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Long Hair and the Judicial Clippers: Can Welfare Officials Constitutionally Require Applicants to Trim Their Locks to Enhance Their Employability?

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LONG HAIR AND THE JUDICIAL CLIPPERS: CAN WELFARE OFFICIALS CONSTITUTIONALLY REQUIRE APPLICANTS TO TRIM THEIR LOCKS TO ENHANCE THEIR EMPLOYABILITY?

Individuals with long hair often find it extremely difficult to secure employment though qualified to perform the work. Employers fear the adverse effect the individual's presence will have on their business. Employers often refuse to hire the "long hairs" to perform tasks not involving public exposure because they doubt the "hippies' " determination to hold a job on a long term basis.

If such an individual is a family man he may well be forced to apply for welfare benefits under the Aid to Families with Dependent Children (AFDC) program.[1] As a condition to the receipt of aid under the AFDC program, the unemployed parent must actively seek employment during the period aid is received.[2] The AFDC regulations require the claimant be "available to work."[3]

This comment will examine the applicability of the "available to work" clause to a long haired individual who refuses to cut his hair in order to obtain employment. Can the local welfare department deny the claimant AFDC benefits employing the rationale that by his refusal to cut his hair, the claimant has voluntarily removed himself from the labor market and is not "available to work"?

This situation focuses attention on the ever-troublesome issue of individual rights versus state interest in the administration of public welfare programs. More precisely, to what extent may the state's interest in regulation of public assistance programs dilute the constitutional rights of the individual?[4]

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[1] CAL. WELF. & INST'NS CODE §§ 11200-11488 (West 1966).

[2] *Id.* § 11303 (West 1966). "Aid shall be denied to an unemployed parent and his family if it is determined by the county department, in accordance with regulations of the department, that: (a) He fails to seek and to keep himself currently available for employment as required by standards set by the department, or (b) He refuses without good cause to accept part-time, full-time, temporary or permanent employment without reference to his customary occupation or skill . . . ."

[3] *Id.* § 11303.

[4] *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME LAW. 603, 604 (1969). "The legislature's function, after considering all the relevant information and possible approaches, is to formulate policy and establish legal structures to deal with the problems of poverty; the legal system's function is to determine, in the various litigated situations which arise, whether the legislature has overstepped its legal power to establish, regulate and condition financial assistance to the needy . . . ." [Hereinafter cited as *Social Welfare.*]

To balance the interests involved and to determine which shall prevail, it is necessary to determine the precise state interest sought to be advanced. It is also necessary to ascertain the degree of constitutional protection afforded the right to determine one's hair style and decide if the protection attendant this right removes it from the sphere of permissible state interference.

This conflict has been called by one authority "the foremost political and legal problem of our time."[5]

AFDC: When, Why and How?

The Aid to Families with Dependent Children program was established by the Social Security Act of 1935.[6] Originally, children of unemployed parents were not eligible for AFDC funds but were brought into the program by later amendment.[7] The program provides for matching federal funds to those states which choose to establish a state-wide AFDC program.[8] A state is not required to establish an AFDC program, but those who do so must obtain approval of the proposed state program from the Secretary of Health, Education, and Welfare.[9]

This program reflected a new philosophy toward public welfare in our society. Public welfare was elevated from a mere gratuity, financed and administered in a haphazard fashion at the local level to a position of paramount federal concern with a greater emphasis on the importance of the individual.[10]

The purpose of the AFDC program, as outlined to the states, was twofold. First, the program sought to alleviate the immediate physical needs of indigent persons through direct payments of money.[11] The second purpose was to instill in recipients the self confidence, personal independence and strength of family life necessary to lift the family to a position of self-support and self-respect in their community.[12] This second purpose reflected an awareness of

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[5] Cowan, *The Import of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 Rutgers L. Rev. 688 (1957).

[6] 42 U. S. C. §§ 601-609 (1964).

[7] *Id.* § 607.

[8] *Id.* § 603(a)(1)(A).

[9] *Id.* § 601.

[10] Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1246 (1965). "The Social Security Act represented a departure from this general welfare philosophy. The framers of the Act had a clear concept concerning the 'right' to public assistance, and provided devices to protect these rights."

[11] 42 U.S.C. § 601 (1964). "For the purpose of encouraging the care of dependent children in their own homes . . . by enabling each state to furnish financial assistance . . . ."

[12] *Id.* ". . . to help maintain and strengthen family life and to help such parents

the necessity to do more than merely perpetuate the welfare problem. It embodied a commitment to seek means to eliminate the dependency of a growing segment of our society. To accomplish this second purpose, the AFDC program was keyed to employment. It is required that the parent be involuntarily unemployed through no fault of his own.[13] The parent must also actively seek employment while receiving benefits[14] and, if unemployable, must enroll in a training program designed to prepare the recipient to join the labor force.[15] It is obvious that a secondary function of the employment emphasis of the program is to control the expenditure of public funds.[16] It must be emphasized, however, that the legislature's encouragement, indeed even coercion, of employment is primarily rehabilitative in nature.[17]

California has instituted an AFDC program in accordance with the federal minimum requirements.[18] California's program is administered by a State Department of Social Welfare[19] and implemented locally on a county basis.[20] County Welfare Departments are established by the County Board of Supervisors.[21] The County Director of Social Welfare, on behalf of the Board of Supervisors, has full charge of the county department and responsibility for administering and enforcing the provisions of the AFDC program.[22]

The emphasis on employment manifest in the fededal program is made binding on the county welfare departments through state legislation. Statutes provide that eligible claimants must be available to work and seeking employment, accept reasonable employment if offered, and refusal is an adequate basis for denial of AFDC benefits.[23]

The rehabilitative character of employment manifested in the federal program is reflected in the California AFDC program. Self-support, when possible, is recognized as essential to preservation

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or relatives to attain or retain capability for the maximum self-support and personal independence . . . ."

[13] *Id.* § 607 (2)(B).

[14] *Id.* § 607 (2)(A).

[15] *Id.* § 609(a)(3).

[16] *Id.* § 602(a)(5). "A state plan for aid and services to needy families with children must . . . (5) provide such methods of administration . . . as are found by the secretary to be necessary for the proper and efficient operation of the plan . . . ."

[17] *Social Welfare,* note 4 *supra,* at 626. "The new emphasis in conditions attached to welfare benefits is on rehabilitation . . . ."

[18] CAL. WELF. & INST'NS CODE §§ 11200-11488 (West 1966).

[19] *Id.* § 10600.

[20] *Id.* § 10800.

[21] *Id.*

[22] *Id.* § 10802

[23] *Id.* § 11303.

of home life and the legislature clearly indicates its intent to construe employment situations strictly to accomplish this goal.[24]

Eligibility determinations are initially a county function. Claimants, however, are provided review procedures to preclude arbitrary county policy dictating administration of the welfare programs. A dissatisfied claimant can make an informal request for a prompt, fair hearing from the State Department of Social Welfare.[25] The hearing will be conducted by referees employed by the Department of Social Welfare or the director or his administrative advisor.[26] The hearing is informal and the claimant may be represented by counsel if he so desires.[27] The claimant may request a rehearing within thirty days of the decision and the application for rehearing must be approved or denied by the State Director of Social Welfare within ten days.[28] Within one year from the date of the final administrative decision, the claimant is entitled to file a petition in the Superior Court praying for a review of the entire proceedings upon questions of law involved in the case. This review is the exclusive judicial remedy available to the claimant.[29]

The provision for judicial review of the administrative process is particularly valuable to the claimant. Administrative agencies and their determinations reflect contemporary political pressures.[30] Also, "there is an administrative tendency to use the existing policy to justify the action rather than to use the situation to question the policy."[31] When dealing with human rights, administrative agencies need the guidance and clarification of issues which the law can provide.[32]

Under the traditional approach,[33] public assistance was considered a mere gratuity, and as such could be granted, withheld, or conditioned as the legislature desired. This approach, however, was

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24 *Id.* § 11205.
25 *Id.* § 10950.
26 *Id.* § 10953.
27 *Id.* § 10955.
28 *Id.* § 10960.
29 *Id.* § 10962.
30 Reich, note 10 *supra*, at 1252. "Absent challenge, welfare administrators are permitted broad areas of discretion in which they make the law by administrative interpretations under the pressures of current public opinion—interpretations that may be neither consistent from one jurisdiction to another nor in accord with the original purposes of the legislation."
31 Wedemeyer & Moore, *The American Welfare System*, 54 CAL. L. REV. 326, 342 (1966).
32 Reich, note 10 *supra*, at 1257. "[D]ecisions concerning human rights are too important to be left to public welfare workers and public administration officials without the aid of law. Law is needed to help them to see the issues clearly, to guide them, and to strengthen their good intentions."
33 *Social Welfare*, note 4 *supra*, at 609.

emphatically rejected by the United States Supreme Court in *Sherbert v. Verner*.[34] Existing review procedures afforded an AFDC claimant now preclude the imposition of conditions to the receipt of welfare benefits upon any terms the state desires.

Although elevated from the status of a gratuity, public assistance is not considered a vested right.[35] It may be conditioned and classified but "[a]ny legislative classification must be reasonably related to the purpose of the statute in order to pass as constitutional . . . ."[36]

The purpose of the AFDC program is more than support. The primary goal is preservation of the family unit and the development of a sense of purpose and self-importance in the family. The program recognizes self-sufficiency as essential to accomplishment of this goal. Thus, employment is considered crucial to the success of the program. The financial assistance provided is considered temporary, providing the necessities of life until the head of the family is able to join the labor force. With this legislative intent in mind, we can examine the "available to work" clause and determine the rationality of its application to accomplish the employment purpose of the program.

AVAILABLE TO WORK

The term "available to work" is not defined in the regulations. The term is given meaning through its interpretation by the county welfare department subject to the review procedures made available to the claimant.[37]

The most comprehensive interpretation of the clause "available

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[34] 374 U.S. 398 (1963). Appellant, a Seventh Day Adventist, was refused unemployment benefits because she refused to accept employment which required Saturday labor. The United States Supreme Court, reversing the South Carolina courts, ruled the decision as to appellant abridged her first amendment right of free exercise of her religion. The Court stated: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404.

[35] Smith v. King, 277 F. Supp. 31, 40 (M.D. Ala. 1967). "It should be noted that there is no vested legal right for anyone to receive public financial assistance; neither the United States nor the Alabama Constitution requires Alabama to grant financial assistance to needy dependent children." *Accord*, County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 473, 18 Cal. Rptr. 573, 576 (1962). "An applicant for public assistance . . . has no vested right to such aid . . . ." Some authors have taken the position that the needy person does have a right to assistance from the state: "The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right." Reich, note 10 *supra*, at 1256.

[36] *Social Welfare*, note 4 *supra*, at 622-23.

[37] Freeman, *Able to Work and Available to Work*, 55 YALE L.J. 123, 134 (1945).

to work" is found in the Unemployment Insurance area. Availability is made a prerequisite to the receipt of benefits under the Unemployment Insurance regulations as well as the AFDC program.[38] The legislative intent to encourage employment in the AFDC program is reiterated in the Unemployment Insurance regulations.[39] The processing and placement of unemployed parents is accomplished through the joint efforts of the State Department of Unemployment and the Department of Social Welfare.[40] The facilities of the State Department of Unemployment are used extensively to promote the employment of AFDC applicants.[41]

Availability for work is defined by the courts as "availability for suitable work which the claimant has no good cause for refusing. . . . [I]f the unavailability for work be involuntary and without fault, a claimant may not be deprived of benefits. . . ."[42] "Good cause" is defined as "adequate cause, a cause that comports with the purposes of the Unemployment Insurance code and with other laws."[43] The courts are defining availability in terms of good cause or adequate cause and emphasizing degree of fault and ability to control the circumstances on the part of the claimant as determinative of "availability."

Conditions or restrictions placed on one's availability by a claimant are examined in terms of adequate cause. The court must look to the entire fact situation to determine if a condition be "good cause" for refusal of employment. If the condition is "not usual and customary in that occupation, but which he may desire because of his particular needs or circumstances,"[44] it is often held not to be good cause. Likewise, if the conditions "so restrict his willingness to work that his services are rendered unmarketable, he has removed himself from the labor market and is ineligible."[45] It is said that "a willingness to be employed conditionally does not necessarily meet the test of availability. . . ."[46]

If the condition is imposed by the employer, not the claimant,

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38 CAL. UNEP. INS. CODE § 1253 (West Supp. 1970).

39 *Id.* § 325 (West 1956).

40 CAL. WELF. & INST'NS CODE § 11302 (West 1966).

41 *Id.*

42 Garcia v. California Employment Stabilization Comm., 71 Cal. App. 2d 107, 113-14, 161 P.2d 972, 975-76 (1945), *quoting with approval from* Hagadone v. Kirkpatrick, 66 Idaho 55, 56, 154 P.2d 181, 182 (1944).

43 Syrek v. California Un. Ins. Appeals Bd., 54 Cal. 2d 519, 529, 354 P.2d 625, 630-31 (1960).

44 Unemployment Compensation Comm. v. Tomko, 192 Va. 463, 466, 65 S.E.2d 524, 527 (1951).

45 Beaman v. Safeway Stores, 78 Ariz. 195, 198, 277 P.2d 1010, 1013 (1954).

46 Ellis v. Employment Security Agency, 83 Idaho 95, 96, 358 P.2d 396, 397-98 (1961).

at least one authority[47] argues that the availability of the claimant should not be questioned because he does not meet the condition:

> Where employers refuse or are reluctant to hire an individual, suitable job opportunities which the individual is qualified to perform and which he is able, willing, and ready to accept may nonetheless exist. Such refusal to hire a worker does not of itself render the work unsuitable or prevent him from legally performing the work. . . . While employers, for what they think is in their best interests, or for any reason, may refuse to hire any worker, such refusal should not affect the availability of workers whom they refuse to hire, unless such refusal is required by law.[48]

The author of the cited article categorizes married women, individuals beyond a certain age, and members of minority groups, as persons who may be precluded from the labor market by conditions imposed by employers but nevertheless must be treated as available for employment. The reasoning is sound as applied to these groups. They are members of a closed class which employers have excluded from consideration. They have been excluded from the labor market through no volitional act on their part and are powerless to meet the condition imposed.

However, the author attempts to expand the argument to include those refused employment due to appearance, dress and mannerisms. Here, the argument strains. If the appearance, dress and mannerisms are not of the claimant's volitional act—*i.e.*, dress dictated by economic conditions—and he is powerless to escape the condition, the reasoning above should apply. However, the author herself requires that the individual "has done nothing volitionally to lessen his chances of getting work."[49] Thus, if the dress or appearance is due to the personal preference of the individual and is within his power to control, his exclusion is due to a volitional act on his part. If this volitional act has the effect of violating a condition imposed by the entire labor market, as opposed to a single employer, it is apparent that the availability of the individual is destroyed by the volitional act. He is available for work only upon the condition that he not be required to meet a condition imposed on the entire remainder of the labor force.

The voluntary imposition of a condition on willingness to work, which detaches the individual from the labor market and is motivated by personal choice rather than necessity, will render

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[47] Freeman, note 37 *supra.*

[48] Freeman, note 37 *supra,* at 133-34. *Quoted with approval in* Reger v. Admin., Unemployment Compensation Act, 132 Conn. 647, 649, 46 A.2d 844, 846 (1946).

[49] Freeman, note 37 *supra,* at 133.

the individual "unavailable for work" and, thus, ineligible for benefits.[50]

The purpose of the "available to work" clause, as interpreted by the courts, is to channel individuals into the labor market by placing limits upon the discretion of the individual to act as the determinative factor of his employment.[51] The clause is designed to limit the conditions an individual may set upon his employment in order to increase the labor market available to the individual. The clause is directly related to the employment goal of the AFDC program. The "available to work" clause operates exclusively to promote employment. The rational relationship between application of this clause and the goals of the program is evident.

LONG HAIR AND THE CONSTITUTION

In *Dandridge v. Williams*,[52] the United States Supreme Court examined a Maryland AFDC provision which placed a ceiling on the welfare grant. The Court emphatically stated that the Court has no power "to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[53] In the area of economics and social welfare, the Court will require of the state only that its regulations and classifications bear a reasonable relation to a legitimate state interest.[54] The Court, in this case, extended to the public welfare area the traditional constitutional standard employed in examination of business or industry.[55] The Court will not interfere in state

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50 Noone v. Reeder, 151 Mont. 248, 252, 441 P.2d 309, 312-13 (1968). ". . . his unemployment is a matter of choice rather than necessity and therefore he has not been actively or genuinely in the labor market. Voluntary removal of oneself from the labor market does not satisfy the requirement that an applicant for unemployment compensation benefits is 'available for work' . . . ." *accord*, Leclerc v. Administrator, Employment Compensation Act, 137 Conn. 438, 440, 78 A.2d 550, 552 (1951). ". . . a claimant who limits his availability for work because of personal reasons unrelated to the employment is not entitled to compensation."

51 Dwyer v. Appeal Bd. of Michigan Unemp. Comp. Comm'n, 321 Mich. 178, 182, 32 N.W.2d 434, 438 (1948). "The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market . . . . The test suggested is subjective in nature. Whether or not a claimant is in fact available for work depends to a great extent upon his mental attitude, i.e., whether he wants to go to work or is content to remain idle."

52 90 S. Ct. 1153 (1970).

53 *Id.* at 1163.

54 *Id.* at 1162. "It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment . . . ."

55 *Id.* "To be sure, the case cited and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved

public welfare regulation unless it is arbitrary and without rational justification. The Court will retreat from use of the "reasonableness" standard to examine the constitutionality of state action in the welfare area only when "freedoms guaranteed by the Bill of Rights"[56] are involved. If such freedoms are threatened, the Court implies it will hold the state to a stricter standard.[57] The Court couches this exception to the "reasonableness" test in terms of "Bill of Rights" freedoms and "first amendment guarantees."[58] The implication is clear that unless fundamental rights are endangered by welfare regulations, the Court will interfere only if the state action is demonstrably arbitrary.

This position clarifies and limits the Supreme Court's decision in *Shapiro v. Thompson*.[59] In *Shapiro* the Court invalidated a state welfare regulation imposing a one-year residency requirement as a precondition to receipt of benefits. The Court concluded the regulation impinged upon the right of interstate travel and was unconstitutional.[60] The Court stated that "any classification which serves to penalize the exercise of that [constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[61] The Court appears to require a "compelling interest" on the part of the state when any constitutional right is proscribed. However, the bulk of the opinion clearly makes a distinction between fundamental rights and other rights which may constitutionally be conditioned by the state. The Court clearly defines

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state regulation of business and industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard." (The traditional constitutional standard is set forth in *Lindsley v. Natural Carbolic Gas Co.*, 220 U.S. 61, 78 (1911), as follows: "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary;" *accord, Flemming v. Nestor* 363 U.S. 603, 611 (1960): "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.")

[56] *Id.* at 1161.

[57] *Id.* "For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. . . ."

[58] *Id.*

[59] 394 U.S. 618 (1969).

[60] *Id.* at 629. "This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

[61] *Id.* at 634.

interstate travel as a fundamental right.[62] Justice Stewart, in his concurring opinion, also differentiates between a fundamental right and a conditional personal right.[63] The Court concludes its examination of the residency requirement as follows:

> [E]ven under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.[64]

Dandridge and *Shapiro* make clear the Court's extreme interest in the probable consequence of the welfare regulation. If "Bill of Rights" or "first amendment" freedoms are theatened, the Court will require the state to exhibit a "compelling state interest" to justify state infringement of these freedoms. In other situations, the Court will require only that the state regulation be reasonable and non-arbitrary.

Thus, to determine the degree of state interest necessary to constitutionally justify limiting the individual's freedom of hair style, it is necessary first to examine the degree of constitutional protection afforded individual discretion in choice of hair style.

The individual's right to wear his hair as he so desires has been a lively issue in recent years. United States federal courts have considered the issue frequently and come to surprisingly divergent conclusions.[65] Most of the cases considered have dealt with student

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[62] *Id.* at 630. The court quotes with approval *United States v. Guest,* 383 U.S. 745, 757 (1966): "The constitutional right to travel from one State to another . . . . occupies a position fundamental to the concept of our Federal Union."

[63] *Id.* at 642-43. Addressing the right of interstate travel the court states: "This constitutional right . . . . is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . [I]t is a virtually unconditional personal right, guaranteed by the Constitution to us all."

[64] *Id.* at 638.

[65] For cases upholding the school's right to regulate the length of students' hair *see;* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied* 393 U.S. 856 (1968); Pritchard v. Spring Branch Independent School Dist., 308 F. Supp. 570 (S.D. Tex. 1970); Farrell v. Smith, 310 F. Supp. 732 (S.D. Me. 1970); Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1967); Akin v. Bd. of Education of Riverside Unified School, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968). *Contra,* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Reichenberg v. Nelson, 310 F. Supp. 248 (Neb. 1970); Calbillo v. San Jacinto Jr. College, 305 F. Supp. 857 (S.D. Tex. 1969); Olff v. East Side Union High School Dist., 305 F. Supp 557 (N.D. Cal. 1969); Richards v. Thurston, 304 F. Supp. 449 (Mass. 1969); Zachery v. Brown, 299 F. Supp. 1360 (N.D. Cal. 1967); Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

attacks on dress code regulations sought to be imposed by public school officials. Despite the educational setting of the cases, the basic issue is consistent with this discussion. Is personal choice of hair style a constitutionally protected right and if so, what degree of protection is afforded this right by the courts?

In *Breen v. Kahl*,[66] the federal district court stated emphatically that hair style is an ingredient of personal freedom protected by the United States Constitution, and applicable to the states through the due process clause of the fourteenth amendment. The court noted that ". . . to limit or curtail this or any other fundamental right the state has a substantial burden of justification."[67]

The high degree of constitutional protection evident in *Breen* is reemphasized in *Griffin v. Tatum*.[68] In *Griffin*, the federal district court stressed the importance of individuality to our society and clearly indicated the suspicion with which the court would view any attempt to proscribe an individual's freedom of hair style.[69] This court also placed on the state a substantial burden of justification.[70]

Hair length has not enjoyed uniform protection by the courts. Many courts refuse to extend to freedom of hair style the degree of constitutional protection of *Breen* and *Griffin*.[71]

In *Davis v. Firment*,[72] the federal district court expressed doubt that the wearing of long hair is symbolic expression and entitled to constitutional protection. The court felt long hair does not express an idea or viewpoint and, thus, is at best a meaningless symbol and quite possibly not a symbol at all.[73] The court concluded that "[e]ven if the wearing of long hair is assumed to be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest."[74]

At least one court has concluded that the right to wear long hair may be properly proscibed for economic reasons. In *Farrell v.*

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66 419 F.2d 1034 (7th Cir. 1969).

67 *Id.* at 1036. Placing the burden of justification on the state is questioned in *Pritchard v. Spring Branch Independent School Dist.*, 308 F. Supp. 570 (S. D. Tex. 1970).

68 300 F. Supp. 60 (M.D. Ala. 1969).

69 *Id.* at 62. "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."

70 *Id.*

71 *Cases cited* note 65 *supra.*

72 269 F. Supp. 524 (E.D. La. 1967).

73 *Id.* at 527.

74 *Id.*

Smith,[75] students at a vocational school sought to enjoin school officials from enforcing hair length regulations. The school defended the regulations on the grounds that long hair was prejudicial to effective job opportunities in industry and that the economic welfare of the student is advanced through adherence to the grooming regulations. The court denied the injunction, concluding that the economic considerations advanced by the school were sufficient justification to enforce the regulations.[76]

Crews v. Cloncs,[77] best summarizes the opinion of the majority of courts which have not afforded freedom of hair style a high degree of constitutional protection. In *Crews* the federal district court denied a high school student injunctive relief prohibiting enforcement of a hair length regulation. The court classified hair style as conduct and upheld the state's right to control this conduct upon showing of a sufficient interest. The following comment from this court capsulizes the feeling of many courts on this issue: "Little harm will result to Plaintiff from trimming his hair—his opinions and beliefs, personality and individuality will still be his own."[78]

Ferrell v. Dallas Independent School District,[79] is one of the most frequently cited cases in the school dress code area. The federal district court upheld the school's right not to enroll a student because the length of his hair violated an established school regulation. The court noted:

> The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly and religion may be infringed by the state if there are compelling reasons to do so. . . . 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.[80]

The *Ferrell* court did not decide that "hair style is a constitutionally protected mode of expression."[81] It only decided that "if" this right is constitutionally protected, and is elevated to the level of freedom of speech, it still may be proscribed upon evidence of compelling state interest. The court found this compelling reason in the disruptive effect of the students with long hair on the remainder of

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[75] 310 F. Supp. 732 (S.D. Me. 1970).
[76] *Id.* at 738-39.
[77] 303 F. Supp. 1370 (S.D. Ind. 1969).
[78] *Id.* at 1377.
[79] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968).
[80] *Id.* at 702-03.
[81] *Id.* at 702.

the student body.[82] Thus, the court found a compelling state interest in regulation of hair length not because hair length is disruptive in itself, but because it induces disruptive behavior by others.

It is obvious that if the *Ferrell* court had decided hair style was not a fundamental right akin to freedom of speech, it would have placed a lesser burden of justification on the state.

The Supreme Court of the United States has remained silent in the school dress code cases. The Court's one reference to the hair length issue is contained in *Tinker v. Des Moines School District.*[83] Petitioners were suspended from school for wearing black armbands to protest Government policy in Vietnam. The Court granted the students an injunction, concluding that this symbolic speech was protected under the first amendment and since the school could not show a disruptive influence due to the presence of the armbands, the school could not proscribe the student's constitutional right. The Court carefully pointed out, however, that "[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. *Cf. Ferrell v. Dallas Independent School District* 392 F.2d 697 (1968)."[84]

Thus, the Court granted at least tacit approval to the analysis and conclusions of the *Ferrell* decision. Though not deciding the question of the constitutional status of hair style, the Court seems unwilling to categorically afford freedom of hair style the status of symbolic speech and invoke the attendant first amendment protections.

The Supreme Court has not yet defined "symbolic speech." There is no available test by which to measure conduct intertwined with "speech" or "expression" and decide if the degree of expression involved requires first amendment protection.[85] The Court will not label all conduct tinged wth an element of expression, the status of "speech."[86] Since the Court recognizes the concept of "symbolic

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[82] *Id.* at 700-01. From the evidence presented, the court decided the disruptions which occurred when other students harassed and teased students with long hair were sufficient reason to uphold the regulation.

[83] 393 U.S. 503 (1969).

[84] *Id.* at 507-08.

[85] Cowgill v. California, 78 Cal. Rtpr. 853 (1969), *appeal denied*, 396 U.S. 371, 372 (1970). The Supreme Court, denying appellant's appeal from a conviction for mutilating the American flag by wearing a vest made from an American flag noted: "The Court has, as yet not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression."

[86] United States v. O'Brien, 391 U.S. 367, 376 (1968). "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" when-

speech" but refuses to extend the protection this concept entails to all situations involving conduct and expression, the Court must apply some criteria to decide the cases before it.

The Court has recognized "symbolic speech" in such conduct as "sit-ins,"[87] wearing of armbands,[88] and draft card burning.[89] The non-verbal expression, in each of these situations, was positive and assertive. The conduct was outside the normal scope of activities of the individual. There is little explanation for the participants' conduct except as an attempt to communicate an idea. The idea sought to be expressed is sufficiently defined by the conduct to establish the communication of the idea to the audience. Given the general context of our society, most persons would easily associate a sit-in with segregation practices, wearing of armbands as sympathy with the cause identified on the band, and a draft card burning as protest against the Vietnam war and/or the draft.

The wearing of long hair, viewed in the terms discussed above, presents a vague, uncertain situation.[90] One's hair style is not assertive conduct, at least not to the degree of the wearing of an armband. It can be explained as part of the individual's normal activity pattern. Communication of an idea is not the only plausible explanation for such conduct. It may simply denote personal preference. The wearing of the long hair may not sufficiently define the idea so as to be communicative.[91] What idea is the actor trying to communicate to his audience? A political belief? Economic? Social? The possible inferences available to the audience are limited only by their imagination!

The point of the above discussion is *not* to deny long hair the status of symbolic expression, but to illustrate that it is often impossible to decide the question limited to an examination of the conduct

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ever the person engaging in the conduct intends thereby to express an idea." *See also* Gregory v. Chicago, 394 U.S. 111, 124 (1969); Giboney v. Empire Storage Co., 336 U.S. 490, 502 (1949).

87 Brown v. Louisiana, 383 U.S. 131 (1965).

88 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

89 United States v. O'Brien, 391 U.S. 367 (1968).

90 Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1112 (1968). "The wearing of a beard or long hair, however, presents a fairly ambiguous situation. The subjective intent behind such conduct may be only a natural preference of personal appearance, and thus closely related to a normal activity pattern. In most cases the actor will be attempting to express nothing to others. Admittedly, it is a part of psychological character expression, but for the purposes of inclusion under the first amendment, we are concerned with conscious acts of communication."

91 *Id.* at 1113-14. "If there is to be a doctrine of first amendment protection for symbolic conduct, its cornerstone must be the requirement that others can recognize the conduct as communication."

alone. The answer must depend upon an examination of all the factors involved in the situation. A statement that the wearing of long hair is or is not symbolic expression, divorced from the particular factual situation at issue, is a legal conclusion influenced more by emotion and prejudice than a logical application of the law.

If, after examination of all the circumstances surrounding a particular factual situation, the court rules that the hair style is not symbolic expression, then it is not deserving of first amendment protection. Consequently, the state may properly regulate the length of the individual's hair in the welfare area upon proving a reasonable, non-arbitrary relationshp between the regulation and a legitimate state interest. If the hair length is found to be symbolic expression, the state may not proscribe this first amendment right unless required to further a compelling state interest.

In *United States v. O'Brien*,[92] the Court sets forth a four-part test for determining whether a state regulation of "symbolic speech" is justifiable. The test requires: (1) that the regulation be within the constitutional power of the government; (2) that the regulation must further a substantial governmental interest; (3) that the governmental interest must be unrelated to the suppression of free expression; and (4) that the incidental restriction on the first amendment freedom be no greater than necessary to accomplish the desired result.[93]

Even if, under the circumstances of a particular case, an individual's hair length is found to constitute "symbolic expression," an examination of AFDC hair length requirements in light of the *O'Brien* test should reveal that the incidental infringement upon the

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[92] 391 U.S. 367 (1968).

[93] *Id.* at 376-77. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." The Court applies this test in *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). The Court recognizes the wearing of an armband as symbolic speech, but also recognizes the substantial interest of the state in preserving the orderly operation of the school and accepts the state's right to proscribe conduct which would be disruptive to the efficient operation of the school. In *Tinker*, however, the state is unable to exhibit that the proscription of the wearing of armbands is merely an *incidental* suppression of free expression. The facts clearly show the purpose of the school officials was to suppress the *idea*, not the conduct.

individual's first amendment rights is constitutionally permissible. The state clearly has the power to require employment, whenever possible, as an alternative to the receipt of public assistance. The Supreme Court has decided that regulations designed to promote gainful employment are constitutionally valid.[94] The "available to work" regulation seeks to accomplish this objective. The "available to work" clause as applied to individuals with long hair is totally disinterested in the ideas which may be communicated in the manner proscribed. Indeed, the claimant could espouse the ideas verbally with no objections from the state. The regulation is not overly broad. If the length of an individual's hair renders him unemployable, only shorter hair will re-open the labor market to the individual. No less restrictive regulation can be fashioned to accomplish the goal sought. Finally, the state does have a substantial interest in the administration of its AFDC program. The state, reflecting federal policy, considers self-sufficiency imperative to the establishment of a stable home life for the family unit. Employment of the head of the household, with the benefits in terms of family pride and sense of purpose which it instills, is crucial to accomplish the rehabilitative purpose of the welfare program. The obvious cost in terms of human resources resulting from a failure of the rehabilitative aspect of public assistance programs must render welfare programs of paramount concern to the state.

CONCLUSION

The legislative intent of the AFDC program is preservation of the family unit.[95] Employment is the major vehicle utilized by the legislature to achieve this goal. The "available to work" condition to receipt of AFDC benefits is directly related to the employment goal of the legislature. Thus, application of this condition is directly and reasonably related to the achievement of a legitimate state interest.

The question whether the individual's long hair is "symbolic expression" and deserving of first amendment protection must be answered on a case by case basis. The author does not believe the answer may be generalized. Because of its equivocal nature, the wearing of long hair is not sufficiently communicative or definitive of an idea to be considered symbolic speech without reference to the entire context of the particular factual situation involved.

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94 Dandridge v. Williams, 90 S. Ct. 1153, 1162 (1970). "It is clear that the Maryland . . . regulation is constitutionally valid. . . . [A] solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment. . . ."

95 *See*, note 12 and accompanying text, *supra*.

The state must carry the burden of establishing the relationship between the length of the claimant's hair and his unemployability. The state must establish factually that the labor market is closed to the individual and that the length of his hair is the reason for this rejection. If the individual could not find employment with shorter hair, obviously the length of his hair is not the reason for his unemployment. It is due simply to a lack of jobs in the labor market. Likewise, if positions exist in the labor market which the individual with long hair could fill, but the jobs are presently occupied by others, then length of hair is not the reason for the claimant's unemployment. He is unemployed because of an inadequate labor market. The state must establish that the labor market as a whole—both open and occupied positions—is closed to the individual because of the length of his hair.

The author believes this to be an extremely difficult burden of proof for the state to meet. However, failure to establish this fact will destroy the reasonableness of the state's application of the "available to work" clause to the claimant.

If the state can meet this burden of proof, and the claimant's long hair is not considered "symbolic expression," the state may proscribe this conduct upon establishing a reasonable relationship between the hair length regulation as applied and the state's legitimate interest in employment and a stable home life.

If, under the circumstances, the claimant's long hair is considered "symbolic expression," the state regulation must meet the *O'Brien*[96] test before proscription of this first amendment right can be allowed. The author believes the state can meet this test in the context of AFDC hair length regulations.

It must be emphasized that the *O'Brien* test is applicable only when the particular factual situation involves conduct intertwined with speech elements. If the issue involved pure speech or religious beliefs, the test is inapplicable. It is only because the Court allows *incidental* restrictions on first amendment freedoms when the state is furthering a substantial interest through proscription of *conduct*, that the state can meet the *O'Brien* test.

James H. Wilson

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[96] *See*, note 93 and accompanying text, *supra*.