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COMMENT

THE LEGALITY OF DRESS CODES FOR STUDENTS, ET. AL.

[N]o scholler doe weare any long lockes of Hayre uppon his haede, but that be polled, notted, or rounded after the accustomed manner of the gravest Schollers of the Universitie.

—Excerpt from Cambridge University dress code in 1560

Despite the many changes the philosophy and practice of education have undergone throughout the centuries, at least one element of the learning process has remained constant—the preoccupation of educators with the personal appearance of their pupils. Until recent times, the carte blanche authority of school administrators to prescribe student dress standards was virtually unchallenged. In 1967 the schoolhouse floodgates collapsed; the courts suddenly became deluged by a rash of cases brought by students petitioning for review of the legality of their school dress codes.

The facts of these cases are remarkably similar. **Fact one:**

**DRESS CODE**

Hair should be neat, clean, and well groomed, and the length should not be over the eye brows, collar or ears. Sideburns will be permitted to the point where the lower part of the ear is attached, but must be straight and kept trimmed. . . . Beards, mustaches, and other excessive male styles are disapproved.4

**Fact two:** The student's hair fails to conform to the dress code. **Fact three:** The student is expelled, suspended, or denied enrollment because of his infraction of the code, and his refusal thereafter to comply. Given this very simple fact situation, the courts have been unable to reach a consensus as to the validity of student appearance regulations. Instead, two divergent trends have emerged, each equally supported by authority, and

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2. *But see* Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923), the precursor of the dress code cases, in which the right of a female student to use cosmetics was at issue.
3. *See infra* notes 5 and 6.

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each founded on a myriad of varied rationales. One body of cases has
striken down student dress codes as violative of a student's constitutional
rights;\(^5\) at the same time, an equal number of decisions have upheld
dress codes as a valid exercise of authority by school officials.\(^6\)

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5. See Crews v. Clones, 432 F.2d 1259 (7th Cir. 1970); Griffin v. Tatum,
425 F.2d 201 (5th Cir. 1970) (dress code was ruled unconstitutional as to "block
type" haircuts, but is otherwise valid); Richards v. Thurston, 424 F.2d 1281 (1st
Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. den. 398 U.S. 937
(1970) (the most cited of the anti-dress code cases); Karr v. Schmidt, 320 F. Supp.
728 (W.D. Tex. 1970); Lansdale v. Tyler Junior College, 318 F. Supp. 529 (E.D.
Tex. 1970); Black v. Cothren, 316 F. Supp. 468 (D. Neb. 1970); Bannister v. Para-
(N.D. Ohio 1970) (dress code was upheld, but procedural due process was denied
the student); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969); Dunham v. Pulsifer,
312 F. Supp. 411 (D. Vt. 1970) (hair regulations unjustified for male tennis team
members); Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Penn.
1970) (dress code was upheld but plaintiff was not in violation thereof); Reichen-
(W.D. Wis. 1970); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970); Sims v.
San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969); Westley v. Rossi,
305 F. Supp. 706 (D. Minn. 1969); Olff v. East Side Union High School Dist.,
Ala. 1967). See also Myers v. Arcata Union High School Dist., 269 Cal. App. 2d
549, 75 Cal. Rptr. 68 (1969); Laine v. Dittman, 125 Ill. App. 2d 136, 259 N.E.2d

1970); Stevenson v. Bd. of Educ. of Wheeler County, Ga., 426 F.2d 1154 (5th Cir.
1970), cert. den., 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.
1970); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969); Ferrell v. Dallas Inde-
pendent School Dist., 392 F.2d 697 (5th Cir. 1968), cert. den., 393 U.S. 856
(1968) (the most cited of the cases upholding dress codes); see also Mercer v.
(M.D. Penn. 1970); Freeman v. Flake, 320 F. Supp. 531 (D. Utah 1970); Bouse
v. Hipes, 319 F. Supp. 515 (S.D. Ind. 1970); Jeffers v. Yuba City Unified School
Dist., 319 F. Supp. 368 (E.D. Calif. 1970); Southern v. Bd. of Trustees for the
Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Whitessell v. Pampa Independent School
(E.D. Mo. 1970); Livingston v. Swanquist, 314 F. Supp. 1 (N.D. Ill. 1970); Gian-
for graduation exercises); Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970);
Corley v. Dauhnauer, 312 F. Supp. 811 (E.D. Ark. 1970) (deals with the right of a
band member to have long hair); Brownlee v. Bradley County, Tennessee Bd. of
the appearance regulations for school athletes); Schwartz v. Galveston Independent
School Dist., 309 F. Supp. 1034 (S.D. Tex. 1970); Pritchard v. Spring Branch In-
School Dist. No. 1, Denver, Colo., 305 F. Supp. 1316 (D. Colo. 1969). See also
Cal. Rptr. 557 (1968); Day v. McDavid, 119 Ill. App. 2d 62, 254 N.E.2d 802
This comment will examine in detail student dress codes, as well as their interrelationship with appearance regulations and sanctions for Army Reservists, prisoners, public and private employees, lawyers, and ordinary citizens. Each will be analyzed both from a legal standpoint and in terms of the common social thread running through them—the human behavioral tendency which may be called the conformity prejudice.

THE NATURE OF THE PROBLEM

At first glance, the cause of a student who has violated a dress code by wearing an unauthorized hair style may appear too trivial to merit adjudication in our already overcrowded court system. The issues raised by this situation, however, are far deeper and more significant than the question of whether a barber's services are warranted. Because a student dress code establishes a particular style and length of hair as a condition precedent for admission to public school, it may operate to deny a class of citizens a right guaranteed at law—the right to a public education. The existence and application of a dress code thus raises a number of important constitutional issues not to be taken lightly.

Before these issues are examined in depth, it is necessary to answer the question: Why do student dress codes exist? Certainly it is apparent to anyone who recalls his school days with any degree of accuracy that uniformity was the order of the day in the classroom. Rigid rules of discipline prevailed. Silence was demanded of all students except when called upon by the teacher; military formations were required before the class could travel to and from recess; books and pencils were required to be aligned in a designated manner in one's desk; and the student's clothing was regulated either by requiring a prescribed uniform, as in parochial schools, or by banning certain taboo apparel, such as blue jeans, T-shirts, or low-cut dresses.

In the classroom, as well as in all collective experiences—the military and prisons, for example—a high premium is placed on order and control. Uniformity among students is one means of facilitating efficient and effective order and control. When one must deal with a large mass of persons, there is simply not sufficient time allotted to treat the individual problems of each student (or soldier or prisoner) as they arise. Thus, students are

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7. See text at note 93, infra.

8. See text at note 99, infra.
expected to conform to certain uniform behavioral standards, to think, talk, act, and dress alike, so that law and order may reign in the classroom.

A variety of other justifications are advanced in support of student dress codes: Students should concentrate upon their studies, not the appearance of themselves and others. It is disruptive of the learning process to allow distracting variances in dress. The school has the inherent authority to control student appearance because it acts in loco parentis. Dress codes are necessary to maintain health and safety standards within the school. The student's academic performance will decline in direct proportion to his unkempt appearance. Good grooming is part and parcel of the total learning experience, instilling in the student the personal pride essential so that he may be assimilated into our society as a good citizen.

Reduced to simplest terms, this means that the student must learn to think, talk, act, and dress as society expects him to behave—that is, to conform to its standards. The net result is generally that individuality is sacrificed for the sake of an authoritarian discipline.

Are student dress codes desirable from a sociological point of view? There are many, today, who believe that appearance codes (as well as other student regulations) are not only unnecessary, but also are in fact detrimental to the development of the student qua human being. “[W]hat grim joyless places most American schools are, how oppressive and petty the rules by which they are governed, . . .” comments Charles Silberman after a three and one half year study of the condition of our educational system. “These petty rules and regulations are necessary,” he reports, “not simply because of the importance schools attach to control, . . . but also because schools and school systems operate on the assumption of distrust.” The teacher distrusts the student to the extent that every aspect of his freedom must be subject to some discretionary constraint—including his choice of dress. The inevitable result of this distrust pervading the schoolhouse environment is the “mutilation of a child’s spirit.”

The fact that dress regulations may be trivial in comparison to other student problems does not diminish their impact on the student. On the contrary:

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9. See text at note 65, infra.
10. See text at note 73, infra.
11. See text at note 71, infra.
12. See text at note 83, infra.
13. See text at note 82, infra.
15. Id. at 133.
16. Id. at 10.
Trivial regulation is more dangerous to one's sense of one's own dignity and to the belief essential to any democracy that one does have inalienable rights, than gross regulation is. The real function of petty regulations like these [dress codes] is to convince youth that it has no rights at all that anybody is obligated to respect, even trivial ones.  

No attempt will be made to argue that high school dress codes are the major cause of student unrest, and that the elimination of dress regulations is the panacea for all educational problems. Suffice it for now to say that dress codes are a small part of a much larger problem area with which educators must deal in toto.

Though it is undoubtedly true that a large percentage of teachers support appearance regulations as a necessary incident of educating, and oppose any challenge to these regulations as the first step toward the erosion of their total authority, it is nevertheless not accurate to attribute the existence of student dress codes solely to teachers. An even greater percentage of parents, and a surprisingly substantial percentage of students also believe that dress codes are necessary and desirable. This fact bears out the central thesis of this comment—that the student dress code is not an isolated phenomenon, but is just one instance of a human behavioral tendency. The student dress code is merely one manifestation of the overwhelming power of conformity in twentieth-century America. Deeply imbedded in our minds is the social need to conform, and to cause others to conform to arbitrary dress norms. To take the dress code analysis one step further,

18. See, e.g., this contention in Breen v. Kahl, supra note 5, at 1037; Dunham v. Pulsifer, supra note 5, at 420; Calbillo v. San Jacinto Junior College, supra note 5, at 862.
19. See Pucker, A Secondary School District Looks at Its Dress Code, 45 J. Sec. Ed. 293 (1970), in which the attitudes of 3,707 students, 347 faculty members, and 193 parents of the Escondido Union High School District, Escondido, Calif., were surveyed. The results clearly indicated that the parents tended to be more conservative on the matter of student dress than the faculty. For example, in response to the question of whether there should be no restrictions on student hair length, 45 percent of the students, 25 percent of the faculty, but only 12 percent of the parents answered "yes." In response to a regulation prohibiting mustaches on students, 25 percent of the students, 57 percent of the faculty, and 67 percent of the parents reacted favorably. As to a regulation barring beards on students, 59 percent of the students, 73 percent of the faculty, and 82 percent of the parents thought it appropriate. See also a 1969 Louis Harris poll which revealed that nearly two-thirds of high school parents believe that "maintaining discipline is more important than student self-inquiry"; only 27 percent of the teachers agreed. Supra note 14, at 145.
20. See the survey in note 19, supra. See also supra note 14, at 157, for students' tolerant attitude toward school rules.
it is, therefore, necessary to explain why conformity is such a dominant force today.

Dr. Erich Fromm provides a very cogent theory of the causes behind the conformity phenomenon in our society, premised on the idea that the most fundamental drive of man is “the need to be related to the world outside oneself, the need to avoid aloneness.”21 Medieval man did not confront the problem of aloneness, as does modern man, because his society was highly structuralized. He found “relatedness” and avoided aloneness through the certainty of his role in life, determined for him from the instant of his birth. Because of the feudal, caste, and guild systems, there was no hope that he would ever advance another step on the social, political, or economic ladder. He usually inherited his father’s trade and social status, and accepted his role as an immutable fate. Moreover, the strong family bonds and religious dogmas reinforced his acceptance of his role in life. In short, he was without freedom, but he was secure from the awesome feeling of isolation and alienation.22

As history advanced, the medieval institutions began to disintegrate. The caste and feudal systems yielded to the democratic notions of equality. Religious taboos faded. Man was somewhat freed from the bondage of the family. He could no longer automatically identify himself as a member of a particular class—as an artisan, a knight, or a serf; he was now to a much greater degree the master of his fate in life.23

Thus, the result was a new found freedom for man; but a concomitant of this freedom was the loss of the security and relatedness that attached to the certainty of a fixed station in life. Man was no longer naturally related to the world through his role in life. Consequently, he became insecure, afraid, and anxious as to the uncertainty of who he is and what he is to be.24

Dr. Fromm asserts that there are two ways in which modern man may overcome this feeling of isolation and solve his problem of relatedness to the world:

By the first course he can progress to “positive freedom”; he can relate himself spontaneously to the world in love and work, in the genuine expression of his emotional, sensuous, and intellectual capacities. . . . The other course open to him is to fall back, to give up freedom, and to try to overcome his aloneness by eliminating the gap that has arisen between his individual self and the world.25

22. Id. at 69.
23. Id. at 80.
24. Id. at 280.
25. Id. at 161.
Unfortunately, the second course of action is predominant in our society. The gap between self and the world is closed through a submission of individual freedom in a number of ways, including conformity. 26 “The person who gives up his individual self and becomes an automaton identical with millions of other automatons around him, need not feel alone or anxious any more.” 27 By conforming to the standards and authority of others, we find comfort, security, and identity; we overcome the awesome burden of isolation. The validity of this analysis is borne out by the tremendous pride with which a person states, “I am an American,” “I am a Republican,” “I am a Blackstone Ranger,” or “I am a Moose,” and the enormous guilt and insecurity he experiences when he deviates from the group’s norms. The dress code is a by-product of this phenomenon.

Thus far the student dress code has been challenged as pernicious to a person qua student and human being. At this point, the question arises: How is this psychological analysis of dress codes relevant to their legality? Perhaps, there is no relevance. On the other hand, if psychological and sociological studies indicating that “long hours of labor are dangerous to women” 28 and “[s]egregation . . . in public schools has a detrimental effect upon colored children” 29 are relevant to assay the constitutionality of a statute limiting working hours for women and de jure school segregation, respectively, then a factual showing that dress regulations are detrimental to the development of the student may be legally relevant to the constitutionality of dress codes. Perhaps this is what Judge Wyzanski had in mind when he stated that “in schools of general comprehensiveness the constitutional premise is that ‘from different tones comes the best tune.’” 30 Because some judges are now looking beyond the legal sphere of the controversy and are considering the sociological impact of their decision, such studies may assume a growing significance in the courtroom.

THE STUDENT’S CAUSE OF ACTION

The legal problem posed in a student dress code situation arises from an attempt by the courts to reconcile two competing interests: (1) the right of the school administrators, teachers, and public to maintain discipline

26. To keep Fromm’s theory in the proper perspective, it should be noted that conformity is just one mechanism of escape for the isolated and alienated individual; authoritarianism, destructiveness, and submission of individual freedom to the state are additional mechanisms of escape. *Id.* at 157-230.
27. *Id.* at 209.
in the school so as to provide an effective, orderly, and efficient educational process, and (2) the right of an individual student to exercise his constitutional liberties.

In a situation where a dress code operates to deprive a student of a constitutionally protected right, he may seek redress in the federal courts. Jurisdiction may be invoked by the court under 42 U.S.C. §§1983, 1985 and 28 U.S.C. §§ 1343, 2201, and 2202.\textsuperscript{31} The initial burden of proof in a dress code case is on the plaintiff-student to show that the regulation infringes one or more of his constitutional rights. If he can establish this, he has set up a prima facie case, and the burden shifts to the school district to prove a "substantial justification" for this infringement.\textsuperscript{32} To demonstrate such a justification, "[t]he law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy.' "\textsuperscript{33} Thus, if plaintiff fails to prove a constitutional infirmity in the dress code, he loses; if he does prove such an infirmity, but the school district establishes a substantial justification, he still loses. The student will prevail only if there is both a constitutional infringement and a want of substantial justification. The following are some of the constitutional arguments that could be presented in opposition to student dress codes.

**FREEDOM OF SPEECH AND EXPRESSION**

The leading case in the area of a student's right of free speech and expression is *Tinker v. Des Moines Independent Community School Dist.*\textsuperscript{34} Tinker had been sent home from school for wearing a black armband in protest of the Vietnam War. The Supreme Court construed the wearing of the armband as "involving direct primary First Amendment rights 'akin to pure speech.' "\textsuperscript{35} In upholding Tinker's right to wear the symbol of dissent in school, Justice Fortas declared: "It can hardly be argued that either students or teachers shed their constitutional rights of freedom or expression at the schoolhouse gate."\textsuperscript{36}

There are three substantial limitations to this symbolic speech approach that circumscribe its application in dress code litigation. The first is an inherent limitation the *Tinker* Court itself placed on its holding:

\begin{itemize}
  \item \textsuperscript{31} See, e.g., *Freeman v. Flake*, supra note 6, at 533; *Livingston v. Swanquist*, supra note 6, at 2.
  \item \textsuperscript{32} See, e.g., *Breen v. Kahl*, supra note 5, at 1036; *Crews v. Cloncs*, supra note 5, at 1264; *Jeffers v. Yuba City Unified School Dist.*, supra note 6, at 372.
  \item \textsuperscript{33} Griswold v. Connecticut, 381 U.S. 479, 497 (1965).
  \item \textsuperscript{34} 393 U.S. 503 (1969).
  \item \textsuperscript{35} Id. at 508.
  \item \textsuperscript{36} Id. at 506.
\end{itemize}
“The problem posed by the present case does not relate to the regulation of the length of skirts, or the type of clothing, to hair style, or deportment.”37 The second is that the student himself usually does not intend to convey an idea by his appearance; he is wearing long hair simply because he likes it and not as an advocacy of any political opinion.38 Since he has no intent to communicate an idea through his conduct, but merely to express his personality, he is without the free speech immunity of the first amendment. However, even if the student intends his dress to symbolize an idea, there still is a third obstacle that the courts have encountered—distinguishing between conduct that is akin to pure speech and that which is purely meaningless. The courts are clearly troubled as to what conduct constitutes symbolic speech. The Supreme Court has recently stated: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends to thereby express an idea.”39 Where then should the line be drawn? May a student’s hair effectively symbolize, within the first amendment protection, his opposition to the selective service system? Similarly, then, may long finger nails express opposition to the admission of Red China to the United Nations?

The courts have been much more receptive to the symbolic speech argument when the object of expression is something other than hair or ordinary wearing apparel—for example, armbands, buttons, or berets.40 These are objects which through custom and usage have become symbolic signs of dissent. But even these modes of dissent are fraught with legal difficulties. If a nuclear disarmament sign is permitted as symbolic free speech, what about a swastika? And what if a student wearing a “racial unity” button causes violent disturbances in a racially-mixed high school?41

37. Id. at 507.
38. An analysis of the dress code cases reveals that almost without exception the plaintiff-student wore long hair because it “looks better” (Crews v. Cloncs, supra note 5, at 1259), because it expresses his “personality” (Jeffers v. Yuba City Unified School Dist., supra note 6, at 371), because it expresses his “individuality” (Brick v. Bd. of Educ., School Dist. No. 1, Denver, Colorado, supra note 6, at 1319), or other such similar non-political reasons; but see Corley v. Dauhnauer, supra note 6, at 812-13.
41. For treatment of this factual setting, see Blackwell v. Issaquena County Bd. of Educ., supra note 40.
One thing is clear: "[T]he less speech element and the more conduct element, the lessor protection the First Amendment gives." Thus, a hair style which is almost devoid of expression on the speech-conduct continuum, does not usually fall within the protective umbrella of the first amendment. Buttons and armbands, however, which contain a greater measure of the "speech element" tend to be afforded the first amendment protection by the courts.

FOURTEENTH AMENDMENT EQUAL PROTECTION

In order for a denial of the equal protection of the law to exist, "[t]here must be a classification which is the creature of some state action, and the classification must be unjustified under the applicable standards of review." There are two situations under which dress codes may cause a denial of equal protection to the student, and both are illustrated in Miller v. Gillis. Plaintiff Miller, a student in an Illinois secondary school, was denied enrollment because of his shoulder length hair. Testimony revealed that at the same time there were a number of male teachers at the same school, wearing long hair with impunity. The court invalidated the regulation because it is arbitrary in two ways: First, it is "arbitrary in that the regulation makes the acquisition of all education depend upon the length of one's hair." Such a classification is unjustified. Second, long-haired males, amongst themselves, are denied the equal protection of the law because the regulation is enforced only as to certain long hairs—that is, students and not teachers. Nevertheless, a substantial number of cases have found dress codes not to be arbitrary and unjustified classifications, for a variety of reasons.

FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS

A student expelled for an alleged dress code infraction may complain if his expulsion is carried out in an improper manner. While there are no settled principles on what constitutes academic due process rights, it appears certain that a modicum of procedural safeguards are guaranteed

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42. Jeffers v. Yuba City Unified School Dist., supra note 6, at 372.
44. Supra note 5.
46. See, e.g., Stevenson v. Bd. of Educ., Wheeler County, Ga., supra note 6, at 1158; Southern v. Bd. of Trustees for the Dallas Independent School Dist., supra note 6, at 359; Pritchard v. Spring Branch Independent School Dist., supra note 6, at 579; Gfell v. Rickleman, supra note 6, at 365.
47. For these reasons, see text at notes 65 et seq.
First, there must be written notice to the student of exactly what conduct (dress) is expected of him. Usually, this requirement is satisfied by a promulgated school regulation. If, however, no dress code is published, and enforcement of student appearance depends entirely on the subjective and arbitrary fiat of the school administrators, the notice requirement is not met, and due process is denied the student. Similarly, if there is a written regulation, but it is "unduly vague, uncertain, and ambiguous" there is probably not adequate notice to the student. Second, an adversary hearing prior to imposition of any penalty may be required, depending on the patentness of the violation. Third, procedural due process is denied when punishment is not meted out in accordance with fixed practices and regulations—for example, when a student is suspended by a principal who lacks the statutory authority to suspend dress code violators. Fourth, a student may not be disciplined unless he is in violation of the regulation in fact. Thus, in *Lovelace v. Leechburg Area School Dist.*, the court found that an eighteen year old student, who had never shaved, was denied due process because his thin, wispy, natural growth on his lip was not in fact a dress code violation.

RIGHT OF PRIVACY

The leading case in the area of "right of privacy" is *Griswold v. Connecticut* in which the Supreme Court by a 7-2 margin invalidated a statute

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48. For a discussion of academic due process guidelines, see Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961).

49. See generally Richards v. Thurston, *supra* note 5, in which there was no officially promulgated dress code, but only the principal's personal taste; *contra*, Hassan v. Boothby, 318 F. Supp. 1183 (D. Mass. 1970).

50. See Crossen v. Fatsi, *supra* note 5, at 115; *but see* Giangreco v. Center School Dist., *supra* note 6, in which the following dress code was in controversy: "Extreme hair styles should be avoided. The hair should be kept neatly combed, brushed and trimmed, and of a length and style that will not interfere with normal school routine." *Id.* at 778. The court stated: "The specificity required of criminal statutes is not required in the field of education." *Id.* at 781.

51. See Jeffers v. Yuba City Unified School Dist., *supra* note 6, at 370. The court decided that a prior hearing was not necessary because the plaintiffs' violation of the dress code was "obvious." *See also* Jackson v. Dorrier, *supra* note 6, at 217 in which the court decided that a hearing was not an essential prerequisite to suspension, because the plaintiffs were given ample opportunity to be heard; for a further discussion of a student's right to a hearing, Davis v. Ann Arbor Public Schools, 313 F. Supp. 1217 (E.D. Mich. 1970) and Vought v. Van Buren Public Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).


54. *But see* Stevenson v. Bd. of Educ. for Wheeler County, Ga., *supra* note 6, at 1156.

55. *Supra* note 33.
prohibiting the use of contraceptives as an unconstitutional invasion of the privacy of married persons. Justice Douglas, speaking for the majority, reasoned:

[Spec]ific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.56

The relevant question then is: Does a person's right to choose his dress and hair style lie within the zone of privacy created by the Bill of Rights? The courts have usually answered in the negative, eschewing a determination of what falls within the ambit of Griswold. To fit within the right of privacy, "there must be some specific provision or provisions of the Bill of Rights from which [the student's] . . . right of grooming emanates."57

It may be contended that the student's right to choose his appearance is within the penumbral zones of the first amendment (free speech and expression), fourth amendment (no unreasonable searches or seizures), and ninth amendment (rights retained by people). Judge Kerner apparently accepted this viewpoint in Breen v. Kahl:58

The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution. . . . Whether this right is designated as within the "penumbras" of the first amendment freedom of speech . . . or as encompassed within the ninth amendment as . . . "additional fundamental right[s] * * * which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . . , it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

Not wishing to skate on the thin ice of Griswold, most courts, however, have dodged any analysis of this issue, either by holding the right of privacy argument invalid or by disregarding it and finding for the plaintiff on "safer" grounds.59

UNENUMERATED RIGHTS OF THE NINTH AMENDMENT

The ninth amendment of the Constitution, was written in response to the fear that an enumeration of the rights of citizens would result in an abdication of the rights that remained unenumerated.60 The question of what

56. Supra note 33, at 484.
58. Supra note 5, at 1036.
60. See 1 ANNALS OF CONG. 439 (Gale & Seaton ed. 1834), where James Madison said: "It has been objected also against a bill of rights that by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed on that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government."
rights comprise these unenumerated rights of the ninth amendment has been almost completely ignored by the courts. In examining the problem in *Griswold*, Justice Goldberg, concurring, declared that the marital privacy of husband and wife is one such unenumerated right. To fit within the ninth amendment, a right must be “fundamental” and in the “traditions and [collective] conscience of our people.”

Using this approach, the right to the personal appearance of one’s choosing may be so fundamental as to fall under the ninth amendment’s protection. The founding fathers of our nation were certainly “long hairs” by contemporary standards, as were a multitude of other great Americans. Certainly, the authors of the Constitution, flamboyant as they were, regarded personal appearance as a matter of right. One could imagine the public outcry had the First Congress passed a law requiring crewcut hair styles and declaring wigs illegal. Continual change in clothing fashion and hair style is so deeply rooted in the American tradition that there is no valid reason that the freedom of personal appearance should not be held an unenumerated right retained by the people.

**FREEDOM TO WORK WITHOUT GOVERNMENT INTERFERENCE**

In *Ferrell v. Dallas Independent School Dist.*, three students, members of a musical group, “Sounds Unlimited,” were denied enrollment in their high school because of their long hair. They argued, *inter alia*, that the state’s interference with their right to work is an abridgement of their constitutional rights. They reasoned that because in their profession it is necessary to have long hair to attract an audience, the dress code is a violation of the liberty and property concepts of the fifth amendment. The court summarily rejected this assertion, in effect telling the plaintiffs that wigs were available for working hours.

**OTHER CONSTITUTIONAL ARGUMENTS**

There are undoubtedly many other valid constitutional arguments for striking down dress codes. Under the particular facts and circumstances of a case, innovative thought may provide a viable ground for relief. For example, if a black student is in violation of a hair regulation because of his Afro-style haircut, there may exist a case of racial discrimination, because the hair of Negroes is of a different texture than Caucasions or because the regulation deprives him of his African culture. If a student’s hair or beard is worn because of his membership in a particular cult or

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61. *Supra* note 33, at 487.
62. 392 F.2d 697 (5th Cir. 1968).
church, the first amendment religious immunity may be applicable. If a student, because of his family's financial condition, lacks the funds to purchase the clothing necessary to comply with his school's dress code, there may be unjustified discrimination against indigents. And, perhaps, the dress code is an unwarranted discrimination as to sex. (Why allow girls to wear long hair, and limit the length of boy's hair?) It has even been urged, although totally unsuccessfully, that requiring a haircut is "cruel and unusual punishment." 63

THE SCHOOL DISTRICT'S BURDEN OF SUBSTANTIAL JUSTIFICATION

If the student has borne his burden of proving an encroachment by the dress code on one or more of his constitutional rights, the attention of the case is shifted to the school district to prove a substantial justification for the regulation. 64 A myriad of arguments have been advanced relating the dress code to the successful operation of the school, or asserting that the court is without jurisdiction to hear the case. Some of the dominant themes throughout the cases are:

DISRUPTION, DISTRACTION, AND DISCIPLINE PROBLEMS

The Tinker case specifically provided that conduct "which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 65 Thus, if a particular style of dress or hair is disruptive to others, it may be proscribed by a dress code. This is by far the most common justification by school officials in support of dress codes. 66

To invoke this defense, a nexus must be established between a student's unauthorized appearance (long hair) and disruption. As proof thereof the school districts have proffered opinion testimony of school officials, opinion testimony of expert witnesses, evidence of disturbances of which plaintiff was the cause, evidence of similar disturbances in other schools, and findings of fact in other cases. Logically, a male student with long hair may be linked with disruptiveness only if it is true that: (1) long hair causes a male student to have a greater tendency to misbehave and provoke other students to violent conduct, or (2) other students,

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63. Supra note 57, at 529.
64. See supra note 32.
65. Supra note 34, at 513.
66. This argument is presented in almost every case; see, e.g., cases in notes 5 and 6, supra.
without provocation, tend to react to a male with long hair in a violent or abusive manner. Either way, an affirmative, objective showing of disruption is required, for “undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.”67

To prove the first proposition, the school district must establish that long hair is in fact the proximate cause of a student's disorderliness. A variety of syllogisms have been presented to meet this end. For example:

Seventy percent of discipline problems in our school are “exponents or practitioners of lengthy hair grooming for males.” Only thirty percent of troublemakers are short-hairs. Ergo, long hair causes discipline problems.68

Last year the dress code was enforced, and order was maintained in the school. This year the dress code is not enforced, and there is a substantial increase in discipline problems, e.g., firecrackers in lockers, jostling in the halls, etc. Ergo, nonconforming dress must be the cause.69

This reasoning is no more than a post hoc ergo propter hoc approach, with no basis in fact. To say that long hair causes discipline problems is to transpose the cause for the effect. If there is in reality a rational connection between the two, the casual relationship is just the opposite—that is, a disorderly student may choose long hair as a badge of his rebellion. The hair does not cause the rebelliousness; the rebelliousness causes the hair. To require a haircut, therefore, eliminates the effect but not the cause. The student’s hostile attitude remains beneath the roots of his hair, and in all probability is only worsened by the school authorities’ demanding of his scalp.

The second means of proving long hair equals disruption is to establish that other students react violently to a male student with long hair. This proposition is very easy to prove, because it is undoubtedly correct. Human beings do tend to react with hostility to persons different from them, whether the difference is race, religion, ethnic background, political belief, or appearance. However, to bar a long-haired student from school simply because his outward appearance incites anger in others is to penalize an innocent person. He is not the cause of the disturbance; those who harass and assault him are the true provocateurs. A man may not be restrained “from doing a lawful act merely because he knows it will cause another

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67. Supra note 34, at 508.
69. Whitsell v. Pampa Independent School Dist., 316 F. Supp. 852, 853 (N.D. Tex. 1970). This reasoning, carried ad absurdum, is best illustrated by the joke about the Manhattan resident who compulsively snapped his fingers. When asked by a friend why he did it, he answered, “To keep tigers away from my window.” “But there isn’t a tiger within ten-thousand miles of here!” his friend protested. “See how well it works,” he replied.
to do an unlawful act.” If a particular dress style is illegal merely because it may cause another to pummel the plaintiff, then perhaps it is illegal for a black man to move into an all-white suburb because of the disruptions sure to follow. And why then is it not illegal to speak against the President’s war policies when it is certain to disrupt “Middle America.” The natural implication of any extension of this doctrine would be an obliteration of the Bill of Rights.

HEALTH AND SAFETY

Another common justification for dress codes is that they are essential to prevent student health and safety problems, which may be caused by long hair on males. For example, long hair may become caught in a lathe in an industrial arts class; it may lead to injury in a wrestling class; it may clog the swimming pool drain; if unwashed, it may become infested with fleas.

Undoubtedly, this justification has some validity. Hair which extends beyond a student’s shoulder in a shop class, constitutes as grave a safety hazard as loose-fitting clothing and ties, which, traditionally are prohibited from such classes. However, this fact should not be used as an excuse for permitting overly broad appearance regulations. The maintenance of student safety may necessitate forbidding students to wear shoulder length hair in shop courses, but when dealing with sideburns, mustaches, and hair which covers the ear, safety is no longer a factor. Moreover, safety may often be attained without a broad general proscription of excessive hair length; narrower regulations, such as those requiring protective caps in shop and athletic classes, may often suffice.

The argument that long hair on male students is a health problem is utterly fallacious. Why is not long hair on female students also a health problem? The “lengthiness” of the hair does not cause the problem; it is the lack of good gromming habits, such as washing and combing the hair, that causes any health problem. Since there is “no rational basis for distinction between males and females,” a code which regulates hair length

70. Richards v. Thurston, supra note 30, at 454; Beatty v. Gillbanks, 9 Q.B.D. 308, 314 (1882); see also, United States v. U.S. Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897, 906 (M.D. Ala. 1961), where the court said: “[T]he threat of mob violence is no excuse for the failure of the Court to issue an injunction to protect the constitutional rights of private citizens.”


for males, resting entirely upon health considerations, creates an arbitrary classification in violation of the fourteenth amendment.

**IN LOCO PARENTIS**

In *Breen v. Kahle*\(^73\) the school district sought to justify its dress code by the argument that it stood in the place of the student's parents, and, thus, had the right to discipline the student irrespective of any rational basis for the regulation. The court discounted the validity of this contention, especially in view of the parents' support of their son's choice of hair style. A historical analysis of the doctrine of *in loco parentis* reveals that it "was never a control device to govern the child's conduct in areas where the parents could disagree with the school or which was outside the educational province."\(^74\) Today, the last vestiges of this doctrine survive only as "a shibboleth no longer acceptable as a basis to justify student regulations."\(^75\)

**OPEN THE FLOODGATES**

Also argued in the *Breen* case was the familiar warning that to allow the student his day in court would open the floodgates of litigation.\(^76\) The court summarily rejected this defense, because to sustain it would require the court to abdicate its role as arbiter of the rights of all citizens, young and old.

**CODE AUTHORED BY STUDENTS**

In many cases, the dress code is composed, published, and promulgated by the student council. From this fact comes the argument that the students bound themselves to a course of conduct through their own volition. Although this argument is never used alone as a justification, it can give added weight to another justification. For instance, in *Gfell v. Rickelman*\(^77\) the court concluded that the fact that the code originated with the

\(^{73}\) 419 F.2d 1034 (7th Cir. 1969).


\(^{75}\) *Id.* at 910.

\(^{76}\) *Supra* note 73, at 1038.

\(^{77}\) *Supra* note 71, at 366; but see Silberman, *supra* note 14, at 155-57, for a discussion of student government: "[M]ost students are not alienated and do not want power because they feel they would not know what to do with it if they had it. They have remarkable faith in the high schools' paternalism and so see no need to question what their teachers are doing or why. . . . As a result, schools are able to manipulate students into doing much of the dirty work under the guise of self-government." *Id.* at 155-56.
students “dispels any contention of arbitrariness or capriciousness.” However, this is a specious argument because the student himself did not participate in the writing of the dress code. And even if plaintiff did himself write the code, it cannot stand if it is in law unconstitutional.

AESTHETIC CONSIDERATIONS

Only one case, *Brownlee v. Bradley County, Tennessee Bd. of Educ.* has relied on aesthetics as a justification for a dress code:

> A sense of orderliness, a sense of propriety, and a sense of beauty are distinguishing characteristics of the human species. While not always explainable in terms of concrete reason, these matters are facts of human life. They form the basis of the concept commonly referred to as aesthetics.

Recognizing the “fact” that long hair on males is contrary to tradition, and offensive to many people, the court upheld the validity of the dress code. The court, also, relied heavily on the point that the students, themselves, had made the aesthetic judgment through the student council’s adoption of the dress code. The court concluded that such judgment was “neither arbitrary, nor capricious, nor was devoid of reason.”

If there is reason behind the student's aesthetic judgment, it was merely subjective reason. Because aesthetics necessarily involves taste and fancy of the individual mind, it is unavoidably subjective. There is grave danger in allowing subjective opinion to govern and control our constitutional rights. At the very heart of our legal system is the concept of an objective standard so that all citizens may be afforded the equal protection of the law. To rely upon subjective aesthetic considerations would appear to endanger this principle. The sole authority upon which the court relied for a classification based on aesthetic factors is an eminent domain case. Thus, the court's reasoning tends to smack of the morally offensive notion that minors are to be regulated as property rather than persons.

GOOD GROOMING

School officials frequently maintain that dress regulation is necessary because the teaching of good grooming per se is a proper educational function. As additional support, arguments are sometimes advanced relating the teaching of good grooming habits to the development of good

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79. *Id.* at 1366.
citizenship.\textsuperscript{82} There may well be a correlation between sloppy or dirty appearance and poor citizenship. Undoubtedly, a school may promote good grooming habits by requiring a student's body and clothing to be clean. However, good grooming may not justify hair regulation for males, unless it may be assumed either that long hair causes poor citizenship or that long hair departs from good grooming norms. In view of the hair length of our founding fathers, the statement that long hair causes poor citizenship is untenable. Moreover, there is no rational basis for holding that the long hair of either males or females, which is clean and neatly combed, does not comport with established principles of good grooming.

DECLINE OF ACADEMIC PERFORMANCE

In a number of cases, the school district has contended that "[s]tudents whose appearances conform to the dress regulation perform better in school."\textsuperscript{8} No factual foundation for this assertion has ever been produced. In the absence of proof of a direct relationship between dress and performance, scholastic or athletic, this conjectural statement cannot substantially justify dress codes. Even in the case of a student whose grades have fallen simultaneously with the growth of his hair, there exists no positive evidence that one has caused the other. Perhaps, a third factor, \textit{e.g.}, a domestic problem, has caused both. Only via the faulty reasoning process of \textit{a post hoc ergo propter hoc} approach, may a connection between low grades and long hair be established.

JURISDICTIONAL QUESTIONS

Jurisdiction may not be invoked under 42 U.S.C. §1983 in dress code situations, unless there is "state action" involved. Usually, the requisite state action cannot be found in the case of a private school. In \textit{Bright v. Isenbarger},\textsuperscript{83} for example, the plaintiff-students alleged that there was sufficient state action in their private school to grant relief under section 1983. The court rejected this contention even though the state certified the school, required that certain subjects be taught, granted the school a property tax exemption, and provided free bussing for some of its students. Mere state involvement with the school is not enough to constitute state action; the activity of the state must be directly related to the injury

\textsuperscript{84} 314 F. Supp. 1382 (N.D. Ind. 1970).
caused to plaintiff.\textsuperscript{85} Since the state did not set appearance guidelines, the court concluded: “Private schools may impose disciplined conformity of dress, speech, and action, such as found in military schools and to a lesser extent in most private schools, which public schools may not.”\textsuperscript{86} However, in the case of a military academy receiving tuition payments from the state for the education of certain students, an action under section 1983, challenging the dress code is maintainable.\textsuperscript{87}

Even when dealing with public schools, a small minority of courts have refused to rule on the merits of the case, holding that abstention is appropriate, or requiring exhaustion of state remedies as a prerequisite to a section 1983 action.\textsuperscript{88} These decisions are contrary to the vast weight of authority on section 1983 jurisdiction.\textsuperscript{89}

OTHER CONSIDERATIONS

Dress codes have been upheld for a variety of other reasons. For example, in \textit{Lovelace v. Leechburg Area School Dist.}\textsuperscript{90} the court reasoned that hair regulations are justified because to allow students to grow mustaches might cause feelings of inadequacy or insecurity in those who are incapable of doing so. In \textit{Farrell v. Smith}\textsuperscript{91} the court, in examining economic factors, upheld the dress code for a vocational school, because it “enhances the image of the school and its students among prospective employers, and thereby furthers the employment opportunities of the students upon graduation.” And the petition of a bearded student who had been denied admission in a public college was dismissed in \textit{King v. Saddleback Junior College Dist.}\textsuperscript{92} because a preliminary injunction was not necessary to preserve the status quo. (The refusal of the school officials to enroll plaintiff was the status quo.)

ARMY RESERVISTS AND NATIONAL GUARDSMEN

To anyone who has experienced a military existence for any duration, it

\textsuperscript{85} Id. at 1394.
\textsuperscript{86} Id. at 1392.
\textsuperscript{91} 310 F. Supp. 732 (D. Me. 1970).
\textsuperscript{92} 425 F.2d 426 (9th Cir. 1970).
is common knowledge that few things will inspire the wrath of a superior officer more than a soldier who is “out of uniform.” Aside from prisoners, there is probably no other human occupation for which dress and appearance are so highly regimented—and understandably so. In view of the hundred of thousands of men who enter and leave active duty each year, there is little room for any deviation from the norm; the very nature of the military demands absolute standardization—one uniform for all. Apart from the financial impracticality of tailoring the military costume to the taste of each individual soldier, there are far deeper reasons why the military has not tolerated variances in appearance. First, of course, is the deeply-rooted tradition of the uniformed fighting man. Second, there is the psychological motive: to deprive the soldier of any means of asserting his individuality, so that he becomes a team player, a fighting machine that reacts unquestioningly and automatically to the needs of his fellow troops. Third, any variance in appearance may interfere with his combat efficiency. For example, long hair may cause the soldier’s head gear to fit improperly; a single strand of long hair which falls in the firing chamber may cause his weapon to misfire; a beard or sideburns may interfere with his wearing a protective (gas) mask. In addition to these reasons, there is a fourth, generally unstated, reason that the military refuses to yield to changes in male hair styles. Many of those men who choose to wear lengthy hair are outspoken critics of the military and the military-industrial complex. In the context of our times, long hair on males has in fact become a symbol of dissent. It is no wonder, therefore, that the pentagon, fearing that dissent will spread across the ranks of the armed forces, opposes this badge of protest.

For the soldier on active duty, these reasons provide sufficient justification for a rigid military dress code. However, in the case of an Army Reservist, who spends only one weekend a month on duty, and the remainder of the time as a civilian, the military dress code as it relates to hair, sideburns, and mustaches may be seriously questioned. Is the interest of the military in the semi-soldier/pseudo-civilian’s hair length for one weekend per month, sufficient to warrant regulations affecting his appearance in his non-military existence for the remainder of the month?

Before this question may be answered, it is necessary to explain the military obligation of a reservist. After a reservist completes his initial active duty training (four to six months), he is obligated to attend monthly drills in a ready reserve unit for six years from the date of his induction.\(^93\) A failure to have sideburns, mustache, or hair in conformity with Army

Regulations results in an unsatisfactory drill.\textsuperscript{94} If in any period of a year, the reservist accumulates five unsatisfactory and unexcused drills, he may be ordered to active duty for two years less any active duty time already served.\textsuperscript{95} Thus, the reservist's problem is quite the opposite of the student's plight. The student's long hair causes him to be thrown out of school, whereas the reservist's long hair cause him to be thrown into the Army.

Obedience to the military dress code can cause more dire consequences for the reservist than a school dress code causes a student. Usually, a reservist is at that stage in life at which he must support himself, and perhaps a wife and children. If he is a musician, entertainer, actor, or seller of men's fashions his military appearance may impair his success at his livelihood. In most cases, long hair would not hinder his performance as a soldier on weekend drills. Why, then, is a military haircut required? One might suspect that the military's distaste for "hippie-types" is the controlling factor.

The military dress code has been judicially challenged on a number of occasions, and each time has been upheld.\textsuperscript{96} Although constitutional parallels between the situations of the reservist and the student can be drawn, the courts have generally refused to reach the constitutional issues presented. The evolving rule of law is that the courts will not rule on the legality of military appearance regulations or sanctions for violations thereof, because "it is not our function to review the discretionary judgment of a military officer made within the scope of his authority."\textsuperscript{97} In the case of \textit{Smith v. Resor},\textsuperscript{98} however, the court ordered the Army to stay reservist Smith's call-up order, because his commanding officer failed to follow Army Regulations in directing him to report to active duty. Thus, it appears that a denial of procedural due process is the only ground on which a court will grant relief to a reservist.

\textsuperscript{94} See A.R. 600-20 governing appearance of Army personnel, and A.R. 135-91 (5) concerning unsatisfactory performance by a reservist.
\textsuperscript{95} 10 U.S.C.A. § 673a (Supp. 1970).
\textsuperscript{96} See Anderson v. Laird, 437 F.2d 912 (1971); Gianatasio v. Whyte, 426 F.2d 908 (2d Cir. 1970) in which a shoe salesman was ordered to active duty because of unsatisfactory drills; Byrne v. Resor, 412 F.2d 774 (3rd Cir. 1969), in which a failure to wear a military belt resulted in the fifth unsatisfactory drill; Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969), in which long hair on an agent for a musical group caused his call-up; Krill v. Bauer, 314 F. Supp. 965 (E.D. Wis. 1970), in which the court dismissed the petition of a number of reservists, asking that enforcement of the Army hair regulation be enjoined as unconstitutional. \textit{See also} Doyle v. Koelbl, 434 F.2d 1014 (5th Cir. 1970), in which the court rejected the challenge of a member of the Air Force on active duty to the hair regulation.
\textsuperscript{97} Byrne v. Resor, \textit{supra} note 96, at 775.
\textsuperscript{98} 406 F.2d 141 (2d Cir. 1969).
Although it is doubtlessly true that upon lawful incarceration a prisoner loses many of the rights and privileges he would otherwise be able to exercise, it would nevertheless be incorrect to state that he has surrendered all of his constitutional liberties. What rights are withdrawn and what rights are retained? Three recent cases have focused on this question as it relates to appearance regulations for inmates of penal institutions. In Brown v. Wainwright,99 a Florida prisoner alleged that “he is a demigod, ‘an offspring of a God and Mortal,’ and that his mustache is a gift from his creator.” Another Florida prisoner, in Brooks v. Wainwright,100 took a similar approach, alleging that he had received a “divine revelation” from the “Lord God of Israel” commanding him to follow “His laws such as given Moses for the children of Israel.” Among these laws in Biblical scripture is: “Ye shall not round the corner of your head, neither shalt thou mar the corner of thy beard.”101 Both men contended that the prison hair and shaving regulations conflict with their first amendment right to freely exercise their religious beliefs. In Blake v. Pryse,102 a federal prisoner took a different approach, asserting that shaving is unconstitutional as corporeal punishment. The courts ruled against the prisoners in each of the cases, failing to find either “cruel or inhumane punishment” or an infringement of the freedom of religion. Among the justifications cited by the courts in support of prison appearance sanctions are: Hair and shaving regulations are necessary to promote hygiene and cleanliness for prisoners.103 Weapons might conceivably be concealed in the long hair of an inmate.104 Unusual hairstyles might be offensive to other prisoners.105 Finally, regulations relating to length and growth of facial hair are necessary for easy identification of the prisoner from prison photographs.106 Though from a legal standpoint, these reasons substantially justify penal hair regulations, there remains the question of whether it is, in view of modern theories of criminal rehabilitation, desirable to quash one of the few means available for a prisoner to express his individuality (i.e., through his facial appearance).

100. 428 F.2d 652 (5th Cir. 1970).
103. Supra note 99, at 1377; supra note 100, at 653.
104. Supra note 102, at 626.
105. Supra note 102, at 626.
106. Supra note 99, at 1377; supra note 100, at 653; supra note 102, at 626.
PRIVATE EMPLOYEES

The adjudication of the rights of a private employee who has violated a company appearance regulation differs significantly from all other dress code situations. Here the controversy does not involve the rights of an individual vis-à-vis some governmental authority, but rather the private rights of two private parties, employer and employee. It does not arise out of the Constitution and laws of our land, but rather from a privately negotiated collective bargaining agreement. Employee due process is not determined by settled judicial principles, but rather within the framework of a negotiated grievance procedure. The employee's tribunal is not headed by a judge, but a labor arbitrator. And *stare decisis* does not apply. Yet, despite these striking differences, the considerations to be made are essentially the same as in all dress code cases.¹⁰⁷

If the specifics of the company dress code are embodied in the collective bargaining agreement, an employee is without legal ground to complain of its enforcement. In accordance with basic contract law principles, he is legally bound to render performance on his promise to dress as the contract dictates. This, however, is not the case, for the company dress code is never expressly included in the labor contract. Instead, management derives its general authority to prescribe employee appearance standards from some broad provision in the contract, pertaining to the employer's right to control dress,¹⁰⁸ to manage his business,¹⁰⁹ or to make reasonable rules and regulations.¹¹⁰ Labor arbitrators have upheld this managerial right to control employee dress subject to one important limitation: *reasonableness*.¹¹¹ If a dress regulation is reasonable, discharge for a violation thereof is for good cause.

Reasonableness can be determined in each particular case only by weighing the conflicting interests of the respective parties, which in essence is the approach of the student dress code courts. (Does the school's right to maintain discipline substantially justify [outweigh] the student's


right to wear long hair?) An employee's right of personal appearance may be outweighed by any one of the three interests of the employer: (1) maintaining employee safety; (2) guaranteeing sanitary production methods; or (3) upholding the company's good image with the public.

The first factor, employee safety, parallels similar student and reservist justifications. Although an employer has the undisputed right to require protective gear (e.g., hard hats for construction workers, protective shields for welders), his authority to control hair length terminates when a rule departs from the realm of safety and becomes nothing more than an expression of his personal prejudices and preferences. The fact that long hair on machine operators—male or female—has long been considered a safety hazard imparts the requisite reasonableness to hair regulation. However, under the particular facts and circumstances of a case, sound safety practices may not require short hair for operators of certain machines.

The second factor, sanitariness, comes into play when the production of food is involved. Hats and hairnets are usually required to prevent hair from falling into the food. Because sideburns and beards cannot be covered, regulations proscribing them have been held reasonable to prevent hair contamination of the food.

The third factor, the company's image, is founded on the premise that long hair, beards, and sideburns on employees elicits the disfavor of customers and impairs the earning potential of the company. Because of the possible danger to a company's image, labor arbitrators have affirmed the discharge or suspension of a supermarket stock clerk with long hair, a hotel engineer with long sideburns, an airline ramp agent with long hair, a gas company service clerk with a beard, and a route salesman with long hair, sideburns, and a mustache. On the other hand,

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112. See Rubber Workers Local 662 v. Springday Co., supra note 111.
119. Supra note 110.
labor arbitrators have found unreasonable the discharge of a truck driver with sideburns exceeding the specified length by three-eighths of an inch,\textsuperscript{120} gas company servicemen with long sideburns and a goatee,\textsuperscript{121} a butcher with "mutton chop" sideburns,\textsuperscript{122} and a truck loader with a beard.\textsuperscript{123} What distinguishes these two groups? The proximity of the employee to the clients of the company is one obvious answer. A hair regulation is less likely to be unreasonable for one in the front office of a sales division, than it is for one working in an isolated area with little or no contact with the public. Another factor is the nature of the employer's business. Though it may be unreasonable to require short hair on a clothing salesmen, a regulation banning long locks may be reasonable as applied to a farm equipment salesman. Finally, it should be added that the labor arbitrator's predilections as to human appearance play an apparent role in determining the outcome of the employee's grievance.

PUBLIC EMPLOYEES

In addition to the contractual rights which all employees possess, public employees are constitutionally protected against arbitrary or discriminatory discharge by their employer (a governmental agency).\textsuperscript{124} Is a violation of a dress code by a public employee a good (or an arbitrary) cause for discharge? It first should be noted that the considerations relevant to the firing of a private employee are not generally applicable to the public employee situation. A private corporation must uphold its good image with the public, lest it suffer economic loss. Because a beard or long hair on a male employee may impair the company's good will, a dress code violation is good cause for discharge. On the other hand, a government is not in business to make a profit, and in fact usually operates in the red. Moreover, the customers (i.e., taxpayers) of the government cannot refuse to deal with it merely because the tax collector is bearded; in any event they are legally bound to pay their assessed taxes. Hence, a bearded government worker can in no way effect the economic position of his employer, and for that reason the "good image" factor is inapplicable. If a government's dress code is to be enforceable, another justification must be found from among those thus far discussed—e.g., health, safety, disruption, decline of performance. Undoubtedly, there are some situations

\begin{itemize}
  \item \textsuperscript{120} Supra note 108.
  \item \textsuperscript{121} Supra note 118.
  \item \textsuperscript{122} Meat Cutters Local 612 v. Economy Super Mart, supra note 114.
  \item \textsuperscript{123} Operating Engineers Local 66 v. Dravo-Boyle Co., supra note 111.
  \item \textsuperscript{124} See, e.g., Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961) and Wieman v. Upedgraaff, 344 U.S. 183 (1952).
\end{itemize}
where these factors may justify appearance regulations for government workers. For example, safety considerations apply equally to machinists with long hair, be they private or public employees. However, the vast majority of government employees are of the “white collar” variety. What purpose is served by a proscription against facial hair on teachers? On probation officers? Firemen? Policemen?

The courts which have considered the problem of the public employee, have found the government’s dress code devoid of purpose, reason, or substantial justification. Their approach closely resembles the approach in the student dress code cases. For example, in *Lucia v. Duggan*, the court held that the plaintiff, a bearded teacher, had been denied procedural due process because there was no prior regulation banning beards. Similarly, in *Ramsey v. Hopkins*, a teacher with a mustache had been denied due process and equal protection because the school’s tacit dress code was “based upon personal taste of an administrative official . . . .” Two other courts have ruled that facial hair on black teachers is within the peripheral protection of the first amendment. The right of probation officers to display facial hair has also been upheld in recent decisions. The more difficult challenges to government dress codes lie ahead in the cases of policemen and firemen, whose function and regimentation is military in nature.

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**LAWYERS**

Canon 1 of the American Bar Association Canons of Professional Ethics provides: “It is the duty of the lawyer to maintain towards the Courts a respectful attitude . . . .” Does this statement along with similar court rules contain an implicit dress code for lawyers? Professor Pirsig believes it does: “[A] judge may insist that a lawyer appearing before him be at-

127. *Id.* at 482.
128. The court in Braxton v. Bd. of Public Instruction of Duval County, Fla., 303 F. Supp. 958, 959 (M.D. Fla. 1969) found that where the goatee of a black teacher “is worn as ‘an appropriate expression of his heritage, culture, and racial pride as a black man’ its wearer also enjoys the protection of first amendment rights, at least the ‘peripheral protection’. . . .” *Accord*, Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967).
130. *See* Elko v. McCarey, 315 F. Supp. 886 (E.D. Penn. 1970) in which the federal district court refused to rule on the dress code as applied to firemen, but retained jurisdiction pending review by state administrative procedures.
COMMENT

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tired in keeping with the dignity of the proceedings.” Indeed, the costumed tradition of the trial ritual with its judicial robe and the wig and gown required for British barristers underscores the strong connection between courtroom etiquette and dress.

There is no question that judges have the inherent authority to maintain order in the courtroom, and exclude from the presence of the court objects that distract the jurors from the issues of the case. Does this empower a judge to order an attorney to dress in an undistracting, conservative raiment? In People v. Rainey, a California appellate court upheld the right of the trial judge to order a female lawyer to remove her flamboyant bonnet in the courtroom. However, a New York appellate court in Peck v. Stone reversed the order of a trial judge prohibiting a female attorney from appearing in court in a mini-skirt. Another California attorney was recently fined for failing to wear a tie in court. Does a “respectful attitude” require a male lawyer to wear a suit? Between appearance that is distracting to jurors and that which is simply distasteful to the judge, the line is thin. The balance between the right of client to a fair trial and the right of his lawyer to choose his dress is delicate. Must justice, which is blind, depend on one’s outward appearance?

ORDINARY CITIZENS

Appearance regulations for ordinary citizens, though generally not palpable, exist nevertheless in a myriad of disguised forms. The discrimination resulting therefrom may be less obvious, but it is every bit as real as the sanctions imposed by the promulgated dress codes of students and employees. The continued harassment by police, for example, of persons of a particular dress style (e.g., hippies) who frequent a certain park amounts to a de facto park dress code. Likewise, if the police single out

131. PIRSIG, PROFESSIONAL RESPONSIBILITY 323 (1st ed. 1965).
134. Chgo. Sun-Times, Oct. 18, 1970, at 6, col.4, in which is reported: “A municipal court judge [in San Rafael, California] has fined a lawyer $100 and refused him permission to defend a client for showing up in court without a necktie. ‘Judge Alvin H. Goldstein, in court Thursday, told attorney Peter Pipe, 28, ‘You should show more respect for your profession and the court. . .’. Pipe was dressed in blue jeans, tweed sports coat and sport shirt.” (emphasis added)
135. See Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Penn. 1968) in which the federal court refused to enjoin local police from arresting hippies congregating in a certain park. See also Parr v. Municipal Court for the Monterey-Carmel Judicial District of Monterey County, 92 Cal. Rptr. 153 (1971), involving a trespass ordinance for city parks. The City Council of Carmel enacted the ordinance, expressly intending to prevent hippies from congregating in its parks: “The City Council of Carmel-by-the Sea has observed an extraordinary influx of undesirable and unsani-
bearded and long-haired travellers on a certain turnpike, and subject them to unreasonable searches, is there not in fact highway appearance regulation? Another illustration of a disguised dress code lies in requirements for welfare benefits. If a person cannot obtain employment because of his hair length, may the welfare administration require a haircut as a condition for the continued receipt of its funds? May a semi-public facility, such as a shopping center or an amusement park exclude persons whose appearance does not conform to the owner's wishes? When may a public or private interest legitimately authorize discrimination against a particular style of dress? These are questions whose answers as yet lie in the future.

CONCLUSION

Although the courts remain evenly divided and a single de jure trend on the legality of student appearance regulations is not as yet perceptible, simple observation reveals a definite de facto trend in the student dress code area. Many school districts have already succumbed to the pressure of changing fashions, and have become more permissive in clothing and hair style, either through more liberal dress codes, or perhaps by a failure to enforce old regulations. However, the real problem is far from solved. The student dress code is but one manifestation of the conformity prejudice, only the top of the societal iceberg. Variations on the dress code theme emerge in many obvious and disguised forms, and are inextricably interwoven throughout the entire fabric of our culture—for students, tary visitors to the City, sometimes known as 'hippies,' and finds that unless proper regulations are adopted immediately the use and enjoyment of public property will be jeopardized if not entirely eliminated. . . ." (excerpt from the ordinance) Id. at 154. The Supreme Court of California, in striking down the law, stated: "[W]e can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color. . . . We hold [this ordinance] to be in violation of the equal protection clause of the Fourteenth Amendment." Id. at 160.

136. See Lewis v. Kugler, Civil No. 1712-70 (D. N.J. 1971), a recently dismissed suit, petitioning a federal court to enjoin the New Jersey Police from harassing long-haired travelers on the New Jersey Turnpike. The case is currently on appeal in the United States Court of Appeals, Third Circuit, Civil No. 71-1227.

137. For a discussion of the problem, see Comment, Long Hair and the Judicial Clippers: Can Welfare Officials Constitutionally Require Applicants to Trim Their Locks to Enhance Their Employability?, 11 SANTA CLARA LAWYER 92 (1970); see also Spangler v. California Unemployment Insurance Appeals Board, 92 Cal. Rptr. 266 (1971) which deals with this issue.

138. For an analysis of this factual setting, see In re Cox, 3 Cal. 3d 205, 90 Cal. Rptr. 474 F.2d 992 (1970).

teachers, policemen, public and private employees, military personnel, prisoners, lawyers, ordinary citizens, ad infinitum.

It is not the purpose of this comment to suggest that all dress codes are irrational exercises of authority. In many instances circumstances may justify appearance sanctions. Sound safety practices may dictate that a machinist have short hair. Good grooming and health may require a student to wash and comb his hair. Prisoner identification may necessitate facial hair proscriptions for inmates of penal institutions. Military preparedness and combat efficiency may require a clean-shaven active duty soldier so that a gas mask will fit properly. Economic considerations may justify a company in forbidding an employee who deals closely with the public from adopting bizarre clothing styles.

Too often, however, appearance regulations are discriminatory, unduly broad, or simply unnecessary. Though Army appearance regulations may be necessary for an active duty soldier, why a reservist? Surely, he could shave on a minute's notice. Should "sanitariness" in a food factory justify a company hair regulation for an employee who works in the mail room? Does safety necessitate short sideburns on a lathe operator? Must a student conform because his appearance disrupts the student body? The very height of irony is illustrated by a school in Great Britain, the exporter of the "long hair" fashion, which recently sent a student home for not having enough hair on his head.\(^1\)

Deeply ingrained in our social character is the need to conform, and to cause others to conform to arbitrary dress norms. This fact accounts for the prevalence of dress codes in our culture, and for their arbitrariness in applicability and enforcement. It must be the law's function to separate the rational from the arbitrary in dress codes, to determine which appearance regulations are substantially justified by legitimate governmental (or private) interests and which stem purely and simply from the irrational human conformity prejudice. In 1891 the Supreme Court said:\(^2\)

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraints or interference of others, unless by clear and unquestionable authority of law.

Eighty years later these words apply with even greater force to the freedom of personal appearance.

James J. Carroll

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