

7-1-1971

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Recommended Citation

James D. Moore, *In-Hair-Ent Rights and Tonsorial Tutelage*, 32 Mont. L. Rev. (1971).

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IN-HAIR-ENT RIGHTS AND TONSORIAL TUTELAGE

INTRODUCTION

May the state, through its public schools, promulgate and enforce regulations whereby an individual may be denied an education solely because of the length of his hair? This question, perhaps representing a test to the extremes of guaranteed personal rights, has found its way into American courtroom with increasing frequency. It has not been decided by the Supreme Court, and has received comment from but one Supreme Court Justice.¹

The state and federal courts confronting this question have thus far applied divergent approaches and have induced divergent outcomes. There is no agreement as to whether the right of an individual to determine his hair style is constitutionally protected. Where such a right is assumed, or decided in the affirmative, there is no agreement as to where in the Constitution that right is preserved, whether it is fundamental, or whether, and under what circumstances, the state, through its schools, may restrict it.

The outcome in these cases, although literally restricted to the personal grooming-school regulation question, bears directly upon the status and scope of other personal rights, as translated through the special environment of the school. It will be the purpose of this article to examine and compare the opinions handed down in the fifty-plus cases which have reached the courts to date.

A CONSTITUTIONAL RIGHT TO DETERMINE ONE'S HAIR STYLE.

In 1879 the sheriff for the city and county of San Francisco, acting under an 1876 ordinance,² improvidently clipped off the queue of one Ho Ah Kow, who had been sentenced to six months in jail for failure to pay a fine assessed against him for the commission of a misdemeanor. Ho brought an action against the sheriff³ alleging that the sheriff had no right to cut his hair, that it constituted a cruel and unusual punishment, and that the ordinance, as applied to him, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The Court upheld Ho's contentions, noting particularly that the absence of a queue among those of Chinese ancestry was a sign of contempt and disgrace among his peers, and that the enforcement

¹Justice Douglas, dissenting from the denial of certiorari in *Ferrell v. Dallas Independent School District*, 393 U.S. 856 (1968), stated at 856: "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 a public school because of the length of his hair."

²The ordinance provided that upon arrival at the jail, the hair of all prisoners should be clipped to a uniform length of one inch. Although applicable to all inmates, on its face, the ordinance had been drafted and enforced with an eye for the Chinese, who allegedly needed additional impetus before they would pay their fines.

³*Ho Ha Kow v. Nunan*, 12 F. Cas. 252 (D. Cal. 1879).

of the ordinance against Ho therefore constituted a cruel and unusual punishment.⁴

This case is the first in which the right to retain one's hair was given overt recognition by an American Court. Grooming cases, as with the great majority of personal liberty cases, are actually of a more recent vintage. Most have arisen within the past decade, over ninety percent of them having found the courts within the last three years.⁵ Of these recent cases, five either did not reach or did not see fit to discuss the constitutional issue.⁶ Approximately one-third of the cases assumed *arguendo* the existence of the right, without expressly deciding thereupon.⁷ In only three cases did the court meet and flatly reject the contention that hair length and style might be constitutionally protected.⁸ In contrast, twenty-three recognized the right to deter-

⁴*Id.* at 255. It is noteworthy that this facet of the opinion, recognizing the special significance of hair as a symbol among certain groups, and appearing to give weight to peer group opinion, may have been applicable to the cases which follow, although cited by none.

⁵The source which sparked the long-hair look among American youth was probably the English "rock" group, the Beatles. They appeared on the American scene in 1963-64, at a time when social and political disenchantment was beginning to increase among young people. The Beatles offered not only highly innovative music, but a new physical identity with which to consummate a break with the rejected value hierarchy. Independently, the social and political frustration manifested itself through other channels. Some retreated into the pensive solitude of marijuana and related drugs. Some exploded into the violent reaction observed through racial riots and anti-war demonstrations. Others became involved in and worked through the system.

From outside this arena of activity, unfortunately, the new violence (physical rejection), the new rise in drug use (mental rejection), and the physical appearance of independence offered by long hair became virtually synonymous. Long hair except where predominant early in the 60's, became the symbol of a present use of drugs and an impending use of violence. Consequently, and in reaction thereto, it became vogue in the schools to put restrictions upon hair length.

⁶*Gfell v. Rickelman*, 313 F. Supp. 364 (N.D. Ohio 1970); *Alexander v. Thompson*, 313 F. Supp. 1390 (C.D. Cal. 1970); *Doe v. Hacker*, 316 F. Supp. 1144 (D. New Hampshire 1970); *Giangreco v. Center High School District*, 313 F. Supp. 776 (W.D. Mo. 1969); and *Leonard v. School Committee of Attleboro*, 349 Mass. 704, 212 N.E.2d 468 (1965).

By constitutional issue is meant whether there exists, in its pure state, a constitutionally protected right to wear one's hair in the style of one's choice. This issue should not be confused with the power of the state, through its schools, to restrict and regulate hair styles among students, although the justification required to sustain such regulations may be directly conditioned upon whether the court answers the former issue in the affirmative.

⁷*Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); *King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970); *Wood v. Almo Heights Independent School District*, 308 F. Supp. 551 (W.D. Tex. 1970); *Pritchard v. Spring Branch Independent School District*, 303 F. Supp. 570 (S.D. Tex. 1970); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034 (S.D. Tex. 1970); *Lovelace v. Leechburg Area School District*, 310 F. Supp. 579 (W.D. Pa. 1970); *Christmas v. El Reno Board of Education*, 313 F. Supp. 618 (W.D. Okla. 1960); *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970); *Bannister v. Paradis*, 316 F. Supp. 185 (D. N.H. 1970); *Bishop v. Colaw*, 316 F. Supp. 445 (E.D. Mo. 1970); *Black v. Cothorn*, 316 F. Supp. 468 (D. Neb. 1970); *Carter v. Hodges*, 317 F. Supp. 89 (W.D. Ark. 1970); *Crews v. Clones*, 303 F. Supp. 1370 (S.D. Ind. 1969); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969); *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968); and *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967).

⁸*Cordova v. Chonko*, 315 F. Supp. 933 (N.D. Ohio 1970); *Stevenson v. Wheeler County Board of Education*, 306 F. Supp. 97 (S.D. Ga. 1969); and *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967).

mine one's hair length and style as contained within the constitutional guarantees.⁹

Among the latter group, those which found the right protected, the court in *Breen v. Kahl*¹⁰ was most adamant. In that case the plaintiff, an eleventh grade student, was expelled because his hair violated the high school grooming regulation.¹¹ The court, after noting that petitioner's hair style was not obscene, as suggested by the defendant school administrators, stated that the wearing of one's hair at a certain length might be considered a form of expression in which speech and non-speech elements are combined, and to which the *U.S. v. O'Brien* test¹² was applicable. The court, however, found it unnecessary to determine whether hair style was expression within the purview of the First Amendment. It compared the difficulty in ascertaining the specific guaranty which embraced this right to the difficulty encountered in *Griswold v. Connecticut*,¹³ but indicated that the right to present one's self physically to the world as one pleases is a highly protected interest which the state must not impair without first bearing "a substantial burden of justification."¹⁴ The Court also described the value as "implicit within the concept of ordered liberty,"¹⁵ the justification of which required a compelling state interest.

⁹*Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970); *Cash v. Hoch*, 309 F. Supp. 346 (W.D. Wis. 1970); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Farrell v. Smith*, 310 F. Supp. 732 (D. Maine 1970); *Dunham v. Pulsifier*, 312 F. Supp. 411 (D. Ver. 1970); *Corley v. Daubauer*, 312 F. Supp. 811 (E.D. Ark. 1970); *Elko v. McCarey*, 315 F. Supp. 886 (E.D. Pa. 1970); *Boyle v. Scapple*, 38 U.S.L.W. 2614, F. Supp. (D-Ore. 1970); *Whitsell v. Pampas Independent School District*, 316 F. Supp. 852 (N.D. Tex. 1970); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969); *Griffin v. Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969); *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969); *Olf v. East Side Union High School District*, 305 F. Supp. 557 (N.D. Cal. 1969); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969); *Brick v. Board of Education*, 305 F. Supp. 1316 (S.D. Colo. 1969); *Yoo v. Moynihan*, 28 Conn. Supp. 375, 262 A.2d 814 (1969); *Meyers v. Arcata Union High School District*, 75 Cal. Rptr. 68 (1969); *Akin v. Board of Education of Riverside Unified School District*, 68 Cal. Rptr. 557 (1968); and *Finot v. Pasadena City Board of Education*, 58 Cal. Rptr. 520 (1967).

¹⁰*Breen v. Kahl*, *supra* note 9.

¹¹*Id.* at 703. The grooming regulation of the Williams Bay High School Dress Code, involved therein, provided: "Hair should be washed, combed, and worn so it does not hang below the collar line in back, over the ears on the side, and must be above the eyebrows. Boys should be clean shaven."

¹²*U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). Where a government regulation prohibits conduct containing both speech and nonspeech elements, the regulation can be sustained only if (1) promulgation of the regulation was within the constitutional power of the government, (2) the governmental interest subserved by the regulation is substantial or important, (3) the interest is unrelated to the suppression of free speech, and (4) the incidental restriction on speech is no greater than is essential.

¹³*Griswold v. Connecticut*, 381 U.S. 479 (1965). The "right" which confronted the court in that case was that of a husband and wife, within the privacy of their home, to discuss and use contraceptives.

¹⁴*Breen v. Kahl*, *supra* note 9 at 706. The quoted passage reappears frequently within the framework of these cases.

¹⁵*Palko v. Connecticut*, 302 U.S. 319 (1937).

In *Griffin v. Tatum*,¹⁶ the Court noted the analysis in *Breen*, and concluded:

Although there is disagreement over the proper analytical framework, there can be little doubt that the Constitution protects the freedom to determine one's own hair style and otherwise govern one's personal appearance. . . . In short, the freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification.¹⁷

Both *Breen* and *Griffin*, although unclear as to the nature and source of the right to govern one's hair style, were cited by Judge Wyzanski in *Richards v. Thurston*.¹⁸ Pointing out that hair was "one of the most visible examples of personality," and that petitioner's 'Beatle cut' was ". . . in a tidy style that Albert Einstein rarely displayed," Wyzanski simply paraphrased petitioner's right as "his liberty to express in his own way his preference as to whatever hair style comports with his personality and his own search for identity."¹⁹

It is doubtful that hair length can be protected solely on grounds that it constitutes expression as guaranteed by the First Amendment. While there has been substantial dicta favorable to such a position, akin to that found in *Breen*, noted above, most courts, like that in *Breen*, either found it unnecessary to reach such a contention, or felt that hair was not sufficiently expressive to entitle it to First Amendment protection. In only two cases was the "right to self-expression in the styling of one's hair" held to be a First Amendment right.²⁰ Other courts squarely meeting this argument flatly rejected it, generally reasoning that the records were devoid of any *particular* ideological, philosophical, political, or sociological ideas which the various petitioners might have expressed by their hair length.²¹

¹⁶*Griffin v. Tatum*, *supra* note 9. This case was appealed, and although affirmed, was toned down substantially. See 425 F.2d 201 (5th Cir. 1970).

¹⁷*Id.* at 62. Again, the Court found it unnecessary to reach or decide the petitioner's First Amendment claim. As to the right to be left alone, to "breathing space", it appears to find its nebulous roots in *Griswold*, *supra* note 13.

¹⁸*Richards v. Thurston*, *supra* note 9.

¹⁹*Id.* at 452, 453.

²⁰*Yoo v. Moynihan*, *supra* note 9; *Westley v. Rossi*, *supra* note 9.

²¹*Jackson v. Dorrier*, *supra* note 7; *Pritchard v. Spring Branch Independent School District*, *supra* note 7; *Davis v. Firment*, *supra* note 8; *Brick v. Board of Education*, *supra* note 9; *Crossen v. Fatis*, *supra* note 9; *Lovelace v. Leechburg Area School District*, *supra* note 7.

This writer has divided feelings about the position as taken by these courts. It is clear that an outer limit must be imposed upon the term "speech", as found in the First Amendment. It is also clear that our founding fathers did not intend, nor even contemplate, that the term "speech" might encompass hair length or style.

The term "speech", however, has been construed to mean "expression", and thus to include such conduct as burning a selective service card, *U.S. v. O'Brien*, *supra* note 12; wearing black armbands, *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); soliciting legal causes, *NAACP v. Button*, 371 U.S. 415 (1963); in some cases, picketing, *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968); saluting the flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and, rather ironically, even pure silence, *Brown v. Louisiana*, 383 U.S. 131 (1966).

Whether *Griswold v. Connecticut*²² created a place for such a right as that involved in the hair cases is likewise a tenuous proposition, largely because of the absence of a majority opinion in the *Griswold* decision. *Griswold* was similar to the hair cases in that it dealt with another Constitutionally unnamed right—the right to discuss and use contraceptives within the privacy of one's home. The Supreme Court recognized the right to be fundamental, but could not agree upon where, within the framework of the constitution, the right was guaranteed. Justice Douglas's plurality opinion suggested the right to be a "penumbral right" of the First Amendment, while Justice Goldberg's concurring opinion opted for the Ninth Amendment.²³

Understandably, *Griswold* has received substantial mention in the hair cases. Faced with finding a place for this unarticulated but fundamental personal right, the court in *Lovelace v. Leechburg Area School District*²⁴ cryptically summed up the views of many courts:

We believe there is not [a constitutional right to determine one's own hair style] unless it can be derived [like contraception and privacy, citing *Griswold*] by the process of cerebral parthenogenesis from primeval darkness and a vague constitutional continuum without form and void. The task should not be formed by a court of first instance. We concede that speculation regarding the nature and the mystery of the Ninth Amendment rights is an attractive area for philosophic ratiocination.

Only three cases have rejected the *Griswold* approach. The Court in *Davis v. Firment*²⁵ noted the absence of a majority opinion in *Griswold*, and stated that even had there been one, the free choice in grooming was not a fundamental right.²⁶ The Court in *King v. Saddleback Junior College District*²⁷ discussed the *Griswold* contention, but decided that "since the factual existence of this right [to be left alone, the First Amendment penumbral right of privacy] itself is in doubt at this point in the proceeding, we do not think plaintiff's case is entitled to the per set status

The requirement that a particular sociological, political, or philosophical idea be expressed by hair length would appear to go beyond the test applied in the above cases, if under this requirement he who asserts the right must show that what is being expressed is susceptible to precise articulation. Perhaps otherwise stated, if conduct, to be entitled to First Amendment protections, must be intended as a direct substitute for verbal expression, there still remains the question, "expression of what?"

In the midst of this First Amendment soul-searching comes hair. For some it is a single factor in personality, that often unconscious way we present ourselves to the world. For others, as it was for our forefathers, who donned silver wigs as a symbol, albeit vague, of wisdom and experience, it is even more.

²²*Griswold*, *supra* note 13.

²³The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

²⁴*Lovelace*, *supra* note 7.

²⁵*Davis v. Firment*, *supra* note 7.

²⁶*Davis v. Firment* stands alone in this holding.

²⁷*King v. Saddleback Junior College District*, *supra* note 7.

guaranteed by the Constitution²⁸ The court in *Miller v. Gillis*,²⁹ simply rejected the contention without discussion.

While *Griswold*, as noted in the *Davis* and *King* cases, cannot be cited as authority for the proposition that certain fundamental, but unnamed rights, are penumbral to the First Amendment or are guaranteed by the Ninth, *Griswold* is authority for the proposition that certain rights, although unnamed, are nevertheless protected by the Constitution. Thus, as stated in *Farrell v. Smith*:³⁰

It is unnecessary to resolve the much mooted question of whether this right is 'symbolic speech' . . . or is derived from the Ninth Amendment or found in the 'penumbra' of other constitutional protections.

It is sufficient that the right exists and is protected from state infringement by the Due Process Clause of the Fourteenth Amendment.³¹

Although articulated differently by the Courts in each case, the majority of those hair decisions which met constitutional issue arrived at this conclusion. The freedom to determine one's hair style, whether described as a fundamental right,³² or as a "personal liberty"³³ was protected by the Constitution, and the impairment thereof required a "substantial burden of justification"³⁴ by the state.

A subordinate Constitutional issue, since virtually all petitioners in these hair cases have been high school and junior high school students, has been whether, assuming the existence of the right, it is guaranteed to children as well as to adults.³⁵ The Court in *Cordova v. Chonko*,³⁶ citing

²⁸*Id.* at 428.

²⁹*Miller v. Gillis*, *supra* note 7. ,

³⁰*Farrell v. Smith*, *supra* note 9.

³¹*Id.* at 736, 737.

³²*Dunham v. Pulsifier*, *supra* note 9 at 418. "The nature of the right presented in the hair cases, although called by many names, has invariably been deemed fundamental."

³³*Finot v. Pasadena City Board of Education*, *supra* note 9. ". . . one of these constitutionally unnamed but protected personal liberties under the due process provisions of the federal and state constitutions." See also, *Richard v. Thurston*, *supra* note 9 at 452.

³⁴*Breen v. Kahl*, *supra* note 9 at 706. It is noteworthy that in one case the right or liberty was recognized, but the "substantial burden of justification" imposed upon the state was unequivocally rejected. *Pritchard v. Spring Branch Independent School District*, *supra* note 7. In that case the court traced "preferred place" language regarding fundamental rights to *Kovacs v. Cooper*, 336 U.S. 77 (1949), wherein Justice Frankfurter concluded, at 94, "In the field of the First Amendment and Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this court."

This view was supported in *King v. Saddleback Junior College District*, *supra* note 7 at 428, wherein the court stated that "those asserting the existence of the right under the particular circumstances, and an impairment thereof, or a threat of impairment, have the burden of proving it."

³⁵This issue involves only the capacity of children to possess the otherwise admittedly fundamental right, and should not be confused with the state's disparate power to regulate it. See, e.g., *Ginsberg v. New York*, 300 U.S. 629 (1968).

³⁶*Cordova v. Chonko*, *supra* note 8.

Justice Frankfurter from *May v. Anderson*,³⁷ answered this question with a rather flat no:

It is obvious that the problem presented by the facts of this case cannot be solved by reference to cases concerned with the constitutional rights and liberties of adults. Children, of necessity, cannot be uncritically accorded those rights, and it is foolish to say they can be.³⁸

But *Cordova* has standing against it, on this issue, virtually every other hair decision. Of these, the vast majority simply point to the Supreme Court's pronouncement in *Tinker v. Des Moines Independent School District*.³⁹ Justice Fortas, writing for the majority in *Tinker*, stated:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state.⁴⁰

Thus the settled rule appears to be that laid down by Justice Fortas in *Tinker*, that students do not shed their constitutional rights at the school-house door.⁴¹ While other cases have not cited *Tinker*, they have expressed agreement therewith through similar assertions.⁴² Consequently, the rule that children have constitutional rights which follow them into state-operated schools is not only well settled, but is one of the few issues, in the morass presented by hair cases, upon which there is considerable agreement.

³⁷*May v. Anderson*, 345 U.S. 528 (1952). Therein Justice Frankfurter noted "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children."

³⁸*Cordova v. Chonko*, *supra* note 8 at 960.

³⁹*Tinker*, *supra* note 21.

⁴⁰*Id.* at 511.

⁴¹*See, e.g.*, *Richards v. Thurston*, *supra* note 9 at 452; *Dunham v. Pulsifier*, *supra* note 9 at 417; *Farrrell v. Smith*, *supra* note 9 at 736; *Pritchard v. Spring Branch Independent School District*, *supra* note 7 at 574; *Westley v. Rossi*, *supra* note 9 at 713; *Reichenberger v. Nelson*, *supra* note 9; *Calbillo v. San Jacinto Junior College*, *supra* note 9; *Yoo v. Moynihan*, *supra* note 9; and *Crossen v. Fatsi*, *supra* note 9 at 117.

⁴²*Miller v. Gillis*, *supra* note 7 at 99. "Students are persons under the Constitution; they have the same rights and enjoy the same privileges as adults. Children are not second class citizens."

Meyers v. Acata High School District, *supra* note 9. "Adulthood is not a prerequisite: the state and its educational agencies must heed the constitutional rights of all persons including school boys."

Breen v. Kahl, *supra* note 9 at 708. "Vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." [citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)]. School Boards have important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. [citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)]. To avoid judicial involvement in serious constitutional issues merely because they concern younger people, in my view, is neither prudent, expedient, or just.

**THE RIGHTS AND REGULATION — THE SUBSTANTIAL BURDEN
OF JUSTIFICATION**

The standard against which the hair regulations were to be tested was laid down in two Fifth Circuit Court of Appeal cases decided on the same day, *Burnside v. Byars*⁴³ and *Blackwell v. Issaquena County Board of Education*,⁴⁴ as subsequently affirmed and expanded upon in *Tinker v. Des Moines Independent School District*.⁴⁵

Both *Burnside* and *Blackwell* involved regulations which banned the wearing of "freedom buttons" by students. The Court in *Burnside* noted the interest of the state in maintaining an effective system of education, and that the establishment of such a system required the formulation of reasonable rules and regulations. As to what was reasonable, they stated:

. . . a reasonable regulation is one which measurably contributes to the maintenance of decorum within the educational system.⁴⁶
(Emphasis supplied.)

The court failed to find, from the evidence presented and the record before it, that the buttons either were calculated to cause, or did in fact cause a disturbance. Consequently, they held the regulation to be arbitrary, unreasonable, and an unnecessary infringement on the student's Constitutional rights.

In *Blackwell* the factual backdrop was antithetical to that found in *Burnside*. The Court found disruption, in fact, and concluded that the buttons were so inexorably tied to disruption that the two were inseparable. Consequently, the validity of the regulation was upheld, despite the infringement on petitioner's First Amendment rights.

The Supreme Court, in *Tinker*, approved the test enunciated in *Burnside* as proper where the constitutional rights of students collide with school regulations. They also instructed that the State, in justifying such regulations, must be able to show that its action was caused by something more than the desire to avoid the discomfort which tends to accompany an unpopular viewpoint,⁴⁷ and that while any expression⁴⁸ ". . . in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument, or cause a disturbance our Constitution says that we must take that risk."⁴⁹

Virtually all courts confronted with challenges to school hair regulations have recognized and applied the *Burnside* test, as refined in

⁴³*Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

⁴⁴*Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

⁴⁵*Tinker*, *supra* note 21.

⁴⁶*Burnside*, *supra* note 43 at 748.

⁴⁷*Tinker*, *supra* note 21 at 509.

⁴⁸The Supreme Court, in *Tinker*, used the terms "word spoken", but clearly did not intend for it to be given its literal translation. In that case they were dealing with armbands, and therefore symbolic rather than verbal expression.

⁴⁹*Tinker*, *supra* note 21 at 508. See also, *Terminiello v. Chicago*, 337 U.S. 1 (1959).

Tinker.⁵⁰ Thus, in cases where long hair was found, *in fact*, to have a disruptive effect on the successful operation of the educational system, the interests of the state and the rights of other students prevailed over the individual student's Constitutional right to maintain the hair length of his choice.⁵¹ Conversely, where long hair was not found, *in fact*, to have a disruptive effect on the educational process, the regulations have been held violative of due process as unreasonable infringements upon the Constitutional rights of the individual student.⁵² The issue revolves around whether the hair style prohibited contributes measurably to disciplinary problems in the school.

The *Burnside-Blackwell-Tinker* test, as stated above, offers some uncomfortable grey areas. Thus, what is the status of such regulations when promulgated as prophylactic measures?⁵³ This issue is presently unsettled. While it may seem only reasonable that school officials are not forbidden to take steps to prevent that which they believe would otherwise result in a breakdown of school discipline,⁵⁴ the weight of authority appears to require evidence of actual disruption as a condition precedent to the promulgation of regulations which infringe upon Constitutional rights.⁵⁵ *Tinker's* prohibition against basing such rules on the "undifferentiated fear of apprehension of disturbance"⁵⁶ would seem to preclude anything short of requiring such evidence.⁵⁷

Another potential source of divergent holdings lies in the determination of responsibility for those disruptions which do occur.⁵⁸ The recorded altercations in the hair cases invariably, and logically, emanate not from

⁵⁰The most blatant exception was *Stevenson v. Wheeler County Board of Education*, *supra* note 8 at 101, wherein the Court rejected it with the cursory statement that "these decisions would place an intolerable burden on the Federal Courts to examine each case minutely on its facts."

⁵¹*Whitsell v. Pampa Independent School District*, *supra* note 9. "A nexus has been found to exist between rules regulating dress and disruptive influences." *See also*, *Jackson v. Dorrier*, *supra* note 21 at 216.

⁵²*See, e.g.*, *Yoo v. Moynihan*, *supra* note 9 at 815, 816; *Calbillo v. San Jacinto Junior College*, *supra* note 9; *Boyle v. Scapple*, *supra* note 9; *Bannister v. Paradis*, *supra* note 7; and *Black v. Cothorn*, *supra* note 7. In the latter case the Court pointed out that contra to the facts of *Whitsell*, there was no evidence that conformity to the hair regulations would decrease disciplinary problems materially.

⁵³This question presents double-evidentiary difficulties under the present test. First, since the regulation is preventative by nature, it is not prompted by overt disciplinary incidents. Second, it is almost impossible to apportion the responsibility for ensuing disciplinary problems between the act of flaunting the regulation, and the extreme hair style itself.

⁵⁴This view is not without support. *See, e.g.*, *Davis v. Firment*, *supra* note 8 at 528; *Crossen v. Fatsi*, *supra* note 9 at 118; *Carter v. Hodges*, *supra* note 7 at 94; and *Wood v. Almo Heights Independent School District*, *supra* note 7.

⁵⁵*See, e.g.*, *Breen v. Kahl*, *supra* note 9 at 709; *Miller v. Gillis*, *supra* note 7 at 100; *Westley v. Rossi*, *supra* note 9 at 711; *Griffin v. Tatum*, *supra* note 9 at 61, 62; and *Cash v. Hoch*, *supra* note 9.

⁵⁶*Tinker v. Des Moines Independent School District*, *supra* note 21 at 508.

⁵⁷Is there a middle ground between "I think it will" and the "I told you so" other than the event itself?

⁵⁸Surprisingly few of the cases to date have directed an inquiry toward rendering such a determination.

the long hair itself, but from the reaction of other students, teachers, or administrators to the long hair. This was emphasized by Judge Tuttle, dissenting in *Ferrell v. Dallas Independent School District*:⁵⁹

It seems to me it cannot be said too often that the constitutional rights of an individual cannot be denied him because his exercise of them produces the violent reaction of those who would deprive him of the very rights he seeks to assert.

These boys were not barred from school because of any actions carried out by them which were of themselves a disturbance of the peace. They were barred because it was anticipated, by reason of previous experiences, that their fellow students in some instances would do things that would disrupt the serenity or calm of the school. It is these acts which should be prohibited, not the expressions of individuality by the suspended students.⁶⁰

Judge Tuttle's dissent was cited with approval in *Westley v. Rossi*⁶¹ and *Richards v. Thurston*.⁶²

Despite these unresolved problems and the occasional attempts of Courts to forge their own tests,⁶³ the standard developed in *Burnside*, *Blackwell* and *Tinker* has received predominant recognition in the hair cases. While this test, in the area of personal appearance, has not yet received the approval of the Supreme Court, it has received enough support in the Federal courts to render safe that grooming regulation which is promulgated to correct measurable disciplinary problems. The state which can point to disruptions, in fact, will generally have met the substantial burden of justification.

THE HAIR REGULATION AND EQUAL PROTECTION

Whether or not the hair regulation denies the male student his rights under the Equal Protection Clause of the Fourteenth Amendment is pres-

⁵⁹*Ferrell v. Dallas Independent School District*, *supra* note 7.

⁶⁰*Id.* at 705, 706.

⁶¹*Westley v. Rossi*, *supra* note 9 at 712.

⁶²*Richards v. Thurston*, *supra* note 9 at 454.

⁶³Most notable of these are the California cases, *Finot v. Pasadena City Board of Education*, *supra* note 9, *Meyers v. Arcata Union High School District*, *supra* note 9, and *Akin v. Board of Education of Riverside Unified School District*, *supra* note 9, all of which proceeded under the test devised in *Bagley v. Washington Township Hospital District*, 55 Cal. Rptr. 401, 421 P.2d 409 (1966), formulated to determine the permissible limits of restrictions placed upon the political activities of public employees. Under the *Bagley* test it was necessary for the state to show: (a) that the restraint rationally relates to the enhancement of the public service offered, *i.e.*, education. (b) that the benefits gained through the restraints outweigh the impairment of the Constitutional right, and (c) that no alternative less subversive of Constitutional rights is available.

The *Bagley* test has the appearance of a hybrid between *Burnside* and *O'Brien*, and is more flexible, yet attended by fewer problems than the *Burnside-Tinker* test, applied by the Federal Courts. For instance, so long as the *Bagley* test is otherwise satisfied, regulations could clearly be of a prophylactic nature.

In addition, the third requirement of the *Bagley* test is not expressed by the *Burnside-Tinker* test, and while occasionally read into it (as in *Griffin v. Tatum*, *supra* note 9 at 63, where the court held that appropriate disciplinary action could be taken by school authorities short of having their students' heads shaved), it is generally not mentioned.

ently unsettled. It is a manifestly confusing issue in these cases, largely because both the *Burnside* test and the traditional equal protection test speak in terms of reasonableness. Many courts nevertheless have fielded such challenges.

Under the traditional equal protection test "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁶⁴ It would seem that a finding that long hair on male students substantially interferes with the object of the educational program would end this inquiry, at least under the traditional test. But such has not been the case among litigated equal protection-hair regulation challenges.

Some Courts, in upholding the reasonableness of the hair regulation classifications, have been content to point to the fact that the regulations were adopted by, or with the aid of, the students themselves.⁶⁵ Since the Equal Protection Clause was adopted to prevent a majority from imposing arbitrary classifications upon a minority, such holdings would appear to be tenuous at best.

In addition, there have been contentions that hair regulations are unreasonable because not enacted by surrounding schools,⁶⁶ because not equally applicable to adults,⁶⁷ or because they restrict male, and not female students.⁶⁸ One Court, no doubt after an examination of these decisions, concluded: "This Court simply cannot accept the view that the present problem can be rationally analyzed in equal protection terms."⁶⁹

Superimposed upon these already confusing equal protection challenges are those decisions which have held the right of personal grooming to be fundamental. Where such a view is accepted, the doctrine of equal protection, as applied to such regulations, requires "strict scrutiny" of the classification,⁷⁰ and a "compelling state interest" to be subserved

⁶⁴F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). See also, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

⁶⁵See, e.g., Brick v. Board of Education, *supra* note 9 at 1319; Gfell v. Rickelman, *supra* note 6; and Schwartz v. Galveston Independent School District, *supra* note 7.

⁶⁶Brick v. Board of Education, *supra* note 9 at 1321. (The classification was held reasonable.)

⁶⁷Cordova v. Chonko, *supra* note 8 at 960. (The regulation did not apply to adults, held reasonable); Breen v. Kahl, *supra* note 9 at 708 (The regulation did not apply to adults, held unreasonable); Miller v. Gillis, *supra* note 7 at 101 (The regulation did not apply to faculty members, held unreasonable).

⁶⁸Cash v. Hoch, *supra* note 9 at 347. (No rational basis for the distinction: unreasonable); Livingston v. Swanquist, *supra* note 7. (Classification reasonable). Interestingly, this Court found their justification for the regulation in this very distinction. The regulation rendered boys discernible from girls, and thus prevented "some unruly, ill-mannered, or malicious-minded boy" from sneaking into the girls washroom. See also, Goesaert v. Cleary, 335 U.S. 464 (1948), (J. Frankfurter concurring).

⁶⁹Farrell v. Smith, *supra* note 9 at 737.

⁷⁰Skinner v. Oklahoma, 316 U.S. 535 (1942).

thereby.⁷¹ If, in these hair decisions, the equal protection contention is an unpopular one, it must be remembered that any determination must also be made "in light of the special characteristics of the school environment."⁷² Understandably, the cases go both ways.⁷³

THE HAIR REGULATION AND PERMISSIBLE VAGUENESS

Despite the susceptibility of many grooming regulations to vagueness objections, few have been raised in those hair cases litigated to date.⁷⁴ Where raised, a clear split of authority has developed. Those cases holding the right to determine one's hair style to be fundamental, have considered the standards of permissible statutory vagueness to be strict.⁷⁵ Under this line principal what constitutes an extreme fashion or style of grooming is impermissibly vague.⁷⁶

The other line of authority has proceeded from the assumption that some flexibility in the regulation of student conduct by school administrators is not only beneficial, but necessary.⁷⁷

While vagueness challenges to grooming regulations present a potential source of future litigation, it is abundantly clear that such litigation

⁷¹Shapiro v. Thompson, 394 U.S. 618 (1969). See also, Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91 (1966) and Developments in the Law of Equal Protection, 82 HARV. L. REV. 1065 (1969).

⁷²Tinker, *supra* note 21 at 513.

⁷³Those cases holding the hair regulation classifications to be reasonable are *Ferrell v. Dallas Independent School District*, *supra* note 7 at 702; *Neuhaus v. Torrey*, 38 U.S.L.W. 2517, F. Supp. (N.D. Cal. 1970); *Livingston v. Swanquist*, *supra* note 7 at 5; and *Pritchard v. Spring Branch Independent School*, *supra* note 7 at 579.

Those cases holding the hair regulation classifications to be unreasonable include *Zachry v. Brown*, *supra* note 7; *Dunham v. Pulsifier*, *supra* note 9 at 915; *Miller v. Gillis*, *supra*, note 7 at 101; *Alexander v. Thompson*, *supra* note 6; *Calbillo v. San Jacinto Junior College*, *supra* note 9 at 860; and *Griffin v. Tatum*, *supra* note 9 at 62.

⁷⁴Such was the case in *Westley v. Rossi*, *supra* note 9. There the regulation provided: "Boys should have neat, conventional male haircuts and be clean shaven." The Court noted that vagueness and over-breadth had not been urged. The court remarked that the terms "neat", "conventional", and perhaps even "male", as applied to "haircuts", were generic terms having insufficient specificity to comprise a valid rule of conduct.

Other regulations not challenged for vagueness, but which would appear to have been questionable, are those involved in *Davis v. Firment*, *supra* note 8 at 525 ("Exceptionally long, shaggy hair and/or exaggerated sideburns shall not be worn"); *Black v. Cothorn*, *supra* note 7 at 469 ("Any student with excessive long hair, as determined by the principal. . ."); *Carter v. Hodges*, *supra* note 7 at 90 ("Hair of extreme length or bizarre style will be considered undesirable"); *Calbillo v. San Jacinto Junior College*, *supra* note 9 at 858 ("Male students at San Jacinto College are required to wear reasonable hair styles and to have no beards or excessively long sideburns"); to mention only a few.

In more than one case, the Courts simply held that the petitioners had not, in their opinion, violated the code. *Lovelace v. Leechburg Area School District*, *supra* note 7 at 588 and *Olf v. East Side Union High School District*, *supra* note 9 at 559. Such decisions raise doubts as to the regulation's specificity. *Crossen v. Fatsi*, *supra* note 9 at 118.

⁷⁵See, e.g., *Meyers v. Arcata Union High School District*, *supra* note 9 at 74.

⁷⁶*Crossen v. Fatsi*, *supra* note 9 at 117, 118.

⁷⁷*Pritchard v. Spring Branch Independent School District*, *supra* note 7 at 519. See also, *Gianguco v. Center School District*, *supra* note 6; and *Jackson v. Dorrier*, *supra* note 7.

is avoidable. The regulation which is vulnerable to vagueness objections is that which speaks in terms of "extremes of hair styles," "long hair," and "neatness." Conversely, those which provide that hair should not protrude over the eyes, ears or collars⁷⁸ offer a standard which informs the average student of what is and is not permissible under the regulation.

CONCLUSION

Since the interest of the state in maintaining an orderly educational system is clearly compelling,⁷⁹ it is settled that the state, through its schools, may promulgate and enforce regulations directed toward that end. The question of whether it can regulate and dictate the hair length of its students, however, is unsettled. The answer will ultimately depend upon whether the student's right to determine his hair style is deemed fundamental, and if so, how much school disruption the Courts will require as justification for restriction of the right. In addition, there still exists the possibility that such regulations violate the Equal Protection Clause of the Fourteenth Amendment, a view suggested by Supreme Court Justice Douglas,⁸⁰ and that such regulations will fall to vagueness determinations. While this writer would urge that hair regulations bear no rational relationship to the objects of education, he has read over fifty cases in which someone thought they did. Ironically, fifty cases later, the question of hair and the school regulation is still open.

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⁷⁸See, e.g., *Breen v. Kahl*, *supra* note 9 at 703 and *Brick v. Board of Education*, *supra* note 9 at 1318.

⁷⁹*Burnside v. Byars*, *supra* note 43 at 748.

⁸⁰*Ferrell v. Dallas Independent School District*, *supra* note 1.