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Constitutional Law - Schools and School Districts - Prohibition of Long Hair Absent Showing of Actual Disruption Violates Unspecified Ninth Amendment Rights to Govern One's Personal Appearance

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has never been documented.[36] Second, those most affected by arrest records are often those least likely to pursue costly litigation.[37] In order to protect this area of privacy from further governmental encroachment, legislative action must be taken. Only the legislature, through the use of legislative hearings, can effectively probe into the closed system of criminal identification, and determine the usefulness of arrest records in light of the critical threat to individual privacy which they present. Furthermore, only the legislature can establish a statutory requirement enforceable in all cases.[38] Though the ruling in the instant case is undoubtedly an important step in protecting this sphere of privacy, perhaps its greater significance is that it may serve as a warning light to the legislature indicating that the time for action is at hand.

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CONSTITUTIONAL LAW—SCHOOLS AND SCHOOL DISTRICTS—PROHIBITION OF LONG HAIR ABSENT SHOWING OF ACTUAL DISRUPTION VIOLATES UNSPECIFIED NINTH AMENDMENT RIGHTS TO GOVERN ONE'S PERSONAL APPEARANCE.

School authorities suspended the fifteen-year-old petitioner from school attendance based upon his violation of the school dress code.[1] An action was brought by the petitioner and his parents in

36. "It should be noted that usefulness of arrest records remains unproven since the closed system maintained by police impairs the ability to document usefulness." Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. Chi. L. Rev. 850, 855 n.23 (1971).

37. "For most of those arrested—too poor, too ignorant, and often too disheartened to complain—the only adequate remedy may lie either in severely curtailing any use of records of arrests, or in eliminating altogether their maintenance in a file associated with the individual's name." Menard v. Mitchell, 430 F.2d 486, 495 n.51 (1971).

38. The statute should include two basic provisions. First, it should require that arrest records be returned to any person arrested for either a misdemeanor or a felony when the proceedings against that person have been dismissed, or when that person has been acquitted, unless the state can show a "compelling" interest for their retention. Second, the statute should list those particular crimes where, based on a legislative investigation of the usefulness of arrest records in preventing crimes, the state is thought to have a "compelling" interest justifying retention of arrest records.

Devising the second provision to such a statute will be an arduous task. But it is precisely because the legislature has the necessary resources to make a comprehensive analysis of this problem, that the decision-making should be left to that body and not to the courts. It is within the special competence of the legislature to study this question, and to make reasoned judgments based on its findings.

1. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
The pertinent regulations in effect at the time of Stephen's expulsion provided as follows:

> a. all hair is to be worn clean, neatly trimmed around the ears and back of neck, and no longer than the top of the collar on a regular dress or sport shirt while standing erect. The eyebrows must be visible and no part of the ear can be covered. The hair can be in a block cut.
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> b. The maximum length for side burns shall be the bottom of the ear lobes.

Id. at 1070-71.

seeking re-admission and a declaratory judgment to overturn the dress code regulation governing the length and style of male student's hair. It was asserted that these regulations violated both petitioner's and his parent's personal rights as guaranteed by the United States Constitution.[2] The United States District Court for the Eastern District of Missouri denied relief,[3] and the case was brought to the Eighth Circuit Court of Appeals. The court reversed the lower court decision and held that the dress code was invalid and unenforceable where such regulation was unnecessary to the high school's mission of education. *Bishop v. Colaw,* 450 F. 2nd 1069 (8th Cir. 1971).

Essentially, the appellate court asked two questions: first, does the student's interest in wearing long hair enjoy any special constitutional protection, and second, if it does, what kind of showing must a school board make in order to override this interest?

Federal courts have generally found themselves engrossed in the enforcement of various hair regulations especially when in recent years these regulations have touched the fringe of constitutionally protected rights.[4] In February of 1968, the Supreme Court decided *Tinker v. Des Moines Independent Community School District*[5] at which time courts began to take a more objective view of personal appearance matters. Factually, the case involved the wearing of black armbands in protest of the Vietnam war.[6] Al-

2. The court dismissed any ruling upon invasion of the parents' rights. The claim asserted by the parents was that the Fourteenth Amendment forbids state intrusion into the parent-child relationship. But the court found that the record in this case failed to reveal any direct invasion of the parents' rights. *See* Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).

3. Bishop v. Colaw, 316 F. Supp. 445 (E.D. Mo. 1970).

4. Bishop v. Colaw, 450 F.2d 1069, 1071 (8th Cir. 1971). It should be noted that the preference for federal courts over state courts can, at least in part, be attributed to the reluctance of state courts to rule that school regulations are beyond the control of the local school board. Generally, the state's delegation of rule-making authority to the board is very broad. *See, e.g.,* N.D. CENT. CODE § 15-21-19 (1971). Most courts have refused to strike down any rule that is not plainly unrelated to the efficient management of the school. *See, e.g.,* Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Antell v. Stokes, 287 Mass. 103, 191 N.E. 407 (1934); Jones v. Day, 127 Miss. 136, 89 So. 906 (1921). *But see* Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43 (1922); Scott v. Board of Education, 61 Misc. 2d 333, 305 N.Y.S.2d 601 (1969).

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

6. The case involved three public high school students who were suspended from school for wearing black armbands to protest American policy in Vietnam. The school regulation provided that anyone who wore the armband to school would be requested to remove it before action would be taken. Upon refusal to remove the armband the student would be suspended until he returned without it. The student plaintiffs sought both an injunction to restrain school officials from disciplining them and for nominal damages. The District Court dismissed the complaint, Tinker v. Des Moines School Dist., 258 F.Supp. 971 (S.D. Iowa 1966), and the Court of Appeals affirmed on the ground that the regulation was within the school board's power despite the absence of any finding of a disturbance being caused by the activity. Tinker v. Des Moines School Dist., 383 F.2d 988 (8th Cir. 1967).

The Supreme Court of the United States reversed and declared that petitioner's conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth in the absence of a showing that the wearing of such armbands "materially and substantially interferes with the requirements

though the *Tinker* Court specifically disavowed the relevance of its decision to hair style cases,[7] it broadly stated the proposition that a student does not leave his constitutional rights at the "school house gate."[8] In relation to students' constitutional rights generally the court stated:

> [W]here there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" the prohibition cannot be sustained.[9]

Overall it should be noted that the Supreme Court has refused to review constitutional issues in the area of school regulation of hairlength.[10] However, Justice Douglas, dissenting from a denial of certiorari, argued:[11]

> 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 a public school because of the length of his hair.[12]

In contrast to the Supreme Court attitude, the various courts of appeals which have considered the hair regulation issue have done so against a broad range of constitutional attacks.[13] They have found several grounds for invalidating such regulations: that they violate substantive due process of law under the Fourteenth Amendment;[14] that they constitute a denial of equal protection of the laws under the Fourteenth Amendment;[15] or that they infringe freedom of speech guaranteed by the First Amendment[16] and made applic-

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of appropriate discipline." Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969).

7. The Court stated "[t]he problem presented in this case [did] not relate to . . . hairstyles or deportment . . ." *Id.* at 507-08.

8. *Id.* at 506.

9. *Id.* at 509.

10. *E.g.*, Freedman v. Flake, 448 F.2d 258 (10th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Ferrell v. Dallas School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (1968).

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

12. Ferrell v. Dallas School Dist., 393 U.S. 856 (1968).

13. The *Bishop* decision contains a brief outline of the circuit rulings in relation to the hair controversy. *See* Bishop v. Colaw, 450 F.2d 1069, 1701-03 (8th Cir. 1971).

The issue of hair lengths and styles has provoked a great deal of Law Review commentary. *See, e.g.,* 84 HARV. L. REV. 1702 (1971); 55 IOWA L. REV. 707 (1970).

14. *See* 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); Ferrell v. Smith, 310 F. Supp. 732 (D. Me. 1970).

15. *See, e.g.,* Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).

16. *See, e.g.,* Calbillo v. San Jacinto Jr. College, 305 F. Supp. 857 (S.D. Tex. 1969).

able to the states through the Fourteenth Amendment. On the other hand, these courts have refused to strike such codes for a variety of reasons usually characterized by the school's interest in an orderly institution.[17] Not only does the *Bishop* court reject the constitutional arguments presented by these previous forums, but it develops a new attack modifying the various pre-existing judicial attitudes.

"We deem the First Amendment contention to be without merit in the context of this case," stated Judge Bright for the court, "since the record contains no evidence suggesting that [petitioner's] hairstyle represented a symbolic expression of any kind."[18] Petitioners argued, however, that a "[non-conforming hairstyle] need not symbolize anything at all . . . to be a constitutionally protected expression."[19] The court rejected the contention as an unusually broad reading of the First Amendment.[20] The court also found it unnecessary to rule upon the equal protection argument stating that the instant case "does not fall within the traditional concepts of invidious discrimination subject to the proscription of the Equal Protection Clause."[21]

It was held generally that the plantiff did possess a constitutionally protected right of personal appearance while attending high school. Regardless of the different descriptions, the source of this right according to the *Bishop* court is "found within the Ninth Amendment,[22] the Due Process Clause of the Fourteenth Amendment and the 'privacy penumbra' of the Bill of Rights."[23] Judge Bright looked beyond all the labels utilized by the courts which frowned upon such codes and uncovered a basic, unenumerated right to govern one's personal appearance.[24]

The existence of rights other than those specifically enumerated in the Constitution was recognized by the Supreme Court in *Griswold v. Connecticut*.[25] Whether the findings of that decision parallel such a right as that involved in the hair cases is a tenuous proposition, largely because of the absence of a majority opinion in the *Griswold* case. *Griswold* was similar to the hair cases in that it dealt with another constitutionally "unenumerated" right — that of

17. King v. Saddleback Jr. College, 445 F.2d 932 (9th Cir. 1971); Ferrell v. Dallas School Dist., 392 F.2d 697 (5th Cir. 1968).
18. Bishop v. Colaw, 450 F.2d 1069, 1074 (8th Cir. 1971).
19. *Id.* at 1074.
20. "Since all conduct cannot be labeled speech even when 'the [actor] intends thereby to express an idea,' . . . certainly conduct not intended to express an idea cannot be afforded protection as speech." *Id.* at 1074.
21. *Id.*
22. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.
23. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
24. *Id.*
25. Griswold v. Conn., 381 U.S. 479 (1965).

using contraceptives within the privacy of one's home. The Supreme Court recognized this right to be fundamental, but it could not agree where, within the framework of the Constitution, the right was guaranteed. Justice Douglas' plurality opinion suggested the right to be a penumbral right emanating from several amendments,[26] while Justice Goldberg's concurring opinion discussed the Ninth Amendment at length, claiming that it could be used by the Court as an interpretive tool since "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive."[27] Among these rights retained by the people, claimed *Bishop*, is the right of personal appearance. "As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment Due Process Clause."[28]

The *Bishop* court took an extensive step in the clarification of personal appearance rights. It discarded prior defenses and activated the previously little used Ninth Amendment,[29] which the court felt necessary to protect this unenumerated right.

However, as the *Bishop* decision indicates, the inquiry into this personal freedom cannot end at this point because personal freedoms are not absolutes and they yield when they intrude upon the freedoms of others.[30] The task, therefore, is to weigh the competing interests asserted. *Burnside v. Byars*[31] and *Blackwell v. Issaguena County Board of Education*,[32] two Fifth Circuit cases decided on the same day, laid down a standard upon which hair regulations could be tested. They were subsequently affirmed and expanded upon in *Tinker*.

Both *Burnside* and *Blackwell* involved regulations which banned the wearing of "freedom buttons" by students. The court in *Burnside* noted the existing interest of the state in maintaining an education system, and that the establishment of such a system required the formulation of reasonable rules and regulations.[33] They

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26. *Id.* at 484-85.
27. *Id.* at 492. Very little has been written about the Ninth Amendment. *See generally* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1965); Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U.L. REV. 787 (1962); Kelsy, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936).
28. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
29. Prior to 1965 and the issuance of the Griswold decision, the United States Supreme Court had never decided a case on Ninth Amendment grounds. The amendment had, however, been raised by the parties and discussed by the Court in several pre-1965 cases. For a general listing, see Van Loan, *Natural Rights and the Ninth Amendment*, 48 BOSTON U.L. REV. 1, n.3 (1968).
30. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).
31. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
32. Blackwell v. Issaguena County Board of Education, 363 F.2d 749 (5th Cir. 1966).
33. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966):

> The interest of the state in maintaining an educational system is a compelling one, giving use to a balancing of First Amendment rights with

concluded that: "[A] reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the education system."[34]

The Supreme Court, in *Tinker*, approved the test enunciated in *Burnside* as proper where the constitutional rights of students collide with school regulations. They also instructed that the state, in justifying such regulations, "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." [35] Moreover, while any expression "in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance, . . . our Constitution says we must take this risk. . . ."[36]

The *Bishop* court concluded from the evidence that the school board did not meet the *Tinker* test. They were unable to prove that petitioner caused disruption of the educational process, that a sanitation problem existed or that a correlation existed between classroom performance and the length of a person's hair. "Finally, we cannot accept the argument that uniformity of appearance must be maintained in order to prevent 'polarization'. . . ."[37] It is interesting to note that the court mentions the question of sex discrimination, a possible defense in future decisions.[38]

With the instant case, the dress code controversy has reached another plateau. *Bishop* has clarified and sharpened the constitutional theories under which hair regulations can be attacked; it has added a new dimension to the conflict without shattering the foundation of the educational system. In determining that the student has an important interest in preserving his freedom of personal

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the duty of the state to further and protect the public school system. The establishment of an educational program requires the formulation of rules and regulations necessary for the maintenance of an orderly program of classroom learning.

The court then proceeded to say such rules and regulations had to be "reasonable" within the school authorities' power and discretion.

34. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

The court in Burnsdale failed to find from the evidence that the buttons were calculated to cause or in fact did cause a disturbance. Consequently they held that the regulation was "arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression in the circumstances revealed by the record." *Id.* at 748-49.

35. Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969).

36. *Id.* at 509. *See also* Terminiello v. Chicago, 337 U.S. 1 (1949).

37. Bishop v. Colaw, 450 F.2d 1069, 1077 (1971).

The court also viewed the manner in which the code was adopted and then stated "Nor does the acceptance of the dress code by the majority of the St. Charles community and students justify the infringement of Petitioner's liberty to govern his personal appearance." *See* Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

38. *Id.* at 1074. There have been two district court cases in the Eighth Circuit which have upheld regulations similar to those in the instant case. Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Giangreco v. Cedar School Dist., 313 F. Supp. 776 (W.D. Mo. 1969).

appearance, the court has arrived at a new constitutional basis — the Ninth Amendment.

What has been decided is that a state's invasion into the personal rights and liberty of an individual, of whatever age or description, should and does present an issue worthy of judicial review.[39] The resolution of this issue will involve the balancing of competing interests, and strong justifications on the part of school administrators will be required before such regulation is allowed to infringe upon an individual's right of personal appearance.[40]

JAMES S. HILL

TORTS—PARENT & CHILD—UNEMANCIPATED MINOR ENTITLED TO BRING ACTION AGAINST PARENT TO RECOVER FOR PERSONAL INJURIES SUSTAINED IN MOTOR VEHICLE ACCIDENT.

Plaintiff, a seven-year-old child, brought an action against the administrator of her stepfather's estate to recover for injuries suffered in an automobile accident, allegedly resulting from her stepfather's negligence. The trial court dismissed the action holding that the stepfather stood *in loco parentis* to the child and was therefore immune from liability because of parent-child tort immunity. The trial court also stated that even if plaintiff could maintain the action, her stepfather would not be liable because she was a gratu-

39. However, on March 27, 1972, the United States Supreme Court declined to consider the issue of regulation of hair styles. Freeman v. Flake, 405 U.S. 1032 (1972), *denying cert. to* 448 F.2d 258 (1971). Mr. Justice Douglas dissented and stated in a very brief comment that eight circuits have now passed on the question of:

> whether a public school may constitutionally refuse to permit a student to attend solely because his hairstyle meets with disapproval of the school authorities.
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> . . . [O]n widely disparate rationales, four have upheld school hair regulations (*see* Freedman v. Flake, 448 F.2d 258 (C.A. 10, 1971); King v. Saddleback Jr. College, 445 F.2d 932 (C.A. 9, 1971); Jackson v. Dorrier, 424 F.2d 213 (C.A. 6, 1970); Ferrell v. Dallas Ind. School District, 392 F.2d 697 (C.A. 5, 1968), and four have struck them down (*see* Massie v. Henry, ——— F.2d ——— (C.A. 4, 1972); Bishop v. Colaw, 450 F.2d 1069 (C.A. 8, 1971); Richards v. Thurston, 424 F.2d 1281 (C.A. 1, 1970); and Breen v. Kahl, 419 F.2d 1034 (C.A. 7, 1969).
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> I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.

Id. at 1032.

40. *See* Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972), in which the Eighth Circuit Court of Appeals affirmed a District Court decision holding that the regulation in question was invalid as violative of an individual's constitutional rights of privacy and personal freedom. They again used the rational basis test and stated:

> This court recently found that no rational relation exists between a similar school regulation and the educational goals and processes of school administration. Bishop v. Colaw, 450 F.2d 1069 (8 Cir. 1971). We affirm the decision of the District Court under the analysis written in Bishop.

Id. at 779.