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Hair and the Right to Public Education

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twenty-five to thirty-five per cent of the indigent cases, teach a course for credit to local law students, and give assistance to the private counsel who defend the remaining indigent cases.[60]

Deficiencies in the public defender system such as the alleged lack of adverseness or nonparticipation by the local bar could be remedied by a system which provides centralized control but at the same time utilizes independent assigned counsel. Likewise, deficiencies in the assigned counsel system such as higher cost and inefficient operations could be remedied by allowing the public defender to handle the time and money-consuming appeals, leaving the defense of indigents at trial to assigned attorneys.

It may be that still further legislative action is needed to create an ideal public defender system for North Carolina. The General Assembly could balance the issues presented and design a system which simultaneously avoids the deficiencies and includes the advantages of both systems now being tested. A hybrid system similar yet not necessarily identical to those discussed could yield the best possible result. This is the kind of system that is needed in order to meet the demand for assigned counsel by the most efficient and effective method.

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INTRODUCTION

In a nation beset by a generation gap, one of the major areas of division between young and old is personal appearance. Nowhere is this conflict more evident than in the recent burst of litigation involving students, usually males with long hair, suspended from public schools for violating high school grooming codes.[1] Prior to 1969 there had been only two "hair" cases in the federal courts; since that time there have been at least thirty-eight reported cases. The establishment, as represented by school authorities, assert the right to regulate length of hair as a means of promoting order, discipline, an academic atmosphere, and good citizen-

[60] Warner, *The Public Defender and Other Suggested Systems for the Defense of Indigents*, 53 JUDICATURE 245, 245-46 (1969-70).

[1] The school grooming code most often promulgated requires that hair be "combed and worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows." Sideburns below the earlobe and mustaches are also generally prohibited. Breen v. Kahl, 419 F.2d 1034, 1035 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

ship. Students, on the other hand, have insisted that the length of one's hair is a matter of individual discretion and personal freedom, and at times they have claimed it was protected by the Constitution and thereby was exempted from school regulation.

As of this writing[2] the circuit courts of appeals that have ruled on the question stand in disagreement as to the two views, and the Supreme Court has not granted certiorari to resolve the conflict.[3] Perhaps the feeling of the Court was expressed by Justice Black, when he denied a motion by Chesley Karr, a student at Coronado High School in El Paso, Texas, to suspend the school's rule against long hair while his suit moved through the federal courts:

> All the federal courts, including the Supreme Court are heavily burdened with important cases, the kind they must be able to handle if they are to perform their responsibility to society. Moreover, our Constitution has sought to distribute the powers of government in this nation between the United States and the states. Surely, the federal judiciary can perform no greater service to the nation than to leave the states unhampered in the performance of purely local affairs. Surely few policies can be thought of in which states are more capable of deciding than the length of the hair of schoolboys.[4]

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[2] March 1, 1971.

[3] Certiorari has been denied in three cases upholding the school board: Stevenson v. Wheeler County Bd. of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968). Certiorari has also been denied in one case in which the court held for the student. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), in which the court also held for the student, has not been appealed.

[4] Karr v. Schmidt, 91 S. Ct. 592, 593 (1971) (Black, J., sitting as a Circuit Justice). Some lower federal courts apparently agree that the issue is not important enough for judicial consideration. *See, e.g.*, Stevenson v. Wheeler County Bd. of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970), in which Judge Lawrence said:

> All this [desegregation effort] is suddenly jeopardized by a lilliput of a lawsuit—a legal controversy which has upset everybody in the school system—a *cause celebre* that attracted a courtroom full of spectators. . . . What does it involve? It concerns the monumental question of the constitutional right of a student to wear a mustache in violation of a regulation of the school authorities.

Id. at 1155. In *Ferrell v. Dallas Indep. School Dist.*, 393 U.S. 856 (1968), Mr. Justice Douglas, dissenting to the denial of certiorari, expressed a different opinion:

> It comes as a surprise that in a country where the states are restrained by an Equal Protection Clause, a person can be denied education in public school because of the length of his hair. I suppose that a nation bent on

Nevertheless, an increasing number of plaintiffs seek relief from hair regulation through the federal courts.[5]

Student rights against encroachments of their constitutional guarantees by school authorities were throughly reviewed by the Supreme Court in the key case of *Tinker v. Des Moines Independent Community School District*,[6] in which the Court said:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[7]

Most courts confronted with a student-constitutional rights issue will follow *Tinker* in holding that a student is entitled to protection under the Constitution.[8] However, in spite of the commandment from the Supreme Court, two federal district courts have expressed the opinion that student rights are more limited than would appear from *Tinker*. An Arkansas federal court in *Corley v. Daunhauer*[9] compared student rights

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turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy. I had supposed these guarantees permitted idiosyncrasies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.

[5] Most plaintiffs proceed under 42 U.S.C. § 1983, 28 U.S.C. § 1343, and the first and fourteenth amendments of the Constitution. Most federal courts have held that the plaintiff need not exhaust his state remedies first. *See, e.g.*, Alexander v. Thompson, 313 F. Supp. 1389, 1397-98 (C.D. Cal. 1970); Reichenberg v. Nelson, 310 F. Supp. 248, 250 (D. Neb. 1970); Pritchard v. Spring Branch Indep. School Dist., 308 F. Supp. 570, 572 (S.D. Tex. 1970). At least one district court has held that the remedies available to these students were to be pursued in state, not federal courts. Schwartz v. Galveston Indep. School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970).

[6] 393 U.S. 503 (1969).

[7] *Id.* at 511.

[8] *See* Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Lansdale v. Tyler Junior College, 318 F. Supp. 529, 531-32 (E.D. Tex. 1970); Dunham v. Pulsifer, 312 F. Supp. 411, 417 (D. Vt. 1970); Sims v. Colfax Community School Dist., 307 F. Supp. 485, 487 (S.D. Iowa 1970). The court in *Dunham* added that

> it should be observed that the Constitution does not stop at the public school doors like a puppy waiting for its master, but instead it follows the student through the corridors, into the classroom, and onto the athletic field.

312 F. Supp. at 417. *See also* Westley v. Rossi, 305 F. Supp. 706, 713 (D. Minn. 1969).

[9] 312 F. Supp. 811 (E.D. Ark. 1970).

to those of inmates in penal institutions,[10] while Judge Clarie of the District Court of Connecticut felt that to equate the rights of adults and high school students in the area of personal appearance was like comparing oranges and apples.[11]

Another viewpoint is that discretion should be granted to those charged with the responsibility of educating children to make rules and regulations to insure the efficient operation of the school.[12] Thus courts have recognized that there are "differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner."[13] Some federal courts will hesitate to involve themselves in student-school controversies, using as a justification a statement such as that in *Epperson v. Arkansas:*[14]

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[15]

Undoubtedly another reason for judicial hesitance to intervene might be the feeling that schools are managed by professional educators more familar with particular needs and problems than the courts could be.

THE CONSTITUTIONAL ARGUMENTS

The validity of public school regulation of students' hair styles has been challenged on the following four constitutional grounds: 1) as a

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[10] *Id.* at 816.

[11] Crossen v. Fatsi, 309 F. Supp. 114, 118-19 (D. Conn. 1970).

[12] The notion is one of long standing. *See* 1 W. BLACKSTONE, COMMENTARIES *297:*

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

The doctrine still has vitality, as pointed out by Judge Godbold in Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968) (concurring opinion): "Whether it should or should not do so the American community calls upon its school to, in substance, stand *in loco parentis* to its children for many hours of each school week."

[13] Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704-05 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

[14] 393 U.S. 97 (1968).

[15] *Id.* at 104. *See also Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1051-55 (1968).

violation of substantive due process under the fourteenth amendment, 2) as an infringement on freedom of speech as guaranteed by the first amendment, 3) as a denial of equal protection under the fourteenth amendment, and 4) as an abridgment of a fundamental freedom under the ninth amendment. The validity of each of these grounds involves a balancing of the interests of the state as against those of the students.

The most successful argument is that of substantive due process, *i.e.*, a taking of an individual's liberty to choose his personal appearance without due process of law. The key choice that a court must make on this issue is whether an individual's choice of hair style is a fundamental interest which may be abridged only by compelling state interests or should be viewed more as an economic interest, subject to restriction if there is "any rational basis" for it.[16] Most courts that rule against the due process argument generally follow the latter approach, saying the regulation bears a rational relationship to effective operation of schools.[17] Some have followed the former rationale, terming the state interest in maintaining an efficient school system compelling.[18] The few courts that have found the freedom to wear one's hair to be fundamental are adamant in the belief that a compelling state interest is required in order to abridge this right:

> For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality . . . identity, and would invade the human "being." . . . It would deprive a man or a woman of liberty without due process of law in violation of the Fourteenth Amendment.[19]

Other courts hold that the due process clause creates a "sphere of personal liberty" into which the government may not intrude without a

[16] *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Nebbia v. New York, 291 U.S. 502, 525 (1934).

[17] *E.g.*, Wood v. Alamo Heights Indep. School Dist., 433 F.2d 355 (5th Cir. 1970); Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970); Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970); Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970); Wood v. Alamo Heights Indep. School Dist., 308 F. Supp. 551 (W.D. Tex. 1970).

[18] Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 703 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

[19] Breen v. Kahl, 296 F. Supp. 702, 706 (W.D. Wisc.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *Accord*, Dunham v. Pulsifer, 312 F. Supp. 411, 419 (D. Vt. 1970); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970).

showing of substantial justification or the self-evidence of the justification.[20]

The equal protection argument has been successful in only a few cases to date. The most important is the recent case of *Crews v. Cloncs*,[21] in which the court held that exclusion of long-haired male students from classes constituted a denial of equal protection,[22] where females were engaged in substantially the same activities. *Dunham v. Pulsifer*[23] involved an athletic grooming code that was found to violate equal protection—school officials, having extended the right to participate in athletics to all students, denied it on the basis of a classification that had no reasonable relation to the conduct of the athletic program.[24]

The first amendment argument centers around the idea that a student may wear his hair long as a protest or manifestation of some cultural philosophy;[25] therefore, his right to wear his hair at any length is "symbolic speech" as was the wearing of armbands in *Tinker v. Des Moines Independent Community School District*.[26] No court has accepted a pure first amendment argument in hair cases. In fact, most courts reject the argument entirely, saying either that there was no evidence the plaintiff wore his hair as a symbol[27] or that a symbol must be specific or identifiable to merit protection under *Tinker*.[28] One court expressed the view that in

[20] Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970); Westley v. Rossi, 305 F. Supp. 706, 711 (D. Minn. 1969). Both courts pointed out that regulation of length of hair is permanent in nature, affecting a student twenty-four hours a day, as opposed to only during school hours. In *Cordova v. Chonko*, 315 F. Supp. 953, 963 (N.D. Ohio 1970), the court held that the hair code was violative of due process in that the principal exceeded his authority, and in *Griffin v. Tatum*, 425 F.2d 201, 203 (5th Cir. 1970), the court held that the code was arbitrary and unreasonable as applied.

[21] 432 F.2d 1259 (7th Cir. 1970).

[22] *Id.* at 1266. For the court's handling of the disruption issue see page 726 *infra*. In accord is the unreported case of Miller v. Gillis, — F. Supp. — (N.D. Ill. 1969), *cited in* 4 VALPARAISO U.L. REV. 400, 411-12 (1970). *See also* Westley v. Rossi, 305 F. Supp. 706, 713 (D. Minn. 1969); Zachary v. Brown, 299 F. Supp. 1360, 1362 (N.D. Ala. 1967).

[23] 312 F. Supp. 411 (D. Vt. 1970).

[24] *Id.* at 420.

[25] The plaintiff in *Richards v. Thurston*, 304 F. Supp. 449, 455 (D. Mass. 1969), explained that his hair was a symbol of "his association with some of the younger generation in expressing their independent aesthetic and social outlook and their determination to reject many of the customs and values of some of the older generation."

[26] 393 U.S. 503 (1969).

[27] Livingston v. Swanquist, 314 F. Supp. 1, 8 (N.D. Ill. 1970); Brownlee v. Board of Educ., 311 F. Supp. 1360, 1364-65 (E.D. Tenn. 1970).

[28] Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970); Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (1969).

order to qualify for first amendment protection, an expression or point of view must "make a significant contribution to the 'marketplace of ideas.' "[29] A first amendment argument has been successful in two cases, *Breen v. Kahl*[30] and *Dunham v. Pulsifer*.[31] In both cases, the court combined the first and the ninth amendments to find a "penumbra" in which the right to govern one's appearance is fundamental.[32] Each court seemed to be hesitant to confront the first amendment directly. Although these courts had difficulty locating the right precisely, the appellate court in *Breen* was convinced that it was fundamental in nature.[33] This view is also expressed in *Richards v. Thurston*,[34] in which the right to wear one's hair as he pleases is described as "one of the aspects of personal liberty, that is, liberty of appearance . . . or, alternatively, as one of the aspects of freedom of expression."[35] In one case, *Crossen v. Fatsi*,[36] the court held that a school grooming code was unconstitutionally vague and unenforceable in that it violated the pupils' right to privacy under the *Griswold* doctrine,[37] but left the door open for the school board to adopt a more precise grooming code.[38]

The School Board's Arguments

Although school boards have occasionally been successful in claiming that there is no constitutional protection for the right to wear long hair,[39] the majority of cases holding for the defendant school board have recognized the right as protected under the constitution and then have proceeded to find an overriding state interest or justification. The most used and most often successful argument is disruption to the educational process; that is, the state's overriding interest in maintaining an efficient and

[29] Brick v. Board of Educ., 305 F. Supp. 1316, 1320 (D. Colo. 1969).

[30] 296 F. Supp. 702 (W.D. Wisc.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[31] 312 F. Supp. 411 (D. Vt. 1970).

[32] *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965).

[33] Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[34] 304 F. Supp. 449 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970).

[35] *Id.* at 455.

[36] 309 F. Supp. 114 (D. Conn. 1970).

[37] *Id.* at 118. *See* note 32 & accompanying text *supra*.

[38] 309 F. Supp. at 118. The unconstitutionally vague code read:

> Students are to be neatly dressed and groomed maintaining standards of modesty and good taste conducive to an educational atmosphere. It is expected that clothing and grooming not be of an extreme style and fashion.

Id. at 115-16.

[39] *See, e.g.*, Davis v. Firment, 269 F. Supp. 524 (E.D. La.), *aff'd*, 408 F.2d 1085 (5th Cir. 1969).

effective learning atmosphere is thwarted by plaintiff's long hair. It is disruptive in that other students become either so incensed or so excited over a long-haired male that control of the class becomes difficult or impossible thereby eliminating a learning situation. How realistic this claim is becomes an evidentiary consideration for the court. Although most accept the disruption argument, some judges have indicated their belief that the true motive for excluding the long-haired student was a "personal distaste [on the part of school board authorities] for persons . . . who do not conform to societal norm."[40]

The "disruption" theory was born in *Tinker* itself, in which the court suggested that school regulations, although violating constitutional rights, might be upheld if "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[41] The crucial determination, of course, is what constitutes a "material and substantial" disruption. A district court in Nebraska has held that the fact that one-half of the students who cause discipline problems have long hair did not warrant a finding of a substantial disruption.[42] Most courts that hold for the defendants on the disruption issue have not been harsh in requiring the defendant to prove a substantial and material disruption. Some find that the burden has been met where the principal testifies that in his opinion disruptions would result,[43] and one court held that where there was a mere "diverting influence on the student body," the regulation may be upheld.[44] Fears of harassment and

[40] Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970). *See also* Richards v. Thurston, 304 F. Supp. 449, 456 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970). The reason given by the defendants in one early case for suspending certain students was a personal dislike of long hair on males. Zachry v. Brown, 299 F. Supp. 1360, 1362 (N.D. Ala. 1967) (decided in favor of the plaintiff students).

[41] 393 U.S. 503, 513 (1968). There are at least two cases on record that have denied students the right to wear "freedom" or "anti-war" buttons because of their disruptive effect. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970); Blackwell v. Board of Educ., 363 F.2d 749 (5th Cir. 1966).

[42] Black v. Cothern, 316 F. Supp. 468, 472 (D. Neb. 1970). Other courts have maintained that the burden of establishing a valid reason for expulsion is a heavy one. Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970); Breen v. Kahl, 296 F. Supp. 702, 708-09 (W.D. Wisc.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969).

[43] Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 700-01 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968); Giangreco v. Center School Dist., 313 F. Supp. 776, 778 (W.D. Mo. 1969); Brick v. Board of Educ., 305 F. Supp. 1316, 1319 (D. Colo. 1969). *But see* Lansdale v. Tyler Junior College, 318 F. Supp. 529, 534 (E.D. Tex. 1970) (unrealized fears of hypothetical disruptions may not be used as a basis for denying the constitutional right to wear one's hair long).

[44] Stevenson v. Wheeler County Bd. of Educ., 426 F.2d 1154, 1158 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

threats against long-haired males by fellow students may also provide justification for the regulation.[45]

Judge Wyzanski in *Richards v. Thurston*[46] took the position that the fact that plaintiff's long hair caused others to be disorderly is not a valid ground for denying the plaintiff his right to wear his hair as he wished.[47] A more recent federal case has suggested a new approach to the disruption problem. The court in *Crews v. Cloncs*[48] pointed out that

> [t]he record is silent, however, concerning actions taken by school officials to punish those students who actually caused the relatively insubstantial disruption which occurred in this case. Therefore, we hold that defendants have failed to satisfy their substantial burden of justification under their [disruption] theory.[49]

It appears that the court would require school authorities to show that they had attempted to discipline those causing the disruptions before granting enforcement of a hair cut regulation ostensibly aimed at preventing disruptions. A classroom disturbance or distraction that can be controlled through normal disciplinary procedures should not be allowed to pass for a "material and substantial" disruption.

Courts have listened to numerous other justifications for hair regulations: health and safety,[50] maintaining and/or teaching discipline,[51] promoting good citizenship,[52] the correlation between long hair and poor marks,[53] aesthetic considerations,[54] and others.[55] None, however, have

[45] Giangreco v. Center School Dist., 313 F. Supp. 776, 779 (W.D. Mo. 1969); Brick v. Board of Educ., 305 F. Supp. 1316, 1319 (D. Colo. 1969); Westley v. Rossi, 305 F. Supp. 706, 709 (D. Minn. 1969).

[46] 304 F. Supp. 449 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970).

[47] *Id. Accord*, Laine v. Dittman, 125 Ill. App. 2d 136, 259 N.E.2d 824 (1970) (where the disruption was among only a small percentage of the students [20 of 200], there was no justification for requiring the plaintiff to cut his hair).

[48] 432 F.2d 1259 (7th Cir. 1970).

[49] *Id.* at 1265-66.

[50] Gfell v. Rickelman, 313 F. Supp. 364, 366 (N.D. Ohio 1970); Westley v. Rossi, 305 F. Supp. 706, 711-12 (D. Minn. 1969).

[51] Jackson v. Dorrier, 424 F.2d 213, 216 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Southern v. Board of Trustees, 318 F. Supp. 355, 359 (N.D. Tex. 1970); Wood v. Alamo Heights Indep. School Dist., 308 F. Supp. 551, 552 (W.D. Tex. 1970).

[52] Sims v. Colfax Community School Dist., 307 F. Supp. 485, 488 (S.D. Iowa 1970).

[53] Jackson v. Dorrier, 424 F.2d 213, 215 (6th Cir. 1970), *cert. denied*, 400 U.S. 850; Bishop v. Colaw, 316 F. Supp. 445, 448 (E.D. Mo. 1970).

[54] Brownlee v. Board of Educ., 311 F. Supp. 1360, 1366-67 (E.D. Tenn. 1970).

[55] The school authorities in Griffin v. Tatum, 300 F. Supp. 60, 61 (M.D. Ala.

the force of the disruption argument.[56]

Special Problems

A number of unusual situations arise under high school grooming codes. In the one case involving a female student, the plaintiff was successful in challenging a hair regulation code after she had been suspended because her hair was not "one finger width above the eyebrows [and] clear across the forehead."[57] Apparently she had "bangs." Mustache cases have been less than successful for plaintiffs. In *Stevenson v. Wheeler County Board of Education*,[58] although one of the plaintiffs objected that he had never shaved and was too young to begin,[59] the court upheld a "clear-shaven" policy and his suspension. In *Lovelace v. Leechburg Area School District*,[60] on the other hand, the court held that plaintiff's "labial hirsute accresence"[61] was imperceptible and a natural growth and therefore was not violative of the grooming code. A California district court abstained on the issue of length of sideburns.[62] Regarding length of hair and participation in extracurricular affairs, the district courts are divided. An athletic grooming code was struck down in Vermont[63] and upheld in California.[64] High school officials in the Eastern District of Arkansas may require male students to cut their hair as a prerequisite to participation in the band.[65]

Almost all cases involving hair regulation on a college or junior college level have been struck down.[66] One exception is *Farrell v. Smith*,[67]

1969), attempted to justify the regulation on the grounds, among others, that the boys passed combs in class, were tardy because they lingered at the mirrors in the restrooms, and that odor was caused by long hair.

[56] One other factor that seems to have an effect on courts is whether or not students have taken an active role in formulating the grooming code. Cordova v. Chonko, 315 F. Supp. 953, 957 (N.D. Ohio 1970); Gfell v. Rickelman, 313 F. Supp. 364, 366 (N.D. Ohio 1970); Wood v. Alamo Heights Indep. School Dist., 308 F. Supp. 551, 552 (W.D. Tex. 1970); Casey v. Henry, — F. Supp. — (W.D.N.C. 1970).

[57] Sims v. Colfax Community School Dist., 307 F. Supp. 485, 486 (S.D. Iowa 1970).

[58] 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

[59] *Id.* at 99.

[60] 310 F. Supp. 579 (W.D. Pa. 1970).

[61] *Id.* at 580 (roughly translated as "hairy lip").

[62] Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970).

[63] Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).

[64] Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970).

[65] Corley v. Daunhauer, 312 F. Supp. 811 (E.D. Ark. 1970).

[66] *E.g.*, Landsdale v. Tyler Junior College, 318 F. Supp. 529 (E.D. Tex. 1970);

in which the court held that Southern Maine Vocational Technical Institute had met its substantial burden of justification in demonstrating that the haircut regulation enhanced the image of the school and furthered the economic opportunities of its graduates.

CONCLUSION

The current[68] box score of all "hair" cases decided in the federal district courts and circuit courts of appeals stands roughly twenty-four to twelve in favor of upholding hair regulation by school officials, with four cases holding for the students on technical grounds, but reserving to school authorities the right to regulate hair.[69] The circuit courts of appeals are in disagreement, with the first[70] and seventh[71] holding for the student, and the fifth[72] and sixth[73] for school officials. The remaining circuits do not have a circuit court of appeals decision; however, on the basis of district court cases, it may be said that only the second circuit leans in favor of the students, with two cases generally favoring freedom of appearance,[74] while the rest have cases either solidly in favor of regulation of hair styles or divided.

It is difficult to forecast a trend in this area. Unless and until the Supreme Court considers the hair issue worthy of consideration and speaks on it, and as long as long hair remains fashionable for young men, there

Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970); Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967).

[67] 310 F. Supp. 732 (D. Me. 1970).

[68] *See* note 2 *supra.*

[69] The state court decisions are evenly split: Akin v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968) (held for the school board); Shows v. Freeman, — Miss. —, 230 So. 2d 63 (1969) (held for the school board); Laine Dittman, 125 Ill. App. 2d 136, 259 N.E.2d 824 (1970) (held for the student); Leonard v. School Committee, 349 Mass. 704, 212 N.E.2d 468 (1965) (held for the student).

[70] Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

[71] Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (first to hold that in order for the defendants to be successful on the disruption theory, they must first prove inability to control any disruption through normal disciplinary measures); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[72] Wood v. Alamo Heights Indep. School Dist., 433 F.2d 355 (5th Cir. 1970); Stevenson v. Wheeler County Bd. of Educ., 426 F.2d 1154 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969) (per curiam); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).

[73] Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970).

[74] Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).

will be litigation. It would seem reasonable to assume that the more commonplace mustaches, beards, and long hair become among the young, the more difficult it would be for school authorities to prove that hair hanging over Johnny's ear (or collar) would "materially and substantially" disrupt the classroom. This may not be the result, however. It is interesting to note that the National Association of Secondary School Principals, in a pamphlet by their chief counsel, does not take an unduly restrictive view on hair regulation:

> The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing. From this generalization it follows that *there should be no restriction on a student's hair style or his manner of dressing unless these present a "clear and present" danger to the students' health and safety, cause an interference with work, or create classroom or school disorder.*[75]

Perhaps the most rational approach to balancing the rights between the personal freedoms of the student and the authority of the school officials is to require a stricter standard of proof regarding material and substantial disruption, as was done in *Crews v. Cloncs.*[76] The approach would simply require school authorities to show that any dangers or disruption could not be handled through normal school procedures.[77] The need for reconciliation of the rights of the individual with the desires of the school authorities was well expressed by California Superior Court Judge Watson in *Myers v. Arcata Union High School District:*

> Certainly the school would be the first to concede that in a society as advanced as that in which we live there is room for many personal preferences and great care should be exercised insuring that what are mere personal preferences of one are not forced upon another for mere convenience since absolute uniformity among our citizens should be our last desire.[78]

J. MICHAEL BROWN

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[75] R. ACKERTY, THE REASONABLE EXERCISE OF AUTHORITY 9 (1969) (emphasis by the author).

[76] 432 F.2d 1259, 1265 (7th Cir. 1970).

[77] In Griffin v. Tatum, 425 F.2d 201, 203 (5th Cir. 1970), the court states the test well: "The touchstone for sustaining such regulations is the demonstration that they are *necessary* to alleviate interference with the educational process" (emphasis added).

[78] *Quoted in* AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS 19 (1968).