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# Constitutional Law -- Public School Authorities Regulating the Style of a Student's Hair

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than at the trial court level. Allowing the verdict winner the right to argue conditionally for a new trial either at the trial court level or the appellate level seems to ignore the practicalities of advocacy, and indeed of human nature. Only a verdict winner who has been deprived of his verdict can argue meaningfully for a new trial, and he should have the right to argue his case to the trial judge who saw and heard the case.

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## Constitutional Law—Public School Authorities Regulating the Style of a Student's Hair

The availability of public education is often subject to compliance with school regulations governing student appearance and conduct. Courts have jurisdiction by way of mandamus or otherwise to review the legality of such regulations and may order reinstatement or enrollment when the exclusion is made pursuant to regulations that are unreasonable, arbitrary, or discriminatory, or when the exclusion infringes upon some constitutional right.[1] Following this standard, courts have upheld expulsion for using cosmetics, wearing objectionable clothing,[2] smoking,[3] serving liquor to other students,[4] marriage,[5] creating school bus disturbances,[6] and even writing a letter to a newspaper in which the student was "fanatical in his [favorable] views as to atheism."[7]

In *Ferrell v. Dallas Independent School District*,[8] a public high school principal refused to enroll three students—members of a musical group known as "Sounds Unlimited"[9]—because the length and style of their hair could "cause commotion, trouble, distraction, and a disturbance in school."[10] The students claimed that the regulations prescribing appearance constituted an arbitrary and unreasonable violation of their consti-

[1] *The Legal Status of the Public School Pupil*, 26 N.E.A. RESEARCH BULL. 28 (1948).
[2] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).
[3] Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).
[4] State v. Clapp, 81 Mont. 200, 263 P. 433, *cert. denied*, 277 U.S. 591 (1928).
[5] State v. Board of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).
[6] *In re* Neal, 164 N.Y.S.2d 549 (Child. Ct. 1957).
[7] Robinson v. University of Miami, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958).
[8] 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 37 U.S.L.W. 3127 (U.S. Oct. 15, 1968).
[9] *Id.* at 698.
[10] *Id.* at 699.

tutional rights to freedom of expression and privacy. The federal district court denied their petition for injunctive relief,[11] holding that the school authorities had acted with reasonable discretion.[12] The Court of Appeals for the Fifth Circuit affirmed, with Judge Tuttle dissenting.[13]

While the decision has many implications concerning curtailment of the right to privacy where the mere *likelihood* of school disorder exists,[14] the court in *Ferrell* hardly touched the issue.[15] The court declared that even assuming that haircuts are a constitutionally protected mode of expression under the first amendment, such a right was subordinate to the state's interest in operating an efficient school system.[16] A similar contention by Mayor Hague thirty years earlier, however, was refuted by the Supreme Court, which said:

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[11] Ferrell v. Dallas Indep. School Dist., 261 F. Supp. 545 (N.D. Tex. 1966). The district court accepted jurisdiction on the basis of the constitutional issues involved, citing Brown v. Board of Educ., 347 U.S. 493 (1954).

[12] 261 F. Supp. 545, 552 (N.D. Tex. 1966), *reviewed in, A Student's Right to Govern His Personal Appearance*, 17 J. PUB. L. 151 (1968); 20 ALA. L. REV. 104 (1967).

[13] 392 F.2d 697 (5th Cir. 1968). An abundance of prior statutory and case law in many states upholds the right to grant their school officials almost unlimited discretion in governing the behavior and appearance of students attending their public schools, limited only by the requirement of reasonableness. *See* Langenbach, *The Power of School Officials to Regulate Student Appearance*, 3 HARV. LEG. COMM. 1 (1966); 1 PORTIA L.J. 258 (1966); Note, *The Right to Dress and Go to School*, 37 U. COLO. L. REV. 492 (1965).

[14] The students claimed their hair was an important asset to the popularity of their musical group, thus the school officials' action prevented them from following their chosen occupation free from unreasonable governmental interference in violation of the liberty and property concepts of the fifth amendment. The court recognized such a right, but rejected the claim that it was unreasonably infringed upon. 392 F.2d at 703.

[15] *But see* Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965); Marshall v. Oliver, Case No. B-2932 (Cir. Ct. Richmond, Nov. 28, 1965) (unpublished opinion), *appeal denied*, 207 Va. xcix, *cert. denied*, 385 U.S. 945 (1966) (college student denied enrollment in a state college because of long hair). The issue of privacy was presented to the court in *Ferrell*. *See* Brief for ACLU as Amicus Curiae at 6, 7 and Brief for Appellee at 18, 19, Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir. 1968).

[16] 392 F.2d at 703. The court in *Ferrell* also considered the subordinate claim that the school regulation was discriminatory under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983 (1964), but dismissed such claims, citing Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960). In *Byrd* a black student claimed the imposition of an enrollment fee to attend public high school was discrimination under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (1964). Since the issue of race was not involved, the court refused to extend the statutes, holding any invasion of the student's right to attend the school without paying the fee was an invasion of a personal, not a civil right.

> [U]ncontrolled official supression of the privilege [freedom of speech] cannot be made a substitute for the duty to maintain order in connection with the exercise of that right.[17]

When the court assumes that a student's hairstyle is protected under the first amendment,[18] it becomes susceptible to the attack of the dissenting opinion,[19] namely that the state had failed to demonstrate that the petitioners' hairstyle clearly and seriously impeded the educational process enough to justify such invasion of the first amendment right.[20] A possible justification for the majority position can be found in the opinion of *United States v. O'Brien*,[21] where the Supreme Court dismissed the idea that all types of symbolic conduct are protected speech under the first amendment, and rejected the claim that burning a draft card before a public audience is protected symbolic speech.[22] Moreover, if a student's right to wear long hair were protected by first amendment freedom of expression, it is unclear whether a student has even a qualified right to compel the state to supply a platform—the school—for him to exercise that right.[23]

Perhaps the court's analysis and treatment of first amendment protection in *Ferrell* developed from positions it had taken in previous cases dealing with overtly symbolic speech. But the procedure adopted in *Ferrell*, in justifying infringement on the first amendment right, differs significantly from the procedure used in its previous decisions.

For instance, in *Blackwell v. Board of Education*[24] and *Burnside v.*

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[17] Hague v. CIO, 307 U.S. 496, 516 (1939). *See also* Terminiello v. Chicago, 337 U.S. 1 (1949).

[18] 392 F.2d at 702. In Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967), the district court, when faced with the same factual situation, did not accept hair style as protected under the first amendment. Hair style, in order to be a symbol of speech, must express something, but "what does it express? Nothing." *Id.* at 527. *See* note 36 *infra* and accompanying text.

[19] 392 F.2d at 705.

[20] "[T]he constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very right he seeks to assert." *Id.* at 705. The disruptive reactions of fellow students "should be prohibited, not the expression of individuality by the suspended students." *Id.* at 706.

[21] 391 U.S. 367 (1968).

[22] *Id.* at 376.

[23] *See* Adderly v. Florida, 385 U.S. 30, 43 (1966) (involving the arrest of students for staging a protest picket on public jail property). In Cox v. Louisiana, 379 U.S. 536 (1965), civil rights picketing was held to be symbolic speech protected under the first amendment, but the Supreme Court in *Adderly* held that the state had "the right to control the use of its own property for its own lawful non-discriminatory purpose," regardless of the first amendment rights of the protestors. 385 U.S. at 43.

[24] 363 F.2d 749 (5th Cir. 1966).

*Byars*,[25] this same court used different reasoning in cases involving high school students who wore freedom buttons inscribed with civil rights slogans. Granting that such buttons were overtly symbolic speech, the court seemed to require proof of disruption *in fact* to justify infringement upon first amendment rights.[26] Thus, in *Blackwell*, after analyzing various sorts of empirical data, the court found *actual* disruption and upheld the school officials' actions barring the buttons.[27] But in *Burnside*, the court held that school officials had failed to demonstrate sufficient *actual* disturbance to justify similar restrictions.[28] Both decisions stress that the educational process involves the grant of considerable discretionary power to teachers and administrators.[29] Together these companion cases seem to imply that discretionary power necessary to the orderly functioning of the public schools cannot infringe upon rights of free expression unless a connection between the prohibited conduct and disruption *in fact* can be clearly demonstrated. Furthermore, in *Blackwell*, the degree of restriction was reasonable—controversial and disruptive buttons can be worn outside school hours. In sum, a reasonable exercise of discretion, resulting in regulations calculated to remedy a demonstrated problem, was upheld.

Yet in *Ferrell*, the court apparently abandoned the procedure followed in *Blackwell* and adopted the procedure of the district court in *Tinker v. Des Moines Independent School District*,[30] which held that actions of school officials "should not be limited to those instances where there *is* material or substantial interference with school discipline."[31] The regulation was promulgated by the schools and upheld by the court in *Ferrell*,

[25] 363 F.2d 744 (5th Cir. 1966).

[26] *Id.* at 749.

[27] 363 F.2d at 754.

[28] 363 F.2d at 748.

[29] *See also* Waugh v. Trustees of Univ. of Miss., 237 U.S. 589 (1915) (upholding the right of college administrators to prohibit fraternities); Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968) (upholding the suspension of students involved in a demonstration for student power); Zanders v. Board of Education, 281 F. Supp. 747 (W.D. La. 1968) (upholding the suspension of students involved in a sit-in demonstration in an administration building); Byrd v. Gary, 184 F. Supp. 388 (E.D.S.C. 1960) (upholding the suspension of high school students attempting to organize a milk boycott).

[30] 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *cert. granted*, 390 U.S. 942 (1968). In *Tinker* the district court upheld a principal's rule prohibiting students from wearing black arm bands in school. The court recognized that the arm bands were a known symbol of protest against the Viet Nam war, a symbolic form of expression protected under the first amendment.

[31] *Id.* at 973 (emphasis added).

though disturbance was only "reasonably anticipated,"[32] not present *in fact*.[33]

Some courts have concentrated not on the right of free speech, but on the right of privacy. Thus, they have refused to circumvent the more apparent, if not appropriate, issue when approaching similar haircut rules.[34] Traditionally, the right of privacy has been dominated by the common law concept of a man's home as his castle,[35] and admittedly hairstyle does not fall clearly within such a circumscribed theory. In *Davis v. Firment*,[36] a federal district court reasoned that a student's right of privacy to have his hairstyle left alone neither came from specific constitutional provisions[37] nor was so sacred or fundamental[38] as the right to marital privacy affirmed in *Griswold v. Connecticut*.[39] But other recent Court decisions emphasize that the concept of privacy is not confined to the *place*, but rather to the *person*. In *Katz v. United States*,[40] the Supreme Court held that the fourth amendment freedom from unreasonable governmental interference "protected people, not places."[41] Similarly, the Court, in *Terry v. Ohio*,[42] reasoned that the right of personal security "belongs as much to the citizen in the streets of our cities as

[32] *Id.* at 973.

[33] In *Ferrell* the petitioners had been refused enrollment; thus the school officials did not know from empirical observation that the students' hair style would be a source of disruption *in fact*, but based their opinion on past experiences with *different* students.

[34] *See* note 18 *supra*.

[35] *But see* Boyd v. United States, 116 U.S. 616, 630 (1886) (the Court described the fourth and fifth amendments as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life").

[36] 269 F. Supp. 524 (E.D. La. 1967).

[37] *Id.* at 529. The court felt that Justice Douglas's majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), was based on "penumbras" of the first, third, fourth, and fifth amendments which enabled citizens to create certain zones of privacy that government could not force the citizen to surrender to his detriment.

[38] *Id.* at 529. The court infers that Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), meant that although the right of marital privacy is not explicitly mentioned in the Constitution, the ninth amendment reminds us that there are other fundamental rights implicit in the fourteenth amendment's meaning of liberty, the right to marital privacy being such a fundamental right.

[39] 381 U.S. 479 (1965) (holding Connecticut's anti-contraceptive statute unconstitutional because its enforcement would violate the individual's right to privacy).

[40] 389 U.S. 347 (1967) (use of an electronic listening device to record a conversation in a public telephone booth).

[41] *Id.* at 351.

[42] 392 U.S. 1 (1968) (right of a police officer to "stop and frisk" on reasonable suspicion). *See* Sibron v. New York, 392 U.S. 40 (1968).

to the homeowner closeted in his study to dispose of his secret affairs."[43] In applying this reasoning, a student should be entitled to a certain modicum of privacy, notwithstanding his presence in a public institution.

Dictating the proper hairstyle to be worn in public school could be unreasonably "intruding upon the sanctity of the person,"[44] for unlike freedom buttons or armbands, official proscription of long hair during school hours affects the student in his home. Hair is obviously too much a natural and fundamental characteristic of the person to be put on and off, according to school schedule. Although the official intrusion upon the student's privacy is not as blatant or as confined to the home as the intrusion upon marital privacy in *Griswold*,[45] a student should have a right to be free from unreasonable governmental interference with his person at any hour or place.[46] Just as unreasonable restraints on the street corner may be reasonable restraints in the class room,[47] even reasonable restraints on the street corner or class room could well be *unreasonable* restraints when affecting the student not only at school, but also at home.[48]

Besides possibly infringing on the individual student's right to be left alone, banning long hair in public schools could "unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control."[49] But in *Leonard v. School Committee*,[50] the Massachusetts court upheld the suspension of a student musician with long hair, finding neither an abuse of discretion nor an unreasonable invasion of family privacy by school officials.[51]

Thus, the Court of Appeals for the Fifth Circuit indicates adherence to the policy of other courts in readily allowing school officials to promulgate ad hoc rules. Apparently, these school regulations will be

[43] 392 U.S. 1, 8-9 (1968).
[44] *Id.* at 17.
[45] 381 U.S. 510 (1965).
[46] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).
[47] 392 F.2d at 704-05 (concurring opinion).
[48] *Compare* Terry v. Ohio, 392 U.S. 1 (1968), *with* Griswold v. Connecticut, 381 U.S. 510 (1965).
[49] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
[50] 349 Mass. 704, 212 N.E.2d 468 (1965), *noted in* 1 PORTIA L.J. 258 (1966).
[51] The court in *Leonard* reasoned that rules governing the appearance of students were subject to limited court review, and that rules adopted by authorized school officials would be presumed to be based on reasonable deliberation, unless convinced there could be no reasonable connection with the rule and the successful operation of the school. "[J]ust as with any unusual, immodest or exaggerated mode of dress . . . conspicuous haircuts could result in the distraction of other students." *Id.* at 710, 212 N.E.2d at 472.

upheld as a reasonable exercise of official discretion, though perhaps infringing on the student's constitutional right of privacy. In balancing the "gravity of the 'evil' "[52] with the restraint on the right of privacy and possible first amendment intrusions, courts will uphold, as a reasonable exercise of official discretion, school regulations intended to avert *potential* sources of harm. The source of harm need not in fact be realized in the particular case for the regulation to be upheld. The court in *Ferrell* may have adopted this position to discourage students from testing these ad hoc rules at school, and subsequently in court, and to insure an efficient education for a majority of students, though curtailing a right of others. Adherence to such a policy will build fences amounting to a corral for the "mustangs and mavericks"[53] wishing to attend public school.

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## Criminal Law—The Rehabilitative Ideal Activated by the Sentencing Process

### INTRODUCTION

All too often the concept of rehabilitation within the criminal process is embraced by the academic community, but spurned by the black robes of the judiciary. Archaic myths and prejudices, interwoven into the purposes and goals of the criminal law, have resulted in an "antiquated criminal code, which is riveted together by outworn tradition like the iron cuff about the ankle of a chain gang prisoner,"[1] and beyond which the judiciary, historically, has failed to see.

In the case of *People v. Jones*,[2] an Illinois Appellate Court clearly recognized the rehabilitative ideal within the criminal system and applied it to a twenty year old high school boy. The defendant had been convicted of involuntary manslaughter and sentenced to the state penitentiary for not less than six nor more than ten years.[3] The trial court found that the

[52] 392 F.2d at 702.

[53] Pollit, *Free Speech for Mustangs and Mavericks*, 46 N.C.L. REV. 39, 54 (1967).

[1] Note, *Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation*, 50 HARV. L. REV. 677, 686 (1937).

[2] — Ill. App. 2d —, 235 N.E.2d 379 (1968).

[3] ILL. ANN. STAT. ch. 38, § 9-3(c)(1) (Smith-Hurd 1964) reads as follows: "A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to ten years."