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Constitutional Law--School Dress Codes--A Student's Right to Choose His Hair Style and Length

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would seem more analogous to the tax cases[47] where the anonymity of the client conceals transactions in payment of delinquent taxes which are subject to governmental sanctions. These payments have not been deemed per se to be beyond the scope of the attorney-client privilege. The privilege has been held applicable to these situations because disclosure of the client's identity would lead to governmental investigations. The attorneys who withheld their clients' names in these cases were not considered to be using the purivilege as a cloak for wrongdoing.

The *Hughes* decision seems to lack consideration of the history and policy of the limitation in applying it to the delivery of stolen property to the police. Instead of considering the action of the attorney as a concealment to avoid justice, the Court should recognize the value of the recovery of stolen property. To require disclosure in such circumstances, the Court requires the attorney to incriminate his client to the point that any defense is crippled if not rendered impossible.

W. Stokes Harris, Jr.

CONSTITUTIONAL LAW—SCHOOL DRESS CODES—A STUDENT'S RIGHT TO CHOOSE HIS HAIR STYLE AND LENGTH.—Breen and Anton, students at a public high school, were expelled for wearing hair longer than that allowed by a school regulation.[1] Anton had his hair cut and was readmitted, but Breen refused to comply and was denied readmission. The State Superintendent of Public Instruction, petitioned by the students, found that the proceeding was moot in the case of Anton and that the expulsion was warranted in Breen's case. The Superintendent's finding was not that the student's long hair was disruptive, but that refusal to comply with the regulation was a disruptive influence warranting expulsion. A federal district court ordered the students reinstated,[2] and the school officials appealed. *Held:* Affirmed. The right of a student to wear his hair at any length or in any desired

[47] Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

[1] The regulation, similar to haircut regulations found in dress and appearance codes in other schools, stated:

> 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; long sideburns are out. 419 F.2d at 1035.

[2] 296 F. Supp. 702 (W.D. Wis. 1969).

manner is protected by either the first or the ninth amendment of the United States Constitution, and absent a valid showing of justification, the school could not properly threaten to expel and/or expel students for violation of a regulation governing acceptable hair length. *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, — U.S. —, 90 S. Ct. 1836 (1970).

It is well recognized that school authorities may make reasonable rules and regulations[3] pertaining to students in order to maintain an efficient educational system.[4] "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values."[5] However, where it can be shown that a rule is arbitrary or unreasonable, the courts will intervene and refuse to uphold the enforcement of such a regulation.[6] School regulation decisions handed down by the courts reflect that the factual situation and the tenor of the times determine the extent that schools may control matters of personal preference such as appearance.[7]

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[3] *See generally* Taylor, *With Temperate Rod: Maintaining Academic Order in Secondary Schools*, 58 KY. L.J. 616 (1970). The source of this authority is typically found in state statute, *see, e.g.*, KY. REV. STATS. § 160.290 (1934) which vests broad powers and responsibilities as follows:

> (1) Each board of education shall have general control and management of the public schools in its district and may establish such schools and provide for such courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with rules and regulations of the State Board of Education. . . .
> (2) Each board shall make and adopt . . . rules, regulations and bylaws . . . for the qualification and employment of teachers and the conduct of pupils. . . .

[4] *See, e.g.*, Ferrel v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968) (upholding a regulation banning long hair); Blackwell v. Issaquena Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (upholding a regulation barring the wearing of "freedom buttons"); Byrd v. Gary, 184 F.Supp. 388 (E.D.S.C. 1960) (upholding the suspension of a student attempting to organize a milk boycott); Bd. of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) (upholding a regulation excluding married students from extra-curricular activities); Carr v. Dighton, 294 Mass. 304, 118 N.E. 525 (1918) (upholding the expulsion of a student with head lice); Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1936) (upholding a regulation forbidding the use of metal heel plates on shoes); Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957) (upholding a regulation which suspends for the remainder of the school year students who marry).

[5] Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[6] *See, e.g.*, Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969) (striking down a rule prohibiting the wearing of black armbands); Richards v. Thurston, 424 F.2d 1281 (1970) (expulsion under a school haircut regulation invalid); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (striking down a rule prohibiting the wearing of "freedom buttons"); Anderson v. Canyon Ind. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967) (striking down a regulation requiring students, married during the school year, to withdraw from school).

[7] E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION 509 (1970). *Compare* Blackwell v. Issaquena Bd. of Educ., 363 F.2d 749 (5th Cir. 1966), *with* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

Litigation involving student dress and appearance codes has increased significantly in the past five years.[8] The issue now is, or is rapidly becoming, something of a tempest in a teapot.[9] As early as 1923, an Arkansas court in *Pugsley v. Sellmeyer*[10] upheld the right of a public school to exclude a female student for violation of a rule against the use of talcum powder as a facial cosmetic. It was emphasized that the discretionary power of the school authorities to formulate rules would not be infringed upon because the court did not approve of those rules, or they were not essential for the maintenance of discipline. The only finding necessary for the court to uphold this rule was that it be "reasonably calculated to effect the

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[8] The courts, in determining the validity of dress code regulations, have been in technical agreement in that they require justification for any infringement on the constitutional right of the student to govern his personal appearance. The issue has become whether or not the student's right to govern his personal appearance is constitutionally protected, and if so, whether or not the state has met its burden of showing substantial justification for infringement on that right.

For haircut cases holding against the student *see, e.g.*, Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970), *rev'd in part*, 300 F. Supp. 60 (M.D. Ala. 1969) (affirmed the reinstatement of a suspended student because a hair regulation did not apply to that student, but reversed the striking of the entire hair style regulation); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Ferrel v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); Fitzpatrick v. Garrison, Civil No. 2050 (W.D. Ky., May 5, 1970) (moustaches); Brownlee v. Bradley County Bd., 311 F. Supp. 1360 (E.D. Tenn. 1970); Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Pa. 1970) (regulation prohibiting moustaches was reasonable but arbitrarily applied to a student with practically imperceptable natural growth moustache); Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970); Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969) (moustaches); Brick v. Bd. of Educ., 305 F. Supp. 1316 (D. Colo. 1969); Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969); Akin v. Bd. of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968); Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

For haircut cases holding for the students *see, e.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (due process clause of the fourteenth amendment); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, — U.S. —, 90 S. Ct. 1836 (1970) (penumbra of first amendment or ninth amendment); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969) (equal protection clause and due process clause); Olff v. E. Side Union High School Dist., 305 F. Supp. 557 (N.D. Cal. 1969) (due process); Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969) (first amendment); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (first amendment).

[9] Ferrel v. Dallas Ind. School Dist., 392 F.2d 697, 705 (5th Cir. 1968) (dissenting opinion). For general discussions of school dress and appearance codes *see* Note, *School Student Dress and Appearance Regulations*, 18 CLEV.-MAR. L. REV. 143 (1969); Note, *A Re-Evaluation of School Appearance Regulations: Is Free Choice In Grooming Accorded Constitutional Protection?*, 15 S.D. L. REV. 94 (1970); Comment, *The Right To Dress and Go To School*, 37 U. COLO. L. REV. 492 (1965); Comment, *A Student's Right To Govern His Personal Appearance*, 68 J. PUB. L. 151 (1968); Comment, *Constitutional Law—Public School Authorities Regulating the Style of a Student's Hair*, 47 N.C. L. REV. 171 (1968); 20 ALA. L. REV. 104 (1967).

[10] 158 Ark. 247, 250 S.W. 538 (1923).

purpose intended, that is, of promoting discipline in the school."[11] The wisdom or expediency of a rule was not a criterion to be considered in testing for reasonableness.

Relying on the test for reasonableness laid down in *Pugsley*, a Massachusetts court in *Leonard v. School Committee of Attleboro*[12] upheld a school regulation governing the length of students' hair. No evidence of any disruption was offered, but the court thought that "the unusual hair style of the plaintiffs *could* disrupt and impede the maintenance of a proper classroom atmosphere and decorum . . . and *could* result in the distraction of other pupils."[13] (Emphasis added.) The court dismissed an argument that the regulation touched on matters occurring at home that were in exclusive control of the parents, and thus an invasion of family privacy. By application of the balancing of interest technique, it was determined that the domain of family privacy must give way to the paramount interest of students, teachers, administrators and the community in a well run and efficient school system.[14]

A haircut regulation was attacked on the grounds that it was a denial of substantive and procedural due process under the fourteenth amendment in the case of *Ferrel v. Dallas Independent School District.*[15] The student's contention was that the length and style of hair is not unlike constitutionally protected thought and speech. The court in its examination of the reasonableness of the regulation took account of the factual setting in which it was enforced.[16] Testimony as to the disruptive influence of long hair was taken on behalf of the student and the school authorities.[17] Without deciding the issue of

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[11] Id. at —, 250 S.W. at 539. *Accord*, Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

[12] 349 Mass. 704, 212 N.E.2d 468 (1965).

[13] *Id.* at —, 212 N.E.2d at 472.

[14] *Id.* at —, 212 N.E.2d at 472. This argument lost much of its persuasiveness since evidence was not presented to show that long hair would be disruptive.

[15] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968). The opinion in this case brought forth the following conclusion:

> 'We conclude . . . that a regulation banning extreme hairstyles should not be considered arbitrary or unreasonable if the regulation may be reasonably *calculated* to prevent a material adverse effect on school discipline, health or decorum. 69 OP. ATT'Y GEN. 423 (1969).' (Emphasis added.)

[16] *Id.* at 702. The court said:

> [E]ach case must be decided in its own particular setting and factual background . . . in determining whether the rule or the action about which the complaint is made is arbitrary, capricious, unreasonable or discriminatory. *Id.*

[17] Testimony on the student's behalf was essentially that long hair was *currently* in vogue among students. Testimony by school authorities consisted of accounts of disruptions that had occurred in the *past* involving students with long hair and fear of what might occur in the *future* if students were allowed to wear long hair.

long hair as symbolic speech, the court assumed that it was such and stated that there is no absolute right to free expression of ideas.[18] The state may infringe upon such a right if there are compelling reasons to do so.[19]

A student attacked a school haircut regulation as being in violation of the first, eighth and ninth amendments in *Davis v. Firment*.[20] The court found that the regulation suppressed no right guaranteed by the first amendment. Recognizing that symbolic expression is entitled to first amendment protection,[21] the court said:

> A symbol must symbolize a specific idea or viewpoint. A symbol is merely a vehicle by which a concept is transmitted from one person to another; unless it represents a particular idea, a symbol becomes meaningless. It is in effect not really a symbol at all.[22]

Even if long hair is a form of symbolic expression, the court reasoned it would still be subject to state regulation in the furtherance of a state interest. There was uncontradicted evidence that the haircut regulation was based on disciplinary considerations.[23] However, the factual situation was one in which there was no disruption caused

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[18] For an opinion that there is an absolute right to free expression of ideas see Ginzburg v. United States, 383 U.S. 463 (1966) (Black, J., dissenting):

> As I have said many times I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct). . . . *Id.* at 476.

[19] A compelling reason is the interest in the maintenance of an effective and efficient school system. Ferrel v. Dallas Ind. School Dist., 392 F.2d at 703.

[20] 269 F. Supp. 524 (E.D. La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969).

[21] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). It was held that the first amendment prohibited the coercion of a pledge to the flag by school children. The flag itself was said to be symbolic of the government as it is presently organized while the pledge required the individual to communicate by word and sign adherence to that government.

[22] Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967). *But see* Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 120, 75 Cal. Rptr. 68 (1969), where the court, speaking of hair as a symbol, said:

> Its symbolic value . . . need not be judicially assessed: the symbolism is subjective in the person wearing it. . . . If a growth of hair means anything to its wearer (including his right to wear it long), the first amendment protects him in affecting it, and this is so whether he displays it on his chin or on his scalp. Adulthood is not a prerequisite: the state and its educational agencies must heed the constitutional rights of all persons, including school boys. 269 Cal. App. 2d at —, 74 Cal. Rptr. at 73 n.6.

[23] The evidence offered was testimony by school officials, one of whom stated:

> There is a distinct and direct relationship between student dress and conduct. . . . Gross deviation from the norm does cause a disruption of learning atmosphere and can create an undesirable separateness among students. Davis v. Firment, 269 F. Supp. at 528.

Another school official gave testimony that fights had occurred because of derogatory remarks made to students with long hair and that extreme hair styles have caused distractions and disturbances in the classroom. *Id.*

by the plaintiff's hair, but rather by prior disruptions caused by the hair of another student. The court dismissed as being wholly without merit the argument that to make a student cut his hair in order to go to school was a cruel and unusual punishment in violation of the eighth amendment.[24]

The student in *Davis* also argued that the ninth amendment guarantees a "fundamental free choice of grooming" under the rationale of *Griswold v. Connecticut*.[25] The *Davis* court did not agree:

> If this case is to fall within the ambit of *Griswold*, there must be some specific provision or provisions of the Bill of Rights from which student Davis' right of grooming emanates, or if it is permissible to follow the approach of Justice Goldberg,[26] the right must be at least fundamental.[27]

The court concluded that a right of free choice of grooming has no base in any guarantee of the Bill of Rights, and, while the right of marital privacy recognized in *Griswold* may be so sacred as to be fundamental, the right of free choice of grooming is not.[28]

Ferrel was followed in *Jackson v. Dorrier*, a leading sixth circuit haircut case decided after Breen. The facts in *Jackson* were strikingly similar to those in *Ferrel*. Evidence was presented to show that the wearing of excessively long hair by two male students disrupted classroom decorum by distracting other students thereby impeding the educational process.[30] The court found: that the regulation did not deprive the students of free speech in violation of the first amendment since the students' hair, by their own admission was not intended as an expression of any idea;[31] that the students had not

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[24] *Id.* at 524.

[25] 381 U.S. 479 (1965). The specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance. There are zones of privacy and repose created by the various rights, and the court held that the marital relationship was within the zone of privacy created by several constitutional guarantees. *Id.* at 484-85.

[26] *Id.* at 486 (Goldberg, J., concurring). The language and history of the ninth amendment clearly show that there are certain fundamental rights not specifically mentioned in the first eight amendments. By judicial examination of the traditions and conscience of the people, it could be determined that marital privacy is such a right. The fifth and the fourteenth amendments prohibit abridgement by the state of such fundamental rights.

[27] Davis v. Firment, 269 F. Supp. at 529.

[28] *Id.*

[29] 424 F.2d 213 (6th Cir. 1970).

[30] *Id.* at 216-17. While there were some obscure threats by other students to cut the long hair of these students, the court seemed to be mainly influenced by the opinions of teachers and administrators that long hair was distracting to other students. Also that there were disciplinary problems created by the deliberate flaunting of the haircut rule by these students.

[31] *Id.* at 217.

been deprived of due process under the fourteenth amendment in light of the conferences and hearings held before their suspension;[32] that the regulation was not void for vagueness and overbreadth because it clearly informed the students as to the school's grooming requirements and was uniformly applied;[33] that there was no denial of equal protection of the laws since the record was barren of proof that there was a selective enforcement against these students;[34] and that there was no merit in the record that the students' constitutional right of privacy had been impaired in violation of the first, third, fourth, fifth, ninth, and fourteenth amendments.[35]

Relying on *Jackson*, a federal district court in Kentucky held in *Fitzpatrick v. Garrison*[36] that, as a matter of law, the provisions of a school dress code relating to length of hair and wearing of chains were void for vagueness and overbreadth, but upheld a provision of the code prohibiting moustaches. The students, all black, argued that the moustache ban violated their first amendment right to freedom of speech and their fourteenth amendment right to equal protection of the laws. The two contentions were interrelated in that the moustaches were symbols of racial pride and manhood and that the students were prohibited from wearing them because of their race. The court found that the regulation as drawn and applied went to all male students and thus there was no denial of equal protection.[37] The first amendment argument was negated by the apparent insincerity of the students as to what the moustaches actually expressed.[38] Even if the students were sincere, the court questioned whether such an expression was basic enough to warrant intervention into a school operation.[39] The court's only requirement for the rule was that there be a reasonable connection between the rule and the maintenance of school discipline.[40]

The factual situation examined by the court was that the moustaches

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[32] *Id.*

[33] *Id.* at 217-18.

[34] *Id.* at 218.

[35] *Id.* In the court's opinion, *Griswold v. Connecticut*, 381 U.S. 479 (1965), had no application to this case.

[36] Civil No. 2050 (W.D. Ky., May 5, 1970). *See also* Fey v. Sell, Civil No. 1489 (E.D. Ky., Feb. 26, 1970).

[37] Fitzpatrick v. Garrison, Civil No. 2050 at 3. A white student had been suspended with the black students but was readmitted after shaving his moustache.

[38] *Id.* At any earlier hearing the students stated that they grew the moustaches "just because they wanted to." *Id.*

[39] *Id.* at 3-4. The court refused to equate expressions of manhood to expressions about international commitments of the United States. *See* Tinker v. Des Moines Comm. School Dist., 393 U.S. 503 (1969) (first amendment guarantees student right to symbolically express dissatisfaction with American commitments by wearing black armbands).

[40] Fitzpatrick v. Garrison, Civil No. 2050 at 4.

were neat and orderly and no disruption had arisen because of them other than the disruption from refusal to obey the rule.[41] The school officials offered justification for the rule by stressing the need to establish some cut-off point in order to avoid future school disruptions. In other words, to discourage students from attempting to discover the outer limits of any rule allowing moustaches, it would be easier to prohibit them altogether. Although the court felt that this was poor justification for an innocent act, the espoused purpose of the rule was reasonable and therefore the court would not interfere.

The right of a student to wear his hair at any length was held in *Breen* to be a constitutionally protected personal freedom. This freedom was said to fall within the "penumbras" of the first amendment's freedom of speech or within the ninth amendment's "additional fundamental rights not specifically mentioned in the first eight constitutional amendments."[42] This right is applicable to the states through the fourteenth amendment.

The court recognized that students' rights in the area of personal grooming were subject to limitations on a showing of substantial justification by school authorities because of some paramount state interest.[43] The court stated the requirements of substantial justification:

> '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 in 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.'[44]

The justification advanced was that the long hair distracted other students and that students who conform to community standards do better both in academic work and extracurricular activities. Although several educational administrators offered opinions to this effect, the court stressed that the record was void of any evidence of actual distraction. The record was equally barren of facts or empirical studies to substantiate the allegation that long-haired students do not perform as well as short-haired students.[45]

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[41] *Id.* For an opinion that clean and neat is not a redeeming feature by which extreme hair styles, beards or moustaches must be excluded from school regulations *see* 69 OP. ATT'Y GEN. 423 (1969).

[42] *See* note 25-26 *supra,* and accompanying text.

[43] *See* note 19 *supra.*

[44] United States v. O'Brien, 391 U.S. 367, 377 (1968), *cited in* 419 F.2d at 1036.

[45] 296 F. Supp. at 708-09. The distraction and performance factor of students with long hair were findings of fact made by the district court.

The school board advanced arguments to uphold the regulation on three grounds. First, the disciplinary powers of school authorities in formulating regulations for the efficient operation of schools would be greatly diminished unless its rules were vindicated by the courts. This argument was dismissed by the court stating that it would interfere with school conflicts where they "directly and sharply implicate basic constitutional values."[46] Second, the doctrine of *"in loco parentis"*[47] was said to apply. While recognizing the doctrine's value in regard to certain matters, the court said that it is a power to be shared with the parents. The doctrine had no applicability to this case because the parents were in court with their son aiding his effort to retain the right to wear his hair as he chose. Third, it was argued that invalidating this rule would open a floodgate of litigation in the federal courts. The court answered that to yield to this fear would be to abdicate its judicial duty to arbitrate the validity of laws and protect the public from the unconstitutional exercise of governmental power.[48]

Decisions on student haircut provisions of dress and appearance regulations have too often been based on the discouragement of disruption which a principal thinks might occur. The courts before *Breen* paid lip service to a factual setting in which disruption of the educational system did occur, while in reality enforcing the personal preferences of school administrators. Substantial justification for any school regulation can be found if the courts refuse to look at the specific facts of the case and consider only what has happened in the past or what could happen in the future. To be sure, long hair may be the source of some trouble in the classroom,[49] but it has not been demonstrated how long hair could have such an adverse effect as to threaten the state's interest in an efficient educational system.

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[46] Epperson v. Arkansas, 393 U.S. 97, 104 (1968), *cited in* 419 F.2d at 1037.

[47] For a discussion of this doctrine and other non-constitutional aspects of school authority to regulate student conduct and status see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

[48] 419 F.2d at 1038. A similar argument was advanced in Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969), *rev'd in part*, 425 F.2d 201 (5th Cir. 1970). The court said that this proposition could apply to any rule and if accepted would mean that the student has no rights.

[49] Priscilla Robertson, chairwoman of the Kentucky Civil Liberties Union's academic freedom committee, agreeing that student dress should not be disruptive or constitute a danger, stated:

> 'I can see rules such as having no long hair waving around Bunsen burners in a chemistry lab. But the burden of proof of what is disruptive or dangerous falls on the school system not the student.' Helm, *A Dress Affair*, The Courier Journal (Louisville, Ky.), April 3, 1970, § 1, at 1, col. 6.

The holding in *Breen* is an encouraging step in the recognition of student rights in at least the area of his personal appearance. It is unfortunate that a factual situation in which there was evidence of actual disruption caused by a student's long hair was not presented to the court, for dictum in the opinion indicates that the court may have nevertheless reached the same result.[50] Such a decision should be reached by using a balancing of interest test—the constitutional right of a student in deciding how to wear his hair balanced against the disruption of the educational system caused by those who would deny him this right.[51]

Social norms fluctuate and it is essential that courts keep pace with the change by protecting basic constitutional rights. Long hair may not yet be accepted as the norm but it is at least accepted, particularly among those of school age. It is unlikely that a court today would find a substantial justification sufficient to warrant a ban against the use of cosmetics and hosiery by female students.[52] The same rule should be applied to regulations of the length of a student's hair.

That *Breen* recognized the constitutional right of a student to govern his own hair style and length clearly seems the better course. Equally wise was the court's decision to require justification for the rule supported by the facts of the case. While the court left open the

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[50] Discussing a situation in which there might have been disruption caused by the student's long hair, the court said:

> We are more inclined to agree with Judge Tuttle's dissenting opinion in *Ferrel* that "courts are too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it bring disorder, resistance or improper and even violent action by those supporting the status quo. . . ." 419 F.2d at 1037.

[51] See Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969) (second supplementary opinion), *aff'd*, 424 F.2d 1281 (1st Cir. 1970). Commenting on a case where a student was denied relief for suspension for long hair which caused other students to be disorderly, the court stated:

> This court takes the position that that is not a valid ground for denying plaintiff's liberty to wear hair as he pleases. A man may not be restrained 'from doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act.' *Id.* at 454, *citing* Beatty v. Gillbanks, 9 Q.B.D. 308, 314 (1882) (where it was held that the Salvation Army could not be forbidden to parade merely because hostile groups chose to start a disturbance).

Another district court expressed the same view in regard to the actions of other students:

> The exercise of a constitutional right cannot be curtailed because of an undifferentiated fear that the exercise of that right will produce a violent reaction on the part of those who would deprive one of the exercise of that constitutional right. Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969), *rev'd in part*, 425 F.2d 201 (5th Cir. 1970).

[52] *See* text at note 10 *supra.*

possibility of upholding haircut regulations for some justifiable cause,[53] it took a giant stride in advancing this area of the law to a position in step with both current social changes and recent decisions involving the constitutional rights of youth.[54]

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[53] Addressing itself to the problem of justification for a school regulation, one court has stated:

> There might be a sharing of reasonable disciplinary demands which would be determinative. . . . But an attempt to impose conformity for the sake of conformity or merely to accord with a principal's prejudices is not entitled to prevail over the personal liberty of a student to choose his hair style. Richards v. Thurston, 304 F. Supp. 449, 454 (D. Mass. 1969) (supplementary opinion, *aff'd*, 424 F.2d 1281 (1st Cir. 1970).

[54] The Supreme Court has held that the due process clause of the fourteenth amendment applies to delinquency proceedings in the state courts. Due process of law requires: that notice of the charges be given; that before a court hearing the child and his parents be notified of the right to be represented by counsel and to have counsel appointed if they cannot afford their own; that the child be advised of his right against self-incrimination and that absent a valid confession, adjudication of delinquency must be based on sworn testimony of witnesses available for confrontation and cross-examination. *In re* Gault, 387 U.S. 1 (1967).