United States Constitution, and the Court of Appeals was therefore wrong in reversing the District Court's original judgment dismissing the action. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court and write to make clear that, contrary to the concern expressed in the dissent, I find no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance. See *Poe v. Ullman*, 367 U. S. 497, 541-543 (1961) (Harlan, J., dissenting). When the State has an interest in regulating one's personal appearance, as it certainly does in this case, there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

250 The Court today upholds the constitutionality of Suffolk County's regulation limiting the length of a policeman's *250 hair. While the Court only assumes for purposes of its opinion that "the citizenry at large has some sort of `liberty' interest within the Fourteenth Amendment in matters of personal appearance . . . ," *ante,* at 244, I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear. And I find that the rationales offered by the Court to justify the regulation in this case are insufficient to demonstrate its constitutionality. Accordingly, I respectfully dissent.

I

As the Court recognizes, the Fourteenth Amendment's guarantee against the deprivation of liberty "protects substantive aspects of liberty against unconstitutional restrictions by the State." *Ante,* at 244. And we have observed that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). See also *Poe v. Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting).[1] It seems to me manifest that that "full range of conduct" must encompass one's interest in dressing according to his own taste. An individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing
251 his *251 attitude and lifestyle.[2] In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect. See *Roe v. Wade*, 410 U. S. 113 (1973); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U. S. 479, 485 (1965); *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question. When the right has been mentioned, its existence has simply been taken for granted. For instance, the assumption that the right exists is reflected in the 1789 congressional debates over which guarantees should be explicitly articulated in the Bill of Rights. I. Brant. The Bill of Rights 53-67 (1965). There was considerable debate over whether the right of assembly should be expressly mentioned. Congressman Benson of New York argued that its inclusion was necessary to assure that the right would not be infringed by the government. In response, Congressman Sedgwick of Massachusetts indicated:

252 "If the committee were governed by that general *252 principle . . . they might have declared that a *man should have a right to wear his hat if he pleased* . . . but [I] would ask the gentleman whether he thought it

> necessary to enter these trifles in a declaration of rights, *in a Government where none of them were intended to be infringed*." *Id.,* at 54-55 (emphasis added).

Thus, while they did not include it in the Bill of Rights, Sedgwick and his colleagues clearly believed there to be a right in one's personal appearance. And, while they may have regarded the right as a trifle as long as it was honored, they clearly would not have so regarded it if it were infringed.

This Court, too, has taken as an axiom that there is a right in one's personal appearance.[3] Indeed, in 1958 we used the existence of that right as support for our recognition of the right to travel:

> "The right to travel is a part of the `liberty' of which the citizen cannot be deprived without due process of
> 253 law under the Fifth Amendment. . . . *It may be as close to the heart of the individual as the choice* *253 *of what he eats, or wears, or reads*." Kent v. Dulles, 357 U. S. 116, 125 126 (1958) (emphasis added).

To my mind, the right in one's personal appearance is inextricably bound up with the historically recognized right of "every individual to the possession and control of his own person," *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 251 (1891), and, perhaps even more fundamentally, with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States, supra*, at 478 (Brandeis, J., dissenting). In an increasingly crowded society in which it is already extremely difficult to maintain one's identity and personal integrity, it would be distressing, to say the least, if the government could regulate our personal appearance unconfined by any constitutional strictures whatsoever.[4]

254 *254 ||

Acting on its assumption that the Fourteenth Amendment does encompass a right in one's personal appearance, the Court justifies the challenged hair-length regulation on the grounds that such regulations may "be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself." *Ante,* at 248. While fully accepting the aims of "identifiability" and maintenance of esprit de corps, I find no rational relationship between the challenged regulation and these goals.[5]

As for the first justification offered by the Court, I simply do not see how requiring policemen to maintain hair of under a certain length could rationally be argued to contribute to making them identifiable to the public as policemen. Surely, the
255 fact that a uniformed police officer is wearing his hair below his collar will make him *255 no less identifiable as a policeman. And one cannot easily imagine a plainclothes officer being readily identifiable as such simply because his hair does not extend beneath his collar.

As for the Court's second justification, the fact that it is the president of the Patrolmen's Benevolent Association, in his official capacity, who has challenged the regulation here would seem to indicate that the regulation would if anything, decrease rather than increase the police force's esprit de corps.[6] And even if one accepted the argument that substantial similarity in appearance would increase a force's esprit de corps, I simply do not understand how implementation of this regulation could be expected to create any increment in similarity of appearance among members of a uniformed police force. While the regulation prohibits hair below the ears or the collar and limits the length of sideburns, it allows the maintenance of any type of hairstyle, other than a ponytail. Thus, as long as their hair does not go below their collars, two police officers, one with an "Afro" hair style and the other with a crewcut could both be in full compliance with the regulation.[7]

256 *256 The Court cautions us not to view the hair-length regulation in isolation, but rather to examine it "in the context of the county's chosen mode of organization for its police force." *Ante,* at 247. While the Court's caution is well taken, one should also keep in mind, as I fear the Court does not, that what is ultimately under scrutiny is neither the overall structure of the police force nor the uniform and equipment requirements to which its members are subject, but rather

the regulation which dictates acceptable hair lengths. The fact that the uniform requirement, for instance, may be rationally related to the goals of increasing police officer "identifiability" and the maintenance of esprit de corps does absolutely nothing to establish the legitimacy of the hair-length regulation. I see no connection between the regulation and the offered rationales[8] and would accordingly affirm the judgment of the Court of Appeals.

[*] *James vanR. Springer* filed a brief for the International Brotherhood of Police Officers as *amicus curiae* urging affirmance.

[1] Order No. 71-1 (1971), amending Chapter 2 of the Rules and Procedures, Police Department, County of Suffolk, N. Y., provided:

"2/75.0 Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:

"2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

"2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

"2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

"2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wearing of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

"2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards." App. 57-58.

[2] *E. g., Stradley v. Andersen*, 478 F. 2d 188 (CA8 1973); *Greenwald v. Frank*, 40 App. Div. 2d 717, 337 N. Y. S. 2d 225 (1972), aff'd without opinion, 32 N. Y. 2d 862, 299 N. E. 2d 895 (1973). The District Court's dismissal was based on cases upholding the discretionary power of the military and National Guard to regulate a soldier's hair length. See *Gianatasio v. Whyte*, 426 F. 2d 908 (CA2), cert. denied, 400 U. S. 941 (1970); *Raderman v. Kaine*, 411 F. 2d 1102 (CA2), cert. dismissed, 396 U. S. 976 (1969).

[3] 483 F. 2d, at 1130. While it recognized the distinction between citizens and uniformed employees of police and fire departments, the Court of Appeals stated that the individual's status did not bear on the existence of his right but on whether the right was outweighed by a legitimate state interest. *Id.*, at 1130 n. 9.

[4] On remand, the complaint was appropriately amended to reflect the interim renumbering and modification of the hair-grooming regulation. The former sections 2/75.0-2/75.3, see n. 1, *supra*, were modified to provide as follows:

"Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

"A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

"B. If a member chooses to wear sideburns, they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2" in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.

"C. A neatly trimmed mustache may be worn." Rules and Procedures, Police Department, County of Suffolk, N. Y., 2/2.16 (hereinafter Rules and Procedures).

Sections 2/75.4-2/75.5, see n. 1, *supra*, were simply renumbered as 2/2.16, subdivisions D and E, respectively. Deputy Commissioner Rapp's testimony on remand was directed to the regulation as modified. For present purposes, the differences are immaterial.

[5] Illustrating one safety problem, Rapp showed that an assailant could throw an officer off balance by grabbing his hair from the rear and levering against the patrolman's back. After noting that the prohibition against "ponytails" was thus a proper one, the District Court stated:

"The remainder of 2/2.16A, however, bears no relationship to safety but rather related to hair styling. The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his hand. Bulk and length of the hair is not regulated except as it interferes with `the proper wear of any authorized headgear.' Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated. In the remaining subdivisions, sideburns, mustaches and wigs are regulated and beards are barred. No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations." Pet. for Cert. 7a.

The District Court's findings with respect to the relationship between morale and grooming standards are as follows:

"The high morale of police personnel is a matter of grave concern to the department. Proper grooming is an ingredient of the esprit de corps of a good law enforcement organization. The self-esteem generated in the individual and the respect commanded from the public it serves promotes [*sic*] the efficiency of the organization's work. However, with the exception of the general requirement that hair, sideburns and mustaches be neatly trimmed, the regulations do not provide standards for proper grooming. Rather, the standards do nothing more than demand uniformity. Uniformity for uniformity's sake does not establish a public need. Defendant offered no proof that beards, goatees, hair styles that extend below the ears or collar, or sideburns that extend below the lowest part of the ear or beyond 2" in width and do not end with a clean-shaven horizontal line affect the morale of the members of the police department or earn the disrespect of the public." *Id.*, at 7a-8a.

While noting Rapp's testimony that uniformity was required for identification, the District Court stated: "It would appear, however, that the uniform (issued by the department) supplies the necessary identification for police work."

[6] Rules and Procedures 4/1.0-4/1.3.

[7] *Id.*, 6/2.2.

[8] *Id.*, 2/2.5.

[9] *Id.*, 2/5.1.

[10] See, *e. g.*, *id.*, 2/14.0 *et seq.* (Code of Ethics).

[11] The Court of Appeals itself found that while there was no desire on the part of local governments like Suffolk County to create a "military force," "[t]he use of such organization evolved as a *practical administrative solution* . . . ." 483 F. 2d, at 1128-1129 (emphasis added).

[1] We have held that the Constitution's protection of liberty encompasses the interest of parents in having their children learn German, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); the interest of parents in being able to send their children to private as well as public schools, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535 (1925); the interest of citizens in traveling abroad, *Kent* v. *Dulles*, 357 U. S. 116, 125 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505 (1964); the interest of a woman in deciding whether or not to terminate her pregnancy, *Roe* v. *Wade*, 410 U. S. 113, 153 (1973); and the interest of a student in the damage to his reputation caused by a 10-day suspension from school. *Goss* v. *Lopez*, 419 U. S. 565, 574-575 (1975).

[2] While the parties did not address any First Amendment issues in any detail in this Court, governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969).

[3] There has been a substantial amount of lower-court litigation concerning the constitutionality of hair-length and dress-code regulations as applied to schoolchildren. Some of the cases have found the rationales offered for such regulations to be sufficient to support their constitutionality. See, *e. g.*, *King* v. *Saddleback Junior College Dist.*, 445 F. 2d 932 (CA9), cert. denied, 404 U. S. 979 (1971); *Gfell* v. *Rickelman*, 441 F. 2d 444 (CA6 1971); *Ferrell* v. *Dallas Independent School Dist.*, 392 F. 2d 697 (CA5), cert. denied. 393 U. S. 856 (1968). Other cases have found similar regulations unconstitutional. See, *e. g.*, *Richards* v. *Thurston*, 424 F. 2d 1281 (CA1 1970); *Breen* v. *Kahl*, 419 F. 2d 1034 (CA7 1969), cert. denied, 398 U. S. 937 (1970). None of the cases, however, have indicated that the Constitution may offer no protection at all against comprehensive regulation of the personal appearance of the citizenry at large.

[4] History is dotted with instances of governments regulating the personal appearance of their citizens. For instance, in an effort to stimulate his countrymen to adopt a modern lifestyle, Peter the Great issued an edict in 1698 regulating the wearing of beards

throughout Russia. W. & A. Durant, The Age of Louis XIV, p. 398 (1963). Anyone who wanted to grow a beard had to pay an annual tax of from one kopek for a peasant to one hundred rubles for a rich merchant. *Ibid.* Of those who could not afford the "beard tax," there were many "who, after having their beards shaved off, saved them preciously, in order to have them placed in their coffins, fearing that they would not be allowed to enter heaven without them." J. Robinson, Readings in European History 390 (1906).

There are more recent instances, too, of governments regulating the personal appearance of their citizens. See, *e. g.,* N. Y. Times, Feb. 18, 1974, p. 22, col. 4 (Czech police stop long-haired young men, telling them to get haircuts); *id.,* July 23, 1972, p. 4, col. 1 (Libyan Government tells youths to trim hair and wear more sober clothes or submit themselves for training in the army); *id.,* July 7, 1971, p. 22, col. 8 (over 1,000 young men rounded up and given haircuts by South Korean police in what was described by government officials as a "social purification" campaign); *id.,* Oct. 13, 1970, p. 11, col. 1 (police force more than 1,400 South Vietnamese youths to cut their hair). It is inconceivable to me that the Constitution would offer no protection whatsoever against the carrying out of similar actions by either our Federal or State Governments.

[5] A policeman does not surrender his right in his own personal appearance simply by joining the police force. See *Tinker* v. *Des Moines School Dist.,* 393 U. S., at 506. I agree with the Court of Appeals that the "status of the individual raising the claim bears [not on the existence of the right, but rather] on the question of whether the right is outweighed by a legitimate state interest." 483 F. 2d, at 1130 n. 9. Thus, the need to evaluate the governmental interest and the connection between it and the challenged governmental action is as present when the party whose rights have allegedly been violated is a public employee as when he is a private employee. See *CSC* v. *Letter Carriers,* 413 U. S. 548, 564-567 (1973). To hold that citizens somehow automatically give up constitutional rights by becoming public employees would mean that almost 15 million American citizens are currently affected by having "executed" such "automatic waivers." Statistical Abstract of the United States 1975, p. 272.

[6] Nor, to say the least, is the esprit de corps argument bolstered by the fact that the International Brotherhood of Police Officers, a 25,000-member union representing uniformed police officers, has filed a brief as *amicus curiae* arguing that the challenged regulation is unconstitutional.

[7] The regulation itself eschews what would appear to be a less intrusive means of achieving similarity in the hair length of on-duty officers. According to the regulation, a policeman cannot comply with the hair-length requirements by wearing a wig with hair of the proper length while on duty. The regulation prohibits the wearing of wigs or hairpieces "on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration." *Ante,* at 240 n. 1. Thus, while the regulation in terms applies to grooming standards of policemen while on duty, the hair-length provision effectively controls both on-duty and off-duty appearance.

[8] Because, to my mind, the challenged regulation fails to pass even a minimal degree of scrutiny, there is no need to determine whether, given the nature of the interests involved and the degree to which they are affected, the application of a more heightened scrutiny would be appropriate.

Save trees - read court opinions online on Google Scholar.

The City of Chicago v. Wilson, 389 N.E.2d 522 (Il. 1978)

75 Ill.2d 525 (1978)
389 N.E.2d 522

THE CITY OF CHICAGO, Appellee,
v.
WALLACE WILSON et al., Appellants.

No. 49229.

Supreme Court of Illinois.

Opinion filed May 26, 1978.

527 *526 *527 Wendy Meltzer and Thomas F. Geraghty, of the Northwestern Legal Assistance Clinic, of Chicago, and David Goldberger, of the American Civil Liberties Union, of Chicago, for appellants.

528 *528 William R. Quinlan, Corporation Counsel, of Chicago (Daniel Pascale and Mary Denise Cahill, Assistant Corporation Counsel, of counsel), for appellee.

Judgments reversed; cause remanded.

MR. JUSTICE MORAN delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, the defendants, Wallace Wilson and Kim Kimberley, were convicted of having violated section 192-8 of the Municipal Code of the city of Chicago (Code), which prohibits a person from wearing clothing of the opposite sex with the intent to conceal his or her sex. Each defendant was fined $100. The appellate court affirmed (44 Ill. App.3d 620), and this court granted leave to appeal.

Defendants were arrested on February 18, 1974, minutes after they emerged from a restaurant where they had had breakfast. Defendant Wilson was wearing a black, knee-length dress, a fur coat, nylon stockings and a black wig. Defendant Kimberley had a bouffant hair style and was wearing a pants suit, high-heeled shoes and cosmetic makeup. Defendants were taken to the police station and were required to pose for pictures in various stages of undress. Both defendants were wearing brassieres and garter belts; both had male genitals.

Prior to trial, defendants moved to dismiss the complaint on the grounds that section 192-8 was unconstitutional in that it denied them equal protection of the law and infringed upon their freedom of expression and privacy. This motion was denied.

At trial, the defendants testified that they were transsexuals, and were, at the time of their arrests, undergoing psychiatric therapy in preparation for a sex reassignment operation. As part of this therapy, both defendants stated, they were
529 required to wear female clothing and to adopt a female life-style. Kimberley stated *529 that he had explained this to the police at the time of his arrest. Both defendants said they had been transsexuals all of their lives and thought of themselves as females. The question of arrest is not an issue.

Section 192-8 of the Code provides:

> "Any person who shall appear in a public place * * * in a dress not belonging to his or her sex, with intent to conceal his or her sex, * * * shall be fined not less than twenty dollars nor more than five hundred dollars for each offense."

Defendants contend that section 192-8 is unconstitutionally vague, overly broad, and denies them equal protection under the law on account of sex. They argue that the section is overly broad, both on its face and as applied to them, in that it denies them freedom of expression protected by the first amendment and personal liberties protected by the ninth and fourteenth amendments of the United States Constitution.

The city asserts that section 192-8 is neither vague nor overly broad and that the section does not deny defendants equal protection under the law.

We find that the above-cited section, as applied to defendants here, is unconstitutional, and in so doing we do not, therefore, reach the issues of vagueness and equal protection.

The existence of unspecified constitutionally protected freedoms cannot be doubted. *E.g., Roe v. Wade* (1973), 410 U.S. 113, 152-54, 35 L.Ed.2d 147, 176-78, 93 S.Ct. 705, 726-27; *Griswold v. Connecticut* (1965), 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678.

In *Kelley v. Johnson* (1976), 425 U.S. 238, 47 L.Ed.2d 708, 96 S.Ct. 1440, the Supreme Court was confronted with the question of whether one's choice of appearance was constitutionally protected from governmental infringement. At
530 issue was an order promulgated by petitioner, the commissioner of police for Suffolk *530 County, New York, which order established hair-grooming standards for male members of the police force. The court acknowledged that the due process clause of the fourteenth amendment "affords not only a procedural guarantee against deprivation of `liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." (425 U.S. 238, 244, 47 L.Ed.2d 708, 713, 96 S.Ct. 1440, 1444.) The court observed, however, that its prior cases offered little, if any, guidance on whether the citizenry at large has some sort of liberty interest in matters of personal appearance. It assumed for purposes of its opinion that such did exist.

In determining the scope of that interest and the justification that would warrant its infringement, the court distinguished claims asserted by individuals of a uniformed police department from claims by the citizenry at large, noting that the distinction was "highly significant." (425 U.S. 238, 245, 47 L.Ed.2d 708, 714, 96 S.Ct. 1440, 1444.) The court held that, in the context of the case before it, the burden rested with the respondent police officer to demonstrate that there was no rational connection between the regulation and the police department's legitimate function of promoting safety of persons and property. After analyzing the need for uniformity and discipline within the ranks of the police department, the court concluded that the challenged order was rationally related to two legitimate objectives: first, "to make police officers readily recognizable to the members of the public," and second, to foster the "espirit de corps which such similarity is felt to inculcate within the police force itself." (425 U.S. 238, 248, 7 L.Ed.2d 708, 716, 96 S.Ct. 1440, 1446.) Mr. Justice Powell, who specially concurred, noted that "[w]hen the State has an interest in regulating one's personal appearance * * * there must be a weighing of the degree of infringement of the individual's liberty interest against the
531 need for the regulation." 425 U.S. 238, *531 249, 47 L.Ed.2d 708, 717, 96 S.Ct. 1440, 1447.

This court has long recognized restrictions on the State's power to regulate matters pertinent to one's choice of a life-style which has not been demonstrated to be harmful to society's health, safety or welfare. *E.g., People v. Fries* (1969), 42 Ill.2d 446 (statute requiring the wearing of a motorcycle helmet held invalid); *City of Chicago v. Drake Hotel Co.* (1916), 274 Ill. 408 (ordinance prohibiting public dancing in restaurants held invalid); *Town of Cortland v. Larson* (1916), 273 Ill. 602 (ordinance prohibiting the private possession of liquor held invalid); *City of Zion v. Behrens* (1914), 262 Ill. 510 (ordinance prohibiting smoking in public parks and on public streets held invalid).

In *Haller Sign Works v. Physical Culture Training School* (1911), 249 Ill. 436, a case which involved the regulation of billboards for aesthetic purposes, this court noted:

> "The citizen has always been supposed to be free to determine the style of architecture of his house, the color of the paint that he puts thereon, the number and character of trees he will plant, the style and quality of the clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the highly cultured may find on every street in every town and city many things that are not only open to criticism but shocking to the aesthetic taste." 249 Ill. 436, 443.)

The notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with "values of privacy, self-identity, autonomy, and personal integrity that * * *
532 the Constitution was designed to protect." *Kelley* *532 *v. Johnson* (1976), 425 U.S. 238, 251, 47 L.Ed.2d 708, 718, 96

S.Ct. 1440, 1447 (Marshall, J., dissenting).

Finding that the Constitution provides an individual some measure of protection with regard to his choice of appearance answers only the initial issue. Resolution of the second issue is more difficult: to determine the circumstances under which the interest can be infringed. It is at this juncture that *Kelley,* and cases subsequent thereto, offer little guidance. With the exception of one Federal decision — *Williams v. Kleppe* (1st Cir.1976), 539 F.2d 803 — all of the cases subsequent to *Kelley* have involved regulations set in the context of an organized governmental activity. (*E.g., East Hartford Education Association v. Board of Education* (2d Cir.1977), 562 F.2d 838, 860-63.) Such circumstance is distinguished from that in which a regulation, as here, controls the dress of the citizens at large. This distinction, as noted in *Kelley,* is "highly significant."

Even though one's choice of appearance is not considered a "fundamental" right (*Richards v. Thurston* (1st Cir.1970), 424 F.2d 1281, 1284-85), the State is not relieved from showing some justification for its intrusion. As *Kelley* suggests, the degree of protection to be accorded an individual's choice of appearance is dependent upon the context in which the right is asserted. It is, therefore, incumbent upon the court to analyze both the circumstances under which the right is asserted and the reasons which the State offers for its intrusion.

In this court, the city has asserted four reasons for the total ban against cross-dressing in public: (1) to protect citizens from being misled or defrauded; (2) to aid in the description and detection of criminals; (3) to prevent crimes in washrooms; and (4) to prevent inherently antisocial conduct which is contrary to the accepted norms of our society. The record, however, contains no evidence to support these reasons.

533 *533 If we assume that the ordinance is, in part, directed toward curbing criminal activity, the city has failed to demonstrate any justification for infringing upon the defendants' choice of public dress under the circumstances of this case.

Both defendants testified that they are transsexuals and were, at the time of their arrest, undergoing psychiatric therapy in preparation for a sex-reassignment operation. (For a general discussion of the therapy required prior to sex-reassignment surgery, see Comment, *M.P. v. J.T.: An Enlightened Perspective on Transsexualism,* 6 Cap. U.L. Rev. 403, 407-10 (1977); Note, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 Conn. L. Rev. 288, 296 n. 28 (1975); Comment, *Transsexualism, Sex Reassignment Surgery and the Law,* 56 Cornell L. Rev. 963, 972-74 (1971) (wherein it is noted that cross-dressing is recommended as part of a sex-reassignment preoperative therapy program).) Neither of the defendants was engaged in deviate sexual conduct or any other criminal activity. Absent evidence to the contrary, we cannot assume that individuals who cross-dress for purposes of therapy are prone to commit crimes.

The city's fourth reason (as noted above) for prohibiting the defendants' choice of public dress is apparently directed at protecting the public morals. In its brief, however, the city has not articulated the manner in which the ordinance is designed to protect the public morals. It is presumably believed that cross-dressing in public is offensive to the general public's aesthetic preference. There is no evidence, however, that cross-dressing, when done as a part of a preoperative therapy program or otherwise, is, in and of itself, harmful to society. In this case, the aesthetic preference of society must be balanced against the individual's well-being.

534 Through the enactment of section 17(1)(d) of the Vital Records Act (Ill. Rev. Stat. 1977, ch. 111 1/2, par. *534 73-17(1)(d)), which authorizes the issuance of a new certificate of birth following sex-reassignment surgery, the legislature has implicitly recognized the necessity and validity of such surgery. It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for such surgery. Individuals contemplating such surgery should, in consultation with their doctors, be entitled to pursue the therapy necessary to insure the correctness of their decision.

Inasmuch as the city has offered no evidence to substantiate its reasons for infringing on the defendants' choice of dress under the circumstances of this case, we do not find the ordinance invalid on its face; however, we do find that section 192-8 as applied to the defendants is an unconstitutional infringement of their liberty interest. The judgments of

the appellate court and the circuit court are reversed and the cause is remanded to the circuit court with directions to dismiss.

Judgments reversed; cause remanded, with directions.

MR. CHIEF JUSTICE WARD, dissenting:

The majority states that it does not find the ordinance to be unconstitutional on its face, but it concludes that the ordinance was unconstitutional as applied to these defendants. That conclusion is founded on the premise that the defendants' conduct was part of a psychiatrically prescribed program to prepare them for sex-reassignment surgery. The only testimony in support of the defendants' claim was that of the defendants themselves. No psychiatrist was called to testify that the defendants had been diagnosed as transsexuals or that cross-dressing had been prescribed as preoperative therapy. No letter or statement was offered in evidence. Neither defendant named the psychiatrist from whom he was receiving treatment. *535 Indeed, the defendant Wilson, on cross-examination, testified that he didn't know what sex-reassignment surgery would involve and said he did not know the doctor who would perform it.

The majority ignores a basic consideration — that the credibility to be given the defendants' testimony was for the trial judge — and proceeds to discuss therapy in preparation for sex-reassignment surgery. That is a subject of sensitivity and importance, but I consider it is not reached here.

UNDERWOOD and RYAN, JJ., join in this dissent.

Save trees - read court opinions online on Google Scholar.

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

424 F.2d 1281 (1970)

Robert RICHARDS, Jr., a minor by his father and next friend Robert Richards, Plaintiff, Appellee,

v.

Roger THURSTON, as Principal of Marlboro High School, Defendant, Appellant.

No. 7455.

United States Court of Appeals, First Circuit.

Heard March 2, 1970.
Decided April 28, 1970.

David G. Hanrahan, Boston, Mass., with whom William J. Brennan, City Solicitor, George A. McLaughlin, Jr., and The McLaughlin Brothers, Boston, Mass., were on brief, for appellant.

Henry P. Monaghan, Boston, Mass., with whom Daniel D. Levenson, Spencer Neth and John H. Henn, Boston, Mass., were on brief, for appellee.

Gerard F. Doherty, Boston, Mass., on brief for Massachusetts Secondary School Principals Association, amicus curiae.

Before ALDRICH, Chief Judge, McENTEE and COFFIN, Circuit Judges.

COFFIN, Circuit Judge.

1282 Plaintiff, a seventeen year old boy, was suspended from school at the beginning *1282 of his senior year because he refused to cut his hair, which a local newspaper story introduced into evidence described as "falling loosely about the shoulders". Defendant, the principal of the high school in Marlboro, Massachusetts, admits that there was no written school regulation governing hair length or style but contends that students and parents were aware that "unusually long hair" was not permitted.

On these sparse facts the parties submitted the case posed by plaintiff's request for injunctive relief against the deprivation of his rights under 42 U.S. C. § 1983. Each relied on the failure of the other to sustain his burden of proof, plaintiff claiming that he should prevail in the absence of evidence that his appearance had caused any disciplinary problems, and defendant maintaining that plaintiff had failed to carry his burden of showing either that a fundamental right had been infringed or that defendant had not been motivated by a legitimate school concern. The district court granted plaintiff's request for a permanent injunction and ordered plaintiff reinstated. Richards v. Thurston, 304 F.Supp. 449 (D.Mass.1969).

Defendant, apart from his argument on the merits, insists that the district court erred in not abstaining pending consideration by the courts of the Commonwealth of Massachusetts. We are in entire sympathy with the proposition that questions involving school board authority ought to be resolved whenever possible on a nonconstitutional basis.[1] In this case, however, we agree with the district court that Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965), a case containing similar facts, forecloses that nonconstitutional approach and clearly suggests that the courts of Massachusetts would have ruled against plaintiff on these facts.[2]

Plaintiff, too, advances a narrow argument for prevailing — the lack of any specific regulation authorizing suspension for unusual hair styles. We do not accept the opportunity. We take as given defendant's allegation in his answer that parents and students — including plaintiff — were aware that unusually long hair was not permitted. Moreover, we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books.

Coming to the merits, we are aware of a thicket of recent cases concerning a student's wearing of long hair in a public
1283 high school.[3] While several of the *1283 decisions holding against the student have relied on the prior occurrence of disruptions caused by unusual hair styles,[4] we think it fair to say that many of those courts would hold against the student on a barren record such as ours, on the grounds that the student had not demonstrated the importance of the right he asserts. On the other hand, in few of the cases holding for the student was there any evidence of prior disruptions caused by hair styles. Despite the obvious disagreement over the proper analytical framework, each of the "pro-hair" courts held explicitly or implicitly that the school authorities failed to carry their burden of justifying the regulation against long hair.

What appears superficially as a dispute over which side has the burden of persuasion is, however, a very fundamental dispute over the extent to which the Constitution protects such uniquely personal aspects of one's life as the length of his hair, for the view one takes of the constitutional basis — if any — for the right asserted may foreshadow both the placement and weight of the evidentiary burden which he imposes on the parties before him. For this reason, we resist the understandable temptation, when one is not the final arbiter of so basic a constitutional issue, to proceed directly to an application of the constitutional doctrine without attempting to ascertain its source as precisely as possible.

It is perhaps an easier task to say what theories we think do *not* apply here. We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality. However, we reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507-508, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *see* Cowgill v. California, 396 U.S. 371, 90 S.Ct. 613, 24 L.Ed.2d 590 (1970), Harlan, J. concurring; *cf.* Close v. Lederle, **424 F.2d** 988 (1st Cir. 1970), filed this date. That protection extends to a broad panoply of methods of expression, but as the non-verbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote. Nor do we see the logic of expanding the right of marital privacy identified in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), into a right to go public as one pleases.[5]

1284 *1284 Our rejection of those constitutional protections in this case is not intended to denigrate the understandable desire of people to be let alone in the governance of those activities which may be deemed uniquely personal. As we discuss below, we believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests.[6]

The idea that there are substantive rights protected by the "liberty" assurance of the Due Process Clause is almost too well established to require discussion. Many of the cases have involved rights expressly guaranteed by one or more of the first eight Amendments.[7] But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the Court to preclude the existence of other substantive rights implicit in the "liberty" assurance of the Due Process Clause. In the 1920's the Court held that such "liberty" includes the right of parents to send their children to private schools as well as public schools and to have their children taught the German language. Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). In 1958, the Court held that "the right to travel [to a foreign country] is a party of the `liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." Kent v. Dulles, 357 U.S. 116, 125, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958); followed in Aptheker v. Secretary of State, 378 U.S. 500, 505-506, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). More recently, the Court, without specifically ascribing its source, established the right to travel interstate as a right fundamental to our Federal Union despite the absence of any specific mention thereof in the Constitution. United States v. Guest, 383 U.S. 745, 757, 759, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); Shapiro v. Thompson, 394 U.S. 618, 629-631, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Such a right of interstate travel being more inherent in and essential to a Federal Union than the right to travel abroad established in *Kent* and *Aptheker*,[8] we can only conclude that such right must a fortiori be an aspect of the "liberty" assured by the Due Process Clause.

We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with *1285 those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. As the court stated in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L.Ed. 734 (1891):

> "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 restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, `The right to one's person may be said to be a right of complete immunity: to be let alone.'"[9]

Indeed, a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.[10]

We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.[11] The debate concerning the First Amendment is illuminating. The specification of the right of assembly was deemed mere surplusage by some, on the grounds that the government had no more power to restrict assembly than it did to tell a man to wear a hat or when to get up in the morning. The response by Page of Virginia pointed out that even those "trivial" rights had been known to have been impaired — to the Colonists' consternation — but that the right of assembly ought to be specified since it was so basic to other rights.[12] The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance.[13] We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes.

Determining that a personal liberty is involved answers only the first of two questions. The second is whether there is an outweighing state interest justifying the intrusion. The answer to this question must take into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served. For example, the right to appear au naturel at home is relinquished when one sets foot on a public sidewalk. Equally obvious, the very nature of public school education requires limitations on one's personal liberty in order for the learning process to proceed. Finally, a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year. *See* Westley v. Rossi, 305 F.Supp. at 713-714.

*1286 Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.

In the absence of an inherent, self-evident justification on the face of the rule, we conclude that the burden was on the defendant. Since he offered no justification, the judgment of the district court must be affirmed.

Affirmed.

[1] For a thoughtful discussion, see Goldstein, The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis, 117 U.Pa.L.Rev. 373 (1969).

[2] *See* Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); McNeese v. Board of Education, 373 U.S. 668, 671-674, 83 S.Ct. 1433, 10 L.Ed. 2d 622 (1963).

[3] Decisions holding against the student include the following: Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125 (1968); Davis v. Firment, 269 F.Supp. 524 (E.D.La.1967), aff'd, 408 F.2d

1085 (5th Cir. 1969); Crews v. Clones, 303 F.Supp. 1370 (S.D.Ind.1969); Brick v. Board of Education, 305 F.Supp. 1316 (D.Colo.1969); Stevenson v. Wheeler County Board of Education, 306 F.Supp. 97 (S.D.Ga.1969) (mustaches); Akin v. Board of Education, 262 Cal.App.2d 161, 68 Cal.Rptr. 557 (1968); Neuhaus v. Torrey, 310 F.Supp. 192 (N.D.Cal., March 10, 1970); and Leonard v. School Committee of Attleboro, *supra*. Several decisions gave considerable weight to the evidence of prior disruptions of the school atmosphere caused by unusual hair styles. *E. g.,Ferrell, Davis, Brick*. The *Crews* decision relied on the fact of prior disruptions concerning the particular plaintiff there involved.

Ranged against these authorities are the following cases holding for the student: Finot v. Pasadena City Board of Education, 250 Cal.App.2d 189, 58 Cal. Rptr. 520 (1967) (First Amendment); Meyers v. Arcata Union High School District, 269 Cal.App.2d 549, 75 Cal. Rptr. 68, 72-73 (1969) (First Amendment); Sims v. Colfax Community School District, 307 F.Supp. 485 (S.D. Iowa 1970) (Due Process Clause protects female student's long hair); Breen v. Kahl, 296 F.Supp. 702 (W.D.Wis. 1969) (Due Process Clause), aff'd, 419 **F.2d** 1034 (7th Cir. 1969) ("penumbra" of First Amendment or Ninth Amendment); Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (S.D.Tex. 1969) (Equal Protection Clause in a junior college context); Zachry v. Brown, 299 F.Supp. 1360 (N.D.Ala.1967) (Equal Protection Clause); Griffin v. Tatum, 300 F.Supp. 60 (M.D.Ala.1969) (Equal Protection Clause and Due Process Clause); Westley v. Rossi, 305 F. Supp. 706 (D.Minn.1969) (same).

In Farrell v. Smith, 310 F.Supp. 732 (D.Me.1970), the court explicitly accepted the proposition that the right to wear one's hair at any length is an aspect of personal liberty protected by the Due Process Clause of the Fourteenth Amendment, following the "pro-hair" cases cited above. However, the court on the facts before it held that the state vocational school had met its substantial burden of justification by a showing that neatness of appearance enhanced the employment opportunities of its students.

[4] *See also* two Fifth Circuit "freedom button" cases expressly differentiated because of the disruptive response to the plaintiffs in the latter case which had not occurred in the former: Burnside v. Byars, 363 **F.2d** 744 (5th Cir. 1966), and Blackwell v. Issaquena County Board of Education, 363 **F.2d** 749 (5th Cir. 1966).

[5] That "privacy" has not been generally understood in the latter sense is indicated by the definition of privacy given by Alan F. Westin in his wide-ranging book Privacy and Freedom, (1967), at p. 7: "Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

[6] The fact that the "liberty" protected by the Due Process Clause includes such a sphere of personal liberty does *not* require the state to provide a special forum for the exercise of such personal liberty. Moreover, having provided a forum, the state may revoke it when the exercise of personal liberty becomes inimical to the societal interests affected by such use of the state's forum. *Cf.,* Close v. Lederle, *supra*. Of course, when the activity takes on the coloration of a First Amendment right, only a more compelling interest will justify a limitation on such activity. United States v. O'Brien, *supra*, 391 U.S. at 376-377, 88 S.Ct. 1673.

[7] *See e. g.,* Schneider v. New Jersey, 308 U.S. 147, 160, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Cantwell v. Connecticut, 310 U.S. 296, 303-305, 60 S.Ct. 900, 84 L. Ed. 1213 (1940); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia Bar, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964).

[8] *See* discussion in *Guest, supra*, and *Shapiro, supra*, and *see* Stewart, J. concurring in *Shapiro*, 394 U.S. at 642-643, 89 S.Ct. 1322.

[9] In more recent cases, the Court has weighed this right to the control over one's own person against the state interest underlying the state's intrusion. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952); Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957); *cf.* Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[10] *See* W. and A. Durant, The Story of Civilization: Part VIII, The Age of Louis XIV, 396-410 (1963) (account of Peter the Great's proscription of beards).

[11] Redlich, "Are There `Certain Rights . . . Retained By The People'?", 37 N.Y.U.L.Rev. 787, 804-812 (1963).

[12] This exchange is reported and discussed in Irving Brant's The Bill of Rights, 53-67 (1965). As the author there points out, the reference to the wearing of hats had considerable meaning to the participants of the debates, recalling William Penn's trial for disturbing the peace. Upon entering the courtroom bareheaded, Penn was directed by a court officer to don his hat, after which he was fined by the court for not doffing his hat.

[13] Remarks of James Madison, reported and discussed in Redlich article cited in n. 10 *supra*.

Save trees - read court opinions online on Google Scholar.

Meyer v. Nebraska, 262 U.S. 390 (1923)

262 U.S. 390 (1923)

MEYER
v.
STATE OF NEBRASKA.

No. 325.

Supreme Court of United States.

Argued February 23, 1923.
Decided June 4, 1923.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

391 *391 *Mr. Charles E. Sandall,* with whom *Mr. I.L. Albert, Mr. Arthur G. Wray* and *Mr. August Wagner* were on the briefs, for plaintiff in error.

Mr. Mason Wheeler and *Mr. O.S. Spillman,* with whom *Mr. Clarence A. Davis,* Attorney General of the State of Nebraska, and *Mr. Hugh La Master* were on the brief, for defendant in error.

Mr. William D. Guthrie and *Mr. Bernard Hershkopf,* by leave of court, filed a brief as *amici curice.*

396 *396 MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School, he unlawfully taught the subject of reading in
397 the German language to Raymond Parpart, a child of ten years, who had not attained *397 and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows [Laws 1919, c. 249.]:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

"Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100) or be confined in the county jail for any period not exceeding thirty days for each offense.

"Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

The Supreme Court of the State affirmed the judgment of conviction. 107 Neb. 657. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion.

398 "The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, *398 who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that

language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. *Pohl* v. *State*, 132 N.E. (Ohio) 20; *State* v. *Bartels*, 181 N.W. (Ia.) 508.

"It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage.
399 *399 Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence."

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter-House Cases*, 16 Wall. 36; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U.S. 746; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Minnesota* v. *Barber*, 136 U.S. 313; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Lochner* v. *New York*, 198 U.S. 45; *Twining* v. *New Jersey*, 211 U.S. 78; *Chicago, Burlington & Quincy R.R. Co.* v. *McGuire*, 219 U.S. 549; *Truax* v. *Raich*, 239 U.S. 33; *Adams* v. *Tanner*, 244 U.S. 590; *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357; *Truax* v. *Corrigan*, 257 U.S. 312; *Adkins* v. *Children's Hospital*, 261 U.S. 525; *Wyeth* v. *Cambridge Board of*
400 *Health*, 200 Mass. 474. The established doctrine is that this liberty may not be interfered *400 with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U.S. 133, 137.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that "the so-called ancient or dead languages" are
401 not "within the spirit or the purpose of *401 the act." *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 187 N.W. 927. Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our
402 guardians are to be common, and their children are to be common, and no parent is to know his own child, *402 nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present
403 controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v.* *403 *Tanner, supra*, p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's

health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[See the separate opinion of MR. JUSTICE HOLMES, concurred in by MR. JUSTICE SUTHERLAND, in the next case, at p. 412, *infra*.]

Save trees - read court opinions online on Google Scholar.