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Karr v. Schmidt: The Continuing Saga of Long Hair

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IV. CONCLUSION

The court dealt rather lightly with the question presented by holding almost summarily that the search was valid and the evidence admissible. One might wonder if, due to the overwhelming amount of evidence pointing to Sirhan's guilt, the California court has overlooked the fact that the "guarantee of protection [the fourth amendment] against unreasonable searches and seizures extends to the innocent and guilty alike."[37] If the amount of incriminating evidence influenced the court's decision, a finding of harmless error would have been much more appropriate.

The implications of this precedent are far-reaching. Allowing searches to be conducted without sufficient probable cause clearly oversteps boundaries set by the Supreme Court,[38] and could lead to the very kind of indiscriminate police practices which the fourth amendment was designed to prevent. The assassination of a prominent political leader does not give police the license to search upon mere possibilities; to the contrary, it seems that police activities exercised within the political arena should be more strictly scrutinized than those exercised without. *People v. Sirhan* represents a relaxation of restraints upon police powers which invites misuse of those powers, as has been evidenced throughout man's history.

James N. Cowden

Karr v. Schmidt: The Continuing Saga of Long Hair

Plaintiff was a sixteen-year-old student who attempted to enroll for his junior year in high school. Because he was in violation of a school board regulation limiting the length of male students' hair, he was not permitted to enroll.[1] After several futile conferences with school board officials, the plaintiff filed a class action suit in federal court seeking injunctive and declaratory relief. The court concluded that the denial of a free public education to plaintiff on the basis of hair length violated the due process and equal protection guarantees of the Constitution. The court enjoined enforcement of the hair-length regulation and ordered school board officials to enroll plaintiff.[2]

that "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities."

[37] McDonald v. United States, 335 U.S. 451, 453 (1948).

[38] The United States Supreme Court has never ruled on an exigent circumstance created by facts similar to those presented here, and at the time of this writing an appeal has not been taken to that Court.

[1] In May 1970 the Board of Trustees of the El Paso Independent School District adopted the code which was the subject of this suit. The code provides, in part, as follows: "FOR BOYS: 1. Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; i.e., ponytails, buns, wigs, combs, or straps." Karr v. Schmidt, 460 F.2d 609, 611 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

[2] Karr v. Schmidt, 320 F. Supp. 728, 737 (W.D. Tex. 1970).

On motion of the school authorities, the circuit court of appeals stayed the district court's injunction pending appeal. *Held, reversed*: There is no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer. *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

I. CONSTITUTIONAL CONSIDERATIONS

The Equal Protection Clause. As a general rule, a state may satisfy the equal protection clause by showing a reasonable relationship between any discrimination and some legitimate state purpose.[3] This rule is modified when the discrimination operates to discourage the exercise of some fundamental right[4] or there is a "suspect" classification by the state.[5] Then the state must show a "compelling interest" to justify the discrimination.[6] In *Shapiro v. Thompson*[7] the United States Supreme Court found that the right to move from state to state was such a fundamental right. The *Shapiro* decision opened the door to a broader array of situations which must satisfy the rigid requirement of "compelling governmental interest."[8] The real import of *Shapiro* lies in the fact that when a right is determined to be fundamental, the court must ask not only whether the classification challenged is reasonably related to a legitimate objective of the defendants, but also whether it promotes any compelling governmental interest. This scrutiny has resulted in a much more difficult burden of proof to be carried by the defendant.

First Amendment Consideration. The first amendment has been broadened in that freedom of speech has been held to include freedom of expression in other forms.[9] The framers of the first amendment intended that its guarantees

[3] Flemming v. Nestor, 363 U.S. 603, 611 (1960). *See also* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[4] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel from state to state); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (the right to vote).

[5] Certain classifications, such as those based on race, lineage, and alienage, are said to be "suspect," and a very heavy burden of justification is demanded of a state which draws such a distinction. Korematsu v. United States, 323 U.S. 214, 216 (1944). For a general discussion of equal protection, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[6] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Note, *Sentencing in Cases of Civil Disobedience*, 68 COLUM. L. REV. 1508, 1529-30 (1968).

[7] 394 U.S. 618 (1969).

[8] In Lindsey v. Normet, 405 U.S. 56, 73 (1972), appellants successfully contended that the right to peaceful possession of one's home is a constitutional right, and as such could only be restricted by a compelling state interest. Lower federal courts have actively applied *Shapiro*. *See, e.g.*, Eslinger v. Thomas, 340 F. Supp. 886, 895-96 (D.S.C. 1972) (female law student failed in her argument that denial of employment as a page in the state senate violated the equal protection rights); Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972) (injunctive relief granted a state prisoner due to failure on the part of the state to show a compelling governmental interest which would warrant denying the prisoner communication by mail with his wife's sister); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 439 (N.D. Cal. 1972) (school district's mandatory maternity leave policy held in violation of equal protection clause because it singled out pregnant employees for classification without any rational relation to a legitimate objective of the district, and promoted no compelling interest of the district or state).

[9] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966) (a silent sit-in held to communicate through the act itself and merit first amendment protection). *See also* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

be read in a liberal sense.[10] The idea is well stated by Mr. Justice Black in *Kovacs v. Cooper*: " 'Liberty of speech' is no more confined to the speech they [framers of the Constitution] thought permissible than 'commerce' in another clause is limited to sailing vessels and horse-drawn vehicles of 1787 . . . ."[11]

In a case involving a school dress code, the right of a student to appear as he pleases has been held to be a protected right under the first amendment.[12] More recently, the Court has found that the wearing of black armbands is a form of symbolic speech, and protected by the first amendment.[13] The Court disallowed the school's attempt to regulate silent expressions of opinion which were unaccompanied by any disturbance or disorder.[14]

II. LONG HAIR

The question of whether the wearing of long hair is a form of symbolic speech has been answered differently by various jurisdictions.[15] At the outset, there is a conflict concerning the extent that a student's interest in his hair style enjoys constitutional protection. The Seventh Circuit in *Breen v. Kahl* found:

> The right to wear one's hair at any length or in any desired manner is an ingredient of a 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 . . . it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.[16]

The court then applied a "substantial burden of justification" test and found for the students.[17] Likewise, the First Circuit in *Richards v. Thurston*[18] found that the right to wear shoulder-length hair was a right constitutionally protected by the guarantee of personal liberty. *Richards* also stated, however, that hair length was not of a sufficiently communicative character to warrant full protection of the first amendment.[19]

In comparison, the Fifth Circuit in *Ferrell v. Dallas Independent School*

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[10] Kovacs v. Cooper, 336 U.S. 77 (1949).

[11] *Id.* at 102.

[12] *See, e.g.*, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967).

[13] Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

[14] *Id.* at 508.

[15] *See* Note, *supra* note 9. There is a serious division in the various circuits. For a detailed account of the jurisdictional splits, see Note, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37, 38 n.3 (1970); Note, *The Schools Versus the Long Hairs: An Exercise in Legal Gobbledygook*, 1971 WASH. U.L.Q. 89 n.1.

[16] 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[17] The Seventh Circuit defined their test by saying that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 1036. Apparently, the test is substantially equivalent to the "compelling state interest" test.

[18] 424 F.2d 1281 (1st Cir. 1970).

[19] *Id.* at 1283.

District[20] assumed, without deciding, that hair style is a constitutionally protected mode of expression. The court, however, found for the school district, deciding that the rule concerning hair was not arbitrary, capricious, unreasonable, or discriminatory. The Sixth Circuit in *Jackson v. Dorrier*[21] held that members of a musical group who grew their hair long for purely commercial purposes were not protected by the first amendment's guarantee of freedom of speech. The court then held that the school had the authority to regulate hair length as long as they did so in a reasonable manner.

The equal protection clause has also been used in analysis of the long hair cases. The Ninth Circuit combined two long hair cases in *King v. Saddleback Junior College District*[22] and found that school dress and grooming codes which have a rational basis for their enactment, and which are not vaguely worded, do not deprive a student of due process or equal protection. In the absence of a showing that grooming standards are "symbolic speech," or that the students' right to wear long hair is a fundamental right, the codes did not violate the first amendment or the student's right of privacy.

These illustrative cases are typical of the conflict among the circuits regarding the protection which the Constitution affords for the wearing of long hair. They also reveal the conflict concerning what proof by the school board is necessary to justify hair regulation. Some circuits say long hair is constitutionally protected through the penumbras of the first or the ninth amendment,[23] while other circuits have not specified on what constitutionally protected freedom they base their decisions.[24] On the opposite side are those jurisdictions that feel long hair does not warrant protection under the first amendment freedom of speech or other amendments.[25] Concerning the showing necessary by a school board to justify hair regulation, some circuits require only a reasonable[26] or rational basis,[27] while others require a substantial burden of justification.[28] The Supreme Court has not resolved the conflict;[29] thus, district courts are forced to follow the precedent in their circuit.[30]

III. KARR V. SCHMIDT: ANOTHER SPLINTER?

The Fifth Circuit, sitting en banc, not only reversed the district court, but

[20] 392 F.2d 697, 702 (5th Cir. 1968).
[21] 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970).
[22] 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971).
[23] *See, e.g.*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).
[24] *See* note 19 *supra*, and accompanying text.
[25] *See, e.g.*, King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970).
[26] *See, e.g.*, Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).
[27] Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970). *See also* text accompanying note 22 *supra*.
[28] Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 394 U.S. 937 (1970); *see* note 17 *supra*, and accompanying text.
[29] The Supreme Court has denied certiorari both where the circuit court has sustained the school board (*see* note 22 *supra*, and accompanying text) and where it has overruled them (*see* note 17 *supra*, and accompanying text).
[30] *See, e.g.*, Whitsell v. Pampa Ind. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970); Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).

reversed their previous assumption in *Ferrell v. Dallas Independent School District* that a hair style is a constitutionally protected mode of expression.[31] The district court, relying on *Ferrell*, had held that the way a high school student chooses to present himself physically is a fundamental substantive right protected by the due process clause of the fourteenth amendment.[32] In addition, the district court had held that under the equal protection clause of the fourteenth amendment and corresponding provision of the Texas Constitution,[33] any distinction between those who receive the right of free public education[34] and those who do not receive it must have a reasonable basis and be reasonably related to the purpose for which the classification is made.[35] The district court found that the evidence failed to establish that the length of male students' hair was reasonably related to the educational process. Instead, it established that the classification of male high school students by length of hair was unreasonable and violative of the right of equal protection.[36]

In reversing, the Fifth Circuit stated initially that there is no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer.[37] In addition, the court found that wearing of long hair lacked sufficient communicative content to bring it within the protection of the first amendment[38] and that a regulation restricting length of hair in public high schools did not restrict the constitutional right of privacy.[39] Furthermore, the majority stated that the standard of judicial review was "one of whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective."[40] The court also instructed its district courts in the future to grant an immediate motion to dismiss for failure to state a claim upon which relief can be granted, where a complaint merely alleges the constitutional invalidity of grooming regulations.[41]

It has been established that certain rights are not specifically enumerated in the Bill of Rights, but are said to be peripheral and, thus, still protected by the Constitution.[42] The framers of the Constitution did not intend the first eight amendments to be construed as exhaustive of the basic and fundamental rights. Instead, the ninth amendment added: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[43] The first amendment, as well as others, encompasses a group of "penumbral" rights involving privacy which are protected from governmental intrusion. Without these peripheral rights the specific rights

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[31] *See* note 21 *supra*, and accompanying text.
[32] 320 F. Supp. at 735.
[33] TEX. CONST. art. I, § 3.
[34] *Id.* art. VII, § 1.
[35] 320 F. Supp. at 735. The district court itself was somewhat confused when it applied the "reasonable basis" test after finding a fundamental right. *See* note 8 *supra*, and accompanying text.
[36] *Id.* at 728.
[37] 460 F.2d 609, 613 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).
[38] *Id.* at 613.
[39] *Id.* at 614.
[40] *Id.* at 616.
[41] *Id.* at 618.
[42] Griswold v. Connecticut, 381 U.S. 479 (1965).
[43] U.S. CONST. amend. IX.

would be less secure.[44] Grooming and outward appearances are matters private to each individual and as such would seem to be as fundamental as those listed in the Bill of Rights. Yet the majority of the Fifth Circuit in *Karr* thought it plain that individual liberties should be ranked in a spectrum of importance. At one end were the fundamental liberties such as speech which could be restricted only upon a showing of a compelling state interest.[45] At the other end of this spectrum would lie rights not rising to a fundamental level, such as freedom of appearance, which are subject to the reasonable basis test.[46] In such a case as presented by *Karr* the majority stated that interference with the liberty is temporary and relatively inconsequential. They also added that the regulation left the students with a wide range of personal choice in their dress and grooming.[47] These *de minimus* qualifications should not have any bearing on whether or not a right is fundamental. A fundamental right should not be disregarded through a temporal analysis. If a right appears to be fundamental under the Constitution, that alone should require the court to apply the compelling state interest test.[48]

The majority in *Karr* found that the right to wear hair at a length and in a style that suits the wearer was not a right rising to the level of fundamental significance.[49] Perhaps the majority's spectrum idea is really just a pretense for their real concern: the fear of endless litigation in the area of students' rights.[50] Admittedly, there would be a great likelihood that scores of school officials would be brought into court to justify their restrictions, but this occurs in every area of litigation until there is some clarity. It is grossly unreasonable to deal so summarily with a violation of a liberty because dockets are overcrowded.

Assuming *in arguendo* that hair length is not a fundamental right, the regulation must still withstand the reasonable basis test. The district court in the instant case found that "[t]he overwhelming preponderance of evidence shows, and the Court finds, that the classification of male high school students on the basis of the length of their hair is *utterly unreasonable* and hence in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[51] In so determining, the district court

[44] Various rights guaranteed in the Constitution create zones of privacy. It is those zones or emanations from the written guarantees that help give substance to the actual rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1964). The right of association contained in the penumbra of the first amendment is an example. Board of Educ. v. Barnette, 319 U.S. 624 (1942). Another example is the self-incrimination clause of the fifth amendment which creates a zone of privacy. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[45] Ranking equally with them would be such interests as marital privacy, even though absent from the constitutional command. Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

[46] *Id.*

[47] *Id.* It would appear that for some of these students, this interference would restrict their appearance for from four to six years. This would seem to be no "small" infringement, even if the judicial system could overlook "small infringements of constitutionally guaranteed interests." *Id.* at 620 (Wisdom, J., dissenting).

[48] Following the logic of Griswold v. Connecticut, 381 U.S. 479 (1964), it would appear that the right of privacy emanating from the first amendment would allow fundamental protection to wearers of long hair. *See, e.g.*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *See* also note 16 *supra*, and accompanying text.

[49] 460 F.2d at 613-18.

[50] *Id.* at 621 (Wisdom, J., dissenting).

[51] 320 F. Supp. at 735 (emphasis added).

had occasion to observe the plaintiff as well as seventeen of his witnesses and the same number of defense witnesses.[52] The purpose of the grooming code as stated by the defense witnesses was to prevent interference with the educational process. Hair longer than the code permits was said to bear a reasonable relationship to distractions and disruptions of classes, health and safety of the students, and discipline.[53] The district court found that "[t]he overwhelming preponderance of the relevant, credible evidence in the case indicates, however, that the presence and enforcement of the hair-cut rule causes far more disruption of the classroom instructional process than the hair it seeks to prohibit."[54]

The district court also pointed out that female students have traditionally kept their hair long and clean and there should be no problem with males doing likewise. As to safety in the laboratories, the court again found that the goal was laudable, but like the distraction of classes, requiring short hair was simply not reasonably related to the problem.[55] There was evidence that a greater percentage of students referred to the school administration for discipline had hair bordering on, or in violation of, the code than did the student population as a whole, yet there was no credible evidence that the longer hair caused the discipline problems or that those problems would have been avoided under the hair code.[56]

The defense's witnesses also advanced the proposition that since there are rules in society, it is a valid and reasonable function of the education process to require that rules be obeyed. Instead of teaching respect and adherence to rules, "enforcement of an unreasonable rule undermines respect for other rules and laws which are reasonable and which deserve adherence."[57]

The district court's findings of fact clearly state that the rule regarding hair length and style had no reasonable basis. Thus, two different classes of students were established: those denied a free public education and those granted the right to a free public education. Yet without holding the district court's findings of fact "clearly erroneous,"[58] the majority of the Fifth Circuit announced, per se, that such a regulation of hair length is constitutionally valid.[59] The majority's decision is a "novel and unexplained method of writing the Equal Protection Clause out of our Constitution . . . ."[60]

It is interesting to note that recently the Fifth Circuit, in *Lansdale v. Tyler Junior College*,[61] refused to extend the scope of the *Karr* "per se rule"[62] to

[52] Defense witnesses included three students who served on the ad hoc committee which wrote the rule, a football coach, a science teacher, two typing teachers, two student activities directors, three assistants principals, four principals, and the superintendent of the school. 320 F. Supp. at 733. Plaintiff's witnesses were three members of the Karr family, nine students from district schools, a former teacher, three "expert" witnesses (a psychologist, a college English teacher, a college political science teacher), and the plaintiff himself. 460 F.2d at 612-13.

[53] 320 F. Supp. at 735.

[54] *Id.* at 733.

[55] *Id.* at 733-34.

[56] *Id.* at 734.

[57] *Id.* at 733.

[58] FED. R. CIV. P. 52(a).

[59] 460 F.2d at 613-18.

[60] *Id.* at 623 (Wisdom, J., dissenting).

[61] 470 F.2d 659 (5th Cir. 1972).

[62] *See* note 59 *supra*, and accompanying text.

long-haired students on college campuses. The extension was denied, not because the college student has constitutional rights which the lesser educated students lack, but because, as a matter of law, the college campus marks an appropriate boundary beyond which a public institution can no longer assert that the regulation of this liberty is reasonably related to the fostering or encouragement of education.[63] "The value of the liberty hasn't changed, rather the setting in which it is to be exercised has."[64] The majority suggested several factors which support the proposition that the point between high school and college is the place where the line should be drawn. It is in that period of time a student usually comes within the ambit of the twenty-sixth amendment and the Selective Service Act, where he leaves home for dormitory life, and where the educational institution ceases to deal with him through parents and guardians.[65]

IV. CONCLUSION

The majority of the Fifth Circuit appears to have decided the outcome long before manufacturing the reasons. In their strain to avoid inundation by cases concerning student activity, the majority has put together some very inadequate legal reasoning. Effective school systems require a wide range of official discretion, but courts should not be allowed to grant immediate motions for failure to state a claim merely because the majority does not feel "long hair" rises to a level of fundamental significance. Many people wear their hair longer than the norm purely because they feel it is stylish rather than for communicative purposes. However, those individuals should be given sound reasons why their privacy is invaded before their locks are shorn.

As evidenced by the district court's findings of fact in *Karr*, there is no reasonable basis for hair length regulation in *this* situation. There may be occasions for such regulation, but each decision should rest on its own facts. The facts in *Karr* do not present such an exigent situation. *Karr* presents a situation which deserves normal treatment by the judicial system; yet here it was short circuited. The Fifth Circuit's attempt to evade docket problems has done absolutely nothing for the "long hair" confusion and probably nothing for the respect of the judicial system among the younger segments of society. It is inconsistent for the court to expect students to respect rules when the judges refuse to follow their own rules in judicial analysis.

Roger Q. Beck

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[63] 470 F.2d at 662.

[64] *Id.*

[65] *Id.* at 662-63. The *Lansdale* decision is difficult to reconcile with *Karr*. The majority in *Lansdale* makes "constitutional consequences dependent upon a line arbitrarily drawn between high schools and junior colleges." *Id.* at 666 (Dyer, J., dissenting). "[T]he constitutionally protected right of a 17 year old junior college freshman with respect to his choice of hair length may not be logically demonstrated to differ from that of a 17 or 18 year old high school junior or senior." *Id.* at 665 (Simpson, J., concurring specially). The stance of the court would thus appear to be unsatisfactory because of their arbitrary and inconsistent views.