttons in *Burnside*,[67] while substantial commotion and school disturbance occurred in *Blackwell*.[68] The principle espoused by those cases is that the right of symbolic expression may be abridged when it infringes upon the rights of others; the difficult problem is to decide what degree of disruption is a sufficient infringement to warrant the curtailment of symbolic speech.

It would seem that for a symbol to qualify for First Amendment protection it must definitely symbolize some easily recognizable idea or belief.[69] "Freedom buttons" and black armbands are absolute symbols—symbols protected as free speech;[70] each has become recognized as symbolizing an identifiable idea or belief. Under the present guidelines, however, it does not appear that long hair constitutes such a symbol that deserves free speech protection. Even though long hair is theoretically a symbol, the courts have refused to grant it First Amendment protection because it fails to convey a *specific* idea or concept.[71]

Another possible reason for the court's reluctance to accept long hair as a secured symbol is that there is no pressing necessity for such a decision. Realizing the difficulty in deciding whether this symbol warrants free speech protection,[72] the courts appear relieved to discover that the controversies before them could be decided by the application of other amendments.[73] Although it might be said that this is the "easy way out," or that the court is being evasive and hedging, it could also be argued that the courts are adhering to the doctrine of judicial abstention.[74] Traditionally, the Supreme Court has refused to decide constitutional questions unless it is absolutely necessary.[75] Since the cases dealing with long hair can be decided with less difficulty on the basis of the Fourteenth Amend-

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The court said this case involved "regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment." 363 F.2d 749, 753 (1966).

67. "The record indicates only a showing of mild curiosity on the part of the other school children . . . ." 363 F.2d 744, 748 (1966).

68. "This activity [students attempting to put buttons on other students] created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline . . . ." 363 F.2d 749, 751 (1966).

69. *See* notes 28 and 31 *supra* and accompanying text.

70. Tinker v. School Dist., 393 U.S. 503 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

71. Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).

72. Breen v. Kahl, 296 F. Supp. 702, 705 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969).

73. The courts invariably discuss the First and the Ninth Amendments in addition to the Fourteenth Amendment; they usually, however, decide the case pursuant to the Fourteenth.

74. Muskrat v. United States, 219 U.S. 346 (1911).

ment,[76] there is no need for the courts to utilize the First Amendment.

THE DUE PROCESS ARGUMENT

One of the arguments asserted by the students concerning the Fourteenth Amendment is that they were deprived of their "liberty" without due process of law. The liberty for which protection is sought is the freedom of one to present himself to the world as he sees fit.[77]

The four cases holding in favor of the students[78] were decided primarily on the basis that the students were denied due process of law. The court in *Breen v. Kahl*[79] held that "[t]he right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."[80] The court admitted, however, that this freedom could be abridged by the state, but only if the state was able to meet a "substantial burden of justification."[81] To determine this issue the court balanced the individual's right to exercise his liberty to present himself to society as he sees fit against the right of the other students to receive an orderly education with a minimum of disruption. Noting that no substantial commotion was caused by the students' long hair,[82] the court concluded that the school board had failed to adequately justify the promulgation of such a rule.

In *Richards v. Thurston,*[83] Judge Wyzanski stated that a student's "claim to liberty as to his appearance is entitled to protection from action by the state or its agents . . . under the broad terms of the 'due process' clause of the Fourteenth Amendment."[84] Conceding that such a liberty could be curtailed, Judge Wyzanski said that "the state must [first] make a strong showing of the need [for] its curtailment."[85] After reviewing the record, Judge Wyzanski concluded that there was no apparent reason for the regulation other than the satisfaction of the principal's own preference as to hair length.[86]

Griffin v. Tatum[87] took the position that "there can be little doubt that the Constitution protects the freedom to determine one's own hair-

75. Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339 (1892).
76. *See* notes 77 and 107 *infra* and accompanying text.
77. Richards v. Thurston, 304 F. Supp. 449, 455 (D. Mass. 1969).
78. *See* note 2 *supra.*
79. 419 F.2d 1034 (7th Cir. 1969).
80. *Id.* at 1036.
81. *Id.*
82. *Id.* at 1037.
83. 304 F. Supp. 449 (D. Mass. 1969).
84. *Id.* at 453.
85. *Id.* at 452.
86. *Id.* at 451.
87. 300 F. Supp. 60 (M.D. Ala. 1969).

style and otherwise to govern one's personal appearance."[88] The court felt that such a freedom afforded individuals "the right to some breathing space . . . into which the government may not intrude without carrying a substantial burden of justification."[89] Since the record disclosed no harm to others as a result of the student's long hair[90] the court determined that the burden of justification had not been met by the school. In *Miller v. Gillis*,[91] the court found that there was a "highly protected freedom of people to present themselves physically to the world in the manner of their own individual choice"[92] and that since the school board could show no compelling reason for the existence of the rule, the constitutionally secured freedom should take precedence over the unfounded rule.[93]

It is interesting to note that none of the courts which ruled for the school boards[94] mentioned the due process clause even though it constituted one of the students' primary arguments.[95] On the other hand, it is apparent that the courts which held for the students recognized that the right of a person to wear his hair as he sees fit constitutes a "liberty" of the type secured by the due process clause of the Fourteenth Amendment.[96]

While the Fourteenth Amendment guarantees that one will not be deprived of his "liberty . . . without due process of law,"[97] there is no mention as to what constitutes a protected liberty. Although the term "liberty" almost defies definition, the Supreme Court, in *Allegeyer v. Louisiana*,[98] stated:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways. . . .[99]

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88. *Id.* at 62. The court cited *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), as authority. *See* note 84 *supra* and accompanying text.

89. 300 F. Supp. 60, 62 (1969).

90. The court held that "[t]he school authorities' 'justification,' or the reasons they advance for the necessity for such a haircut rule completely fail." *Id.* at 63.

91. —— F. Supp. —— (N.D. Ill. 1969).

92. *Id.* at ——.

93. *Id.* at ——.

94. *See* note 3 *supra*.

95. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967). The court did, however, discuss and reject the student's other three arguments based on the First, Eighth and Ninth Amendments.

96. *See* notes 83 and 88 *supra* and accompanying text.

97. U.S. CONST. amend. XIV, § 1.

98. 165 U.S. 578 (1897).

99. *Id.* at 589.

Subsequently, the Court in *Meyer v. Nebraska,*[100] expanded the term "liberty" so as to include other specific rights.

> Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the individual occupations of life, to acquire any useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of one's own conscience, and generally to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men.[101]

Other court decisions have offered additional clarifications of the term "liberty."[102]

There appears to be a concept which permeates all suggested definitions of this term. Inherent in each is deference to a principle which is more aged than any written law and which transcends the whole Bill of Rights—thought is not patterned. Thought cannot be controlled and will inevitably evidence itself through conduct. Each man must live his personal life as he sees fit. Our founding fathers realized this and in drafting the Bill of Rights ensured the continued existence of this natural right.

It would seem that since the Consitution grants to every person the liberty to use all his faculties in any lawful manner,[103] and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"[104] the choice of hair style, being such a personal matter, would fall well within these protected confines.

The liberty to determine one's own hair style relates to how a man

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100. 262 U.S. 390 (1923).

101. *Id.* at 399.

102. Aptheker v. Secretary of State, 378 U.S. 500 (1964) (the right to travel is such a liberty); Cantwell v. Connecticut, 310 U.S. 296 (1940) (the right to the liberty secured by the First Amendment provisions); Hague v. CIO, 307 U.S. 496 (1939) (the right to use all public streets and public places); Wall v. King, 206 F.2d 878 (1st Cir. 1953) (the right to make use of one's own property); Thomas v. District of Columbia, 90 F.2d 424 (D.C. Cir. 1937) (the right to be governed by "laws which hear before they condemn"); Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964) (the right to freedom from arrest and freedom from imprisonment except through due process of law); Dominguez v. Denver, 147 Colo. 233, 363 P.2d 661 (1961) (the right to further one's business and pleasure concerns); Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944) (freedom of choice in matters of purely personal concern); Fitzsimmons v. New York Athletic Comm'n, 146 N.Y.S. 117, *aff'd*, 162 App. Div. 904, 147 N.Y.S. 1111 (Sup. Ct. 1914) (the right to freedom by the imposition of restraint on others); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949) (the right to enjoy and use all the faculties with which man has been endowed by his creator); Block v. Schwartz, 27 Utah 387, 76 P. 22 (1904) (the right to purchase, hold and sell property); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409 (Wyo. 1962) (the right to do all which is not unlawful).

103. Allegeyer v. Louisiana, 165 U.S. 578, 589 (1897).

104. Meyer v. Nebraska, 262 U.S. 390 (1923).

presents himself to society. It is a right so personal and fundamental that unwarranted curtailment of it would be tantamount to oppression. Individuality should not be stifled.

As personal as this right is, it is not exempt from regulation.[105] The rights of a person to present himself to the world as he sees fit are paramount "until one's appearance carries with it a substantial risk of harm to others."[106] Applying this test to the "hair" cases it would seem that restrictions on hairstyle should not be imposed unless the right of other students to receive an orderly education is thereby jeopardized.

The Equal Protection Argument

In many of the "hair" cases the students claimed that the hair regulations were unreasonable and arbitrary and therefore denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.[107] Five courts made no mention of this argument.[108] One court, while deciding for the school board,[109] discussed the issue and conceded that the student might have been discriminated against, but held that "only *invidious* discrimination . . . is prohibited by the Fourteenth Amendment."[110] Considering the regulation to be in the furtherance of a vital state interest—undisturbed public education—the court found no denial of equal protection.

Griffin v. Tatum[111] and *Miller v. Gillis*[112] decided that the hair regulations were violative of equal protection; both, however, decided in favor of the students on the basis of the due process clause.[113] In *Griffin* the court stated:

> [I]n this instance the application of the haircut rule to this plaintiff . . . constitutes an arbitrary and unreasonable classification; for that reason, the invocation of the rule as a basis for suspending the plaintiff as a student from this public school clearly violates the equal protection clause of the Fourteenth Amendment.[114]

105. Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969).
106. *Id.* at 62.
107. Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).
108. Breen v. Kahl, 419, F.2d 1034 (7th Cir. 1969); Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969); Davis v. Firment, 369 F. Supp. 524 (E.D. La. 1967); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).
109. Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).
110. *Id.* at 1376 (emphasis added).
111. 300 F. Supp. 60 (M.D. Ala. 1969).
112. —— F. Supp. —— (N.D. Ill. 1969).
113. *See* note 78 *supra* and accompanying text.
114. 300 F. Supp. 60, 62 (1969).

The court felt that the rule imposed "an utterly unreasonable condition to the plaintiff's continuing as a student."[115]

The *Miller* court, in finding a denial of equal protection, applied a rather extensive test to determine whether a regulation is repugnant to the equal protection clause. According to the court, a regulation or rule is repugnant if it falls within one or more of the following categories:

> (1) The regulation is not necessary to the exercise of the inherent police powers of the state to provide for the health, education and general welfare of the people of that state; (2) the regulation once promulgated is incapable of meeting the need to which the regulation is directed; (3) the regulation creates, by its enforcement an evil greater than that evil sought to be corrected; and (4) the regulation is arbitrary in defining a class of people to which it applies.[116]

The court then proceeded to declare that the regulation denied long haired students equal protection because it created an arbitrary class of those few wishing to wear their hair long.[117]

Since the courts have taken judicial notice of the importance of an education,[118] and in many states students are required by law to attend school,[119] it may be argued that a regulation which denies a student an education solely on the basis of the length of his hair results in unjust discrimination and is therefore unconstitutional.

The Supreme Court has given some indication as to the interpretation of the equal protection clause and has held that only "invidious discrimination" is prohibited by the provision.[120] It would appear that hair regulations would constitute "invidious discrimination" if they were promulgated merely at the whim of the school principal and not in the furtherance of a legitimate governmental objective.

Invariably, the legitimate governmental objective given by the school

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115. *Id.*

116. —— F. Supp. at ——.

117. *Id.* at ——.

118. In *Brown v. Board of Educ.*, 347 U.S. 483 (1954), Mr. Chief Justice Warren stated:

> Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. *See Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), wherein Judge Doyle stated: "I . . . [take] judicial notice of the social, economic, and psychological value and importance today of receiving a public education through twelfth grade." *Id.* at 704.

119. MASS. ANN. LAWS ch. 76, § 1 (1964); N.Y. EDUC. § 3205 (McKinney 1953); PA. STAT. ANN. tit. 24, § 13-1327 (1962).

120. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

boards is the maintainence of a peaceful, academic atmosphere in the schools.[121] It would seem, however, that this objective may be attained in a variety of ways which would not abridge one's liberty to choose his hair style.[122] When dealing with fundamental liberties the Supreme Court has held that "precision of regulation must be the touchstone."[123] Therefore, if a valid objective may be reached by either of two means, the chosen means should be the one that will result in the least infringement upon the rights of individuals.[124]

If a commotion arises because a student wears long hair, the school can choose either of two means to prevent further disruptions: 1) enforce a prescribed haircut to which everyone is to conform; or 2) reprimand only those who actually cause the commotion. In accordance with the Supreme Court's decision in *Shelton v. Tucker,*[125] the school board must achieve its objective by choosing that course of action which least infringes upon the individual rights and liberties of the students. This would suggest that the second alternative is the most appropriate. The school board's power to initiate rules in the furtherance of managing the schools is not contested,[126] but such rules should not be promulgated and enforced indiscriminately. It would seem that a student's education should not be conditioned on a rule that all students have a prescribed haircut when the objective sought might be achieved by a less imposing alternative—punishing only the students creating the commotion. The student and the school administrator have exactly the same constitutional rights;[127] both are individuals, and each deserves respect from the other.[128]

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121. Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969). In that case, the school board maintained that long hair disrupted the "classroom atmosphere . . . and resulted in the distraction of other students so as to interfere with the educational process in the high school." *Id.* at 1373.

122. *Griffin v. Tatum,* 300 F. Supp. 60, 63 (M.D. Ala. 1969), intimated that various disciplinary measures should be taken in lieu of requiring the students to wear their hair at a prescribed length.

123. United States v. Robel, 389 U.S. 258, 265 (1967), citing NAACP v. Button, 371 U.S. 415, 438 (1963).

124. United States v. Robel, 389 U.S. 258, 265 (1967).

125. 364 U.S. 479 (1960).

126. This Court recognizes and has in the past recognized, the basic principle that school authorities are possessed with the power and the duty to establish and enforce regulations to deal with activities which may materially and substantially interfere with the requirements of appropriate discipline in the school. Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969).

127. Miller v. Gillis, —— F. Supp. ——, —— (N.D. Ill. 1969).

128. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.

1 EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 6 (1967), citing the First Inaugural Address of Thomas Jefferson, March 4, 1801.

CONCLUSION

The single factor which seems to influence the courts most is the absence or presence of a bona fide disciplinary problem. Three courts found that there were no disciplinary problems created as a result of the students' hair length.[129] Accordingly, they saw no reason for presently abridging the students' rights.[130] In only one case did the record show that the students' long hair caused substantial school disturbances and the court therefore held for the school board.[131] Another court held that as long as hair *could* or *might* create disruption, the school board's rule would be sustained.[132] In the three remaining cases, the only evidence of any commotion was from uncorroborated statements made by the principals or a school board's statement that disruption did exist.[133] In *Ferrell v. Dallas Independent School District*[134] and *Davis v. Firment*[135] the courts decided that this was sufficient evidence to justify upholding the school's hair rule. *Griffin v. Tatum,*[136] however, declared that such evidence was not substantial enough to necessitate the curtailment of a constitutional right.

The cases which decided for the students[137] indicated, however, that if sufficient evidence has been introduced to show substantial disruption, and that other disciplinary action had proven to be ineffective, the school regulations might have been sustained.[138] In this respect the cases are consistent.

No one would contest the school's right to require a recalcitrant student to have a specific haircut if it was found to be the only way to preclude school disturbances. The rights of the other students to receive an education in an academic atmosphere should be paramount in such a case. But this method should be resorted to only if: 1) there are no less stringent disciplinary measures to secure the desired end; and 2) the commotion was caused directly by the presence of the long hair. The latter requirement is an attempt to exclude those cases in which the commotion was caused *indirectly* by the long hair. For instance, should

129. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969).

130. Miller v. Gillis, —— F. Supp. —— (N.D. Ill. 1969).

131. Crews v. Clones, 303 F. Supp. 1370 (S.D. Ind. 1969).

132. Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).

133. Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968); Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).

134. 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

135. 269 F. Supp. 524 (E.D. La. 1967).

136. 300 F. Supp. 60 (M.D. Ala. 1969).

137. *See* note 2 *supra.*

138. "It must be shown, and clearly so, that the particular style of dress and appearance complained of would in fact be actually disruptive." Miller v. Gillis, —— F. Supp. ——, —— (N.D. Ill. 1969).

other students taunt, intimidate and ridicule the long haired student, the ensuing disturbance would be the result of the irresponsible acts of the other students.[139] In such a case, the rowdy students, not the long haired student, should be the subject of disciplinary action—a person handing out leaflets on a street corner cannot be prosecuted for littering because the people who accept them throw the leaflets in the street.[140] Some other method, then, must be devised to ensure school tranquility; it cannot be attained by supressing those who wish to exercise their constitutional rights.[141] Mr. Justice Douglas, dissenting in *Ferrell v. Dallas Independent School District,* demonstrated the inequity of such supression when he stated:

> It comes as a surprise that in a country where the states are restrained by an Equal Protection Clause, a person can be denied education in 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 definiton in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed these guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.[142]

The judicial trend is definitely in favor of the students,[143] and there is no indication that this trend will reverse itself. The Supreme Court has denied certiorari to the only party petitioning for review.[144] At that time, however, there was no conflict between the various federal courts on the constitutional issue of long hair.[145] Today there is a conflict[146]—the Fifth

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139. An example of disruption which is directly caused by long hair would be where the long haired student's mere presence in the classroom would

> disrupt the classroom atmosphere, impede classroom decorum, cause disturbances among other students in attendance, and result in the distraction of other students so as to interfere with the educational process in the high school.

Crews v. Cloncs, 303 F. Supp. 1370, 1373 (S.D. Ind. 1969).

140. Scheider v. Irvington, 308 U.S. 147 (1939).

141. Cooper v. Aaron, 358 U.S. 1 (1958).

142. Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

143. Chronologically, the first three cases were all decided for the school board while four of the last five held for the student. *See* notes 2-3 *supra* and accompanying text.

144. Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

145. *Ferrell* and *Breen* are the only cases which have been argued before United States Courts of Appeal.

Circuit has ruled for the school board[147] and the Seventh Circuit has decided for the student.[148] Although these cases might be consistent with each other,[149] it seems probable that the Supreme Court will eventually grant certiorari, and it is submitted that the Court will uphold the rights of the student to determine his own hair style.

146. The conflict, however, is primarily among the United States District Courts.
147. Ferrell v. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).
148. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).
149. *See* note 138 *supra* and accompanying text.