

December 1999

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Deborah Pergament  
*Cook County Office of the Public Guardian*

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### Recommended Citation

Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 Chi.-Kent L. Rev. 41 (1999).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol75/iss1/4>

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# IT'S NOT JUST HAIR: HISTORICAL AND CULTURAL CONSIDERATIONS FOR AN EMERGING TECHNOLOGY

DEBORAH PERGAMENT\*

## INTRODUCTION

Nothing is more indicative of the importance currently being attached to hair growth by the general populace than the barrage of cases reaching the courts evidencing the attempt by one segment of society to control the plumage of another.

—Justice William O. Douglas

Justice Douglas wrote those lines twenty-five years ago during a time when the nation and the court were examining the right of the state to control the appearance and actions of individuals purposefully attempting to flaunt social conventions about gender, race, and status through both action and physical appearance.<sup>1</sup> Nothing symbolized the struggle more than the long flowing tresses of white youths identified with the hippie movement<sup>2</sup> or the large “Afro” hairstyles of prominent African-American radical activists like Angela Davis.

Today, social and legal issues concerning hair are reemerging. Much of the interest remains focused on the right of the state and other institutions to control individual appearance. Increasingly, however, concerns about hair focus on its use as a source of information about an individual’s genetic make-up and/or health

\* Assistant Public Guardian, Cook County Office of the Public Guardian. J.D., Case Western Reserve University; M.L.S. and M.A., Indiana University; A.B., Mount Holyoke College. I would like to thank Lori B. Andrews, Nanette R. Elster, and Dorothy Nelkin for reading earlier drafts of this Article. I would also like to acknowledge the late Beth Fine Kaplan for providing invaluable advice and insights into the importance of hair to personal identity. The ideas and opinions contained in this Article are my own and not the official policy of the Cook County Office of the Public Guardian.

1. See *Ham v. South Carolina*, 409 U.S. 524, 529-30 (1973) (Douglas, J., concurring in part and dissenting in part) (reasoning that the majority should have held that a trial judge abused its discretion when it precluded the defendant from inquiring prospective jurors about their potential prejudices against men with beards).

2. The most obvious example of the importance of hair as a social symbol during the 1960s is the critically acclaimed and popular musical salute to a “curly, fuzzy, snaggy, shaggy, ratty, matty, shining, gleaming, steaming, knotted, twisted, beaded, braided, powdered, flowered, bangled, tangled and spangled” phenomenon called *Hair*. See *HAIR: THE AMERICAN TRIBAL LOVE-ROCK MUSICAL* (RCA VICTOR 1968).

status. Advances in technology and keratin analysis make hair an increasingly important substance for DNA testing,<sup>3</sup> drug testing,<sup>4</sup> and, the most recently announced development, cancer screening.<sup>5</sup> Because hair is a regenerative body part that is easily replenished and obtainable by noninvasive and almost painless measures, it would appear that its use for these types of analyses is relatively benign. Yet, this is not necessarily the case when the potential use of hair as a source of information about an individual's social and genetic identity is considered.

In many cultures, hair plays an important role in the development of social constructs about the body. For example, hair-grooming rituals have symbolic and religious meanings, and many social taboos are centered around hair. Moreover, past uses of hair as a means of social control and dehumanization have influenced the meaning of "hair taking" by the state. This Article argues that these social meanings must be considered in the development of a response to the use of hair as a source of genetic and health information.

## I. THE BIOLOGY OF HUMAN HAIR

Since clothing has met the thermal insulation needs of humans, hair has become primarily a vestigial structure.<sup>6</sup> Hair is an appendage of the skin, and there are several different types of hair that develop throughout a human's lifespan.<sup>7</sup> Lanugo hair is the first type of hair

3. See Mark Hansen, *A Comeback for Hair Evidence*, 84 A.B.A. J., May 1998, at 66, 66 (describing how mitochondrial DNA testing is revolutionizing the field of forensic hair evidence).

4. A discussion of the methodology involved in testing hair to detect illicit drug use is beyond the scope of this article. For a review of recent developments, see generally V. Cirmele et al., *Supercritical Fluid Extraction of Drugs in Drug Addict Hair*, 673 J. CHROMATOGRAPHY BIOMEDICAL APPLICATIONS 173, 173-81 (1995) (describing methods to extract opiates from hair samples of addicts); P. Kintz et al., *Simultaneous Determination of Amphetamine, Methamphetamine 3, 4-Methylenedioxyamphetamine, and 3, 4-Methylenedioxymethamphetamine in Human Hair By Gas Chromatography-Mass Spectrometry*, 670 J. CHROMATOGRAPHY BIOMEDICAL APPLICATIONS 162, 162-66 (1995) (describing the uses of a specific assay in the evaluation of the deposition of the drugs in hair obtained from various parts of the anatomy of a stimulant abuser); Hans Sachs & Pascal Kintz, *Testing for Drugs in Hair: Critical Review of Chromatographic Procedures Since 1992*, 713 J. CHROMATOGRAPHY BIOMEDICAL APPLICATIONS 147 (1998).

5. See V. James et al., *Using Hair to Screen for Breast Cancer*, NATURE, Mar. 1999, at 33, 33 (describing a study of synchrotron X-ray scattering analysis of hair samples that determined there is a consistent change in the scattering patterns among breast cancer patients).

6. See Arthur P. Bertolino et al., *Biology of Hair Follicles*, in 1 DERMATOLOGY IN GENERAL MEDICINE 289, 289 (Thomas B. Fitzpatrick, M.D. et al. eds., 1993).

7. See *id.* at 292.

to develop on the human body.<sup>8</sup> Lanugo hair is a layer of downy, slender hair that becomes evident in the second trimester of fetal life and is entirely shed before or shortly after birth.<sup>9</sup> During the first few months of infancy, down hair, or vellus hair, develops.<sup>10</sup> This hair is fine, short, unpigmented and covers every part of the body except the palms of the hands, the soles of the feet, undersurfaces of the fingers and toes, and a few other places.<sup>11</sup> At puberty, vellus hair is supplemented by a longer, coarser, and heavily pigmented hair called terminal hair.<sup>12</sup> Terminal hair develops in the armpits, genital regions, on the face (in all males and some females), and sometimes on parts of the trunk and limbs.<sup>13</sup>

Mature hair shafts are nonliving biologic fibers.<sup>14</sup> The typical mammalian hair consists of the shaft, which is found protruding above the skin, and the root, which is sunk in a pit (follicle) and found beneath the skin surface.<sup>15</sup> Except for a few growing cells at the base of the root, hair is dead tissue that is composed primarily of keratin and related proteins.<sup>16</sup> The hair follicle is a tubelike pocket of the epidermis that encloses a small section of the dermis at its base.<sup>17</sup> As hair shafts are pushed upward from the follicle's base, they become keratinized (hardened) and undergo pigmentation.<sup>18</sup> Hair is continually shed and renewed by the operation of alternating cycles of growth, rest, fallout, and renewed growth.<sup>19</sup> The average life of a hair shaft varies from about three months, for vellus hairs, to three to five years, for long scalp hairs.<sup>20</sup>

## II. THE SOCIAL MEANINGS OF HAIR

Although hair is a physiological phenomenon, it is also a social one. Hair is an object of intense elaboration and preoccupation in almost all societies. Hairstyles and rituals surrounding hair care and

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.* at 291-92.

12. *See id.* at 292.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.* at 289.

18. *See id.* at 292.

19. *See id.* at 290-91.

20. *See id.* at 290.

adornment convey powerful messages about a person's beliefs, lifestyles, and commitments. Inferences and judgments about a person's morality, sexual orientation, political persuasion, religious sentiments and, in some cultures, socio-economic status can sometimes be surmised by seeing a particular hairstyle.<sup>21</sup>

Hair symbolism has been extensively researched and commented upon by anthropologists, particularly in initiation and marriage ceremonies, mourning rituals, and magic.<sup>22</sup> The earliest of these studies focused on the magical attributes that non-Western societies assigned to hair. In some societies, hair was considered the seat of the soul, and the special power that hair possessed might remain in the hair even after it was cut.<sup>23</sup> Some cultures believe that a link remains between the individual and the severed hair, allowing the person who gained possession of the locks to exert power.<sup>24</sup> Cultures that believe in the protective powers of charms and amulets used hair in the making of rain charms and for medicinal treatments.<sup>25</sup> In some cultures, hair plays a central role in "rites of passage" involving the cutting of hair or hair dressing.<sup>26</sup> Hair is also a symbol of the self and of group identity,<sup>27</sup> an important mode of self-expression<sup>28</sup> and communication.<sup>29</sup> Because of its versatility as an adornment, hair can not only symbolize social norms but also changes in social ideologies.

### A. *Hair as a Gender and Sexual Signifier*

As a signifier of information about gender roles, hair is a vehicle to communicate messages about sexual and gender-based preferences, practices, or beliefs.<sup>30</sup> British anthropologist Edmund A. Leach, based on observations of Hindus in India and Buddhists in Sri

21. See Carol Delaney, *Untangling the Meanings of Hair in Turkish Society*, 67 ANTHROPOLOGICAL Q. 159, 159 (1994).

22. See, e.g., RAYMOND FIRTH, *WE, THE TIKOPIA: A SOCIOLOGICAL STUDY OF KINSHIP IN PRIMITIVE POLYNESIA* (1936); SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* (1935); BRONSILOW MALINOWSKI, *ARONAUTS ON THE WESTERN PACIFIC* (1922).

23. See Margaret Sleeman, *Medieval Hair Tokens*, 17 F. FOR MODERN LANGUAGE STUD. 322, 322-23, 326-32 (1981) (summarizing scholarship on hair beliefs).

24. See *id.* at 322.

25. See *id.* (discussing J.G. Frazer's studies of hair charms and the medicinal uses of hair).

26. See Anthony Synnott, *Shame and Glory: A Sociology of Hair*, 48 BRIT. J. SOC. 381, 390 (1987) (discussing anthropological studies of hair rituals).

27. See *id.* at 381.

28. See *id.*

29. See *id.* at 397-400.

30. See *id.* at 404.

Lanka,<sup>31</sup> theorized that long hair represented unrestrained sexuality, that short hair, tightly bounded or partially shaved hair signaled restricted sexuality, and that shaved heads symbolized celibacy.<sup>32</sup>

In Western cultures, hair serves as an important symbol of sexuality. Psychoanalytic examinations of the meaning of hair in Western mythology and folk literature demonstrate that long-haired women often symbolize women as phallic monsters (i.e., Medusa),<sup>33</sup> that women's long tresses represent the pubic region,<sup>34</sup> and that the cutting of hair is used to symbolize castration, loss of mother, and reparation.<sup>35</sup>

The importance and power of hair as a sexual symbol is also evident in the rich symbolism of the medieval and traditional lyric poetry of the Iberian Peninsula.<sup>36</sup> Hair often serves as a symbol of women's virgin state.<sup>37</sup> In keeping with this symbolism, the *fueros* (local codes of law and custom), when legislating for damage to different parts of the body, lists penalties for seizing a woman by the hair. These codes suggest that the "violation" of hair was seen as a violation of the woman's honor.<sup>38</sup> The *fueros* states that the penalties for violating this provision may include castration, shearing a man's hair or beard, or plucking his beard.<sup>39</sup>

On the British Isles, jewelry and artwork made from hair was a symbol of romantic or sexual relationships. Although the majority of hair tokens were made from the hair of a beloved's head, Charles II was reported to have made a watch fob from the pubic hairs of his mistresses.<sup>40</sup> Hair jewelry was used to symbolize romantic

31. See Edmund A. Leach, *Magical Hair*, 88 J. ROYAL ANTHROPOLOGICAL INST. 147, 155-56 (1958).

32. See *id.*

33. See, e.g., SANDOR FERENCZI, *On the Symbolism of the Head of the Medusa*, in 2 SELECTED PAPERS 360 (1952); SIGMUND FREUD, *Medusa's Head*, in 5 COLLECTED PAPERS. 105, 105-06 (James Strachey ed., 1959).

34. See, e.g., BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES 132, 137, 142-43, 148-49 (1976) (describing the symbolic usage of hair as a metaphor for sexualized behavior in fairy tales like the Brothers Grimm's "The Goose Girl" and "Rapunzel"); Elisabeth G. Gitter, *The Power of Women's Hair in the Victorian Imagination*, 99 PROC. MODERN LANGUAGE ASS'N 936 (1984).

35. See Jeffrey J. Andersen, *Rapunzel: The Symbolism of Cutting Hair*, 28 J. AM. PSYCHOANALYTIC ASS'N 69, 71 (1980).

36. See Margaret Sleeman, *Medieval Hair Tokens*, in 17 F. FOR MODERN LANGUAGE STUD. 322, 322 (1981).

37. See Andersen, *supra* note 35, at 71.

38. See Sleeman, *supra* note 36, at 324.

39. See *id.*

40. See HARVEY RACHLIN, LUCY'S BONES, SACRED STONES, AND EINSTEIN'S BRAIN 269 (1996).

attachments and also became a method to memorialize a deceased loved one.<sup>41</sup> During the nineteenth century, mourning rings made of hair were distributed at funerals or served as invitations to these events. More recently hair symbolism primarily centered on the meaning of hair *in situ* as an indicator of sexual and gender identity. Generally, hairstyles signal rejection of the accepted social norms regarding gender status and roles or sexual practices. The flaunting of gender conventions as a political and social statement during the 1960s and 1970s was reflected by the popularity of long hair for both men and women. Feminists' rejection of social taboos such as underarm, leg or facial hair<sup>42</sup> on women further demonstrates the role hair plays in gender politics.

Among lesbians and gay men, hair has often signaled sexual identity, preferences, or practices. During the early twentieth century, the expressions "let one's hair down" or "keep one's hair up" served to indicate the status of an individual's openness about his homosexuality. In other words, these terms are analogous to the modern expressions of being an "out"<sup>43</sup> or "closeted"<sup>44</sup> gay person. Although these expressions have passed into general usage and are used to mean acting freely and without inhibition, gay men and lesbians continue to employ hair to signify sexual practices and preferences.<sup>45</sup>

### B. *Hair as an Indicator of Group Identity*

Among Orthodox Jews, hairstyling and rituals serve as a means of social control and group identity as well as denote membership in a group and marital status. For married women, hair is considered to be an alluring sexual attribute and must be covered as a part of following the customs concerning *tziniyoot* (modesty).<sup>46</sup> The custom

41. *See id.*

42. One dramatic example of the rejection of the taboo against facial hair on women is the performance art of Jennifer Miller. Miller, a lesbian-feminist and the founder of the performance troupe CIRCUS AMOK, wears a beard as a political act and describes her beard as "a subversive act, a teaching tool, a lifelong conceptual art piece." Susan Schnur, *Transgressive Hair: The Bearded Lady*, LILITH, Spring 1995, at 22, 22 (profiling Jennifer Miller); *see also* Videotape: *Juggling Gender* (Tami Gold 1994) (available through Women Make Movies).

43. *See* THE NATIONAL MUSEUM & ARCHIVE OF LESBIAN AND GAY HISTORY, THE GAY ALMANAC 91 (1996) (defining terms related to gay and lesbian culture).

44. *See id.* at 84.

45. *See* Therese Jansen, *More Lesbian (Stereo?) Types* (visited Aug. 8, 1999) <<http://www.lesbianlife.about.com/library/weekly/aa011298.htm>> (discussing stereotypical appearances associated with various lesbian identities).

46. *See* HARVEY LUTSKE, THE BOOK OF JEWISH CUSTOMS 111 (1986). *See generally* Leila

is a result of the Talmudic statement *Berakhot 24a* that a woman's hair is a sexual enticement.<sup>47</sup> Most ultra-orthodox women wear their hair long and cover it with wigs (*shaytl* or *pahrook*), scarves (*tichel*) or a semirigid cap and scarf that also covers part of the forehead (*shternnichel*).<sup>48</sup> Some members of Hasidic courts closely crop their hair after marriage and hide the remnants under wigs and/or *shternnichel*.

Orthodox men submit to specific Talmudic injunctions against shaving the "four corners" of the face, which is why long beards are the custom.<sup>49</sup> Very observant men wear payess, the earlocks or sidecurls that hang from the side of the head, by the ears.<sup>50</sup> The "orders" for these practices comes from the *Chumash* (the Five Books of Moses) in Leviticus: "Ye shall not round the corners of your head, neither shalt thou mar the corners of thy beard."<sup>51</sup> Although this passage was originally meant to prohibit the Israelites from emulating their pagan neighbors and practices, it is also symbolic of the mandate to leave the corners of cultivated fields unharvested for collection and sustenance by the widow, the orphan, and the stranger.<sup>52</sup> In addition to these gender specific taboos, all Jews are enjoined from cutting their hair during periods of mourning.<sup>53</sup>

The use of hair as a social signifier by African-Americans is another example of hair being used to indicate group identity. The use of hair by African-Americans as a social signifier dates to antebellum plantation culture when slaves used distinctive hairstyles

Leah Bronner, *From Veil to Wig: Jewish Women's Hair Covering*, 42 JUDAISM 465 (1993) (examining the practice of hair covering among Jewish women from a historical and cultural perspective, including a discussion of the practice among resurgent Orthodoxy and the *Ba'alei Teshuva* ("reborn" Jews)); Michael J. Broyde et al., *Further on Women's Hair Covering: An Exchange*, 40 JUDAISM 79 (1991) (discussing the *halakhic* significance of the mandate that married women cover their hair and the varying rabbinic interpretations of "Minhag America" (American customs) on the custom); Marc Shapiro, *Another Example of "Minhag America,"* 39 JUDAISM 148 (1990); Susan Schnur, *Hair O Israel: Jewish Wig Laws*, LILITH, Spring 1995, at 20, 20-21 (analyzing the *halakhic* mandates concerning the covering of women's hair from a feminist perspective).

47. See Bronner, *supra* note 46, at 466 (referring to Biblical Song of Songs 6:5: "Your hair is like a flock of goats from Gilead.").

48. See Lutske, *supra* note 46, at 111.

49. See *id.* at 113.

50. See *id.*

51. See *id.*

52. See *id.*

53. See MAURICE LAMM, *THE JEWISH WAY IN DEATH AND MOURNING* 23, 126-30 (1969) (describing the various prohibitions governing haircutting and shaving during periods of mourning).



as a means to assert individuality and maintain their human dignity.<sup>54</sup> In modernity, African-Americans that wear “Afros” or dreadlocks generally do so in order to demonstrate their rejection of European standards of beauty and superiority.<sup>55</sup> Moreover, rejection of straight hair as a symbol of beauty is often an essential part of the development of a political consciousness based on racial pride.<sup>56</sup>

### C. *Erasing Identity and Dehumanizing Through Hair*

Totalitarian governments have used hair as a means of social control. In Nazi Germany, for example, forced “hair taking” played an intrinsic role in the government’s attempts at social control and domination of Jews. During the period of the *Anschluss* and *Kristallnacht*, Orthodox Jews were subjected to beard pulling, payees cutting, and other forms of hair-related humiliation.<sup>57</sup> In concentration camps, hair-related humiliation was an integral part of the dehumanization of inmates. The practice of shaving concentration camp inmates dated to the earliest establishment of the camp system. During this period, Nazi policy toward undesirable elements, Jews in particular, was to force immigration out of the Reich. The practice of shaving concentration camp inmates may have been adopted both to humiliate and to control the activities of former inmates by marking their appearance. “In the street, former prisoners tried to blend in to the background, but their shaved heads made them instantly recognizable.”<sup>58</sup>

54. See generally Shane White & Graham White, *Slave Hair and African-American Culture in the Eighteenth and Nineteenth Centuries*, 61 J. SOUTHERN HIST. 45 (1995) (describing slaves’ hair styling customs and the social significance that hair styles played in the development of African-American culture).

55. See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (offering a scholarly and personal examination of the effect that African-American hairstyles, like braiding and Afros, have on interlocking configurations in the construction of race and gender).

56. See generally M. Baharti Kuumba & Femi Ajanaku, *Dreadlocks: The Hair Aesthetics of Cultural Resistance and Collective Identity Formation*, 1998 MOBILIZATION 3 (concluding that dreadlocks are an example of culturally contextualized everyday resistance); see also ALEX HALEY & MALCOM X, *THE AUTOBIOGRAPHY OF MALCOM X*, 61-65 (1964) (describing Malcolm X’s feelings associated with the process of “conking” (i.e., straightening his hair) and the significance that abandoning the practice has on the development of racial pride and consciousness).

57. See, e.g., GEORGE E. BERKLEY, *VIENNA AND ITS JEWS: THE TRAGEDY OF SUCCESS* 260 (1988) (describing how, in the early days of the *Anschluss*, a visitor walking around Vienna could see a group of Orthodox women being forced to remove and burn their wigs, or Hitler youth gleefully cutting off a rabbi’s beard).

58. NINA SUTTON, *BETTELHEIM: A LIFE AND A LEGACY* 180-81 (1996) (describing Bruno Bettelheim’s experiences awaiting his departure date from Vienna after his release from KL

The ultimate dehumanizing activity by a government is the use of human exploitation and degradation for economic gain. Shaving practices in Nazi concentration and extermination camps clearly resulted from the development of a society centered on the systematic dehumanization and exploitation of the enemy. Essentially, the evolution of shaving practices and the economic exploitation of prisoner hair mirrors the development of the Nazi "camp" society<sup>59</sup> and the implementation of the "Final Solution." When German policy shifted to economic exploitation and annihilation, the role shaving played in the "camp" system followed suit. "The Nazis did not just murder millions of men, women, and children but literally 'harvested' their remains to drive Germany's industrial machine."<sup>60</sup> During the early 1940s, Germany's felt and textile manufacturers used hair taken from prisoners at Auschwitz, Majadenk, and Treblinka to manufacture thread, rope, cloth, carpets, mattress stuffing, socks, and other clothing products.<sup>61</sup> Hair "cured" in lofts over crematorium ovens was sold to manufacturing firms in twenty-kilogram bales for twenty pfenning per kilogram.<sup>62</sup>

The Nazis' use of hair taking as an explicit form of dehumanization was most fully developed at Auschwitz. Specifically, hair was not only shorn from the heads of corpses immediately after their removal from the gas chambers, but also from prisoners selected for labor when they entered the camp.<sup>63</sup> The loss of hair deprived prisoners, particularly women,<sup>64</sup> of their individual identity and worth and degraded them to the point that they were not capable of normal human reactions like resistance against tyranny or physical abuse. Shaving severed the prisoners' ties to any remaining vestiges of the outside world by erasing essential elements of individual identity. This is particularly evident when considering the use of tattoos in order to replace a prisoner's name.

Buchenwald).

59. See generally DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* (1996). Goldhagen describes the camp system as "integral to the working of Germany, and yet fundamentally separate from other systems of the society, in large measure because it housed a violently dominated population." *Id.* at 172. Moreover, "[i]n a labor-starved war economy the camp system became above all a world for the economic exploitation of millions of slaves." *Id.* at 174.

60. Timothy W. Ryback, *Evidence of Evil*, *NEW YORKER*, Nov. 15, 1993, at 68, 68.

61. See *id.*

62. See *id.*

63. See *id.*

64. Women's hair was preferred to men's or children's hair because it was typically longer and thicker. See *id.*

The use of shaving as a form of systematic humiliation takes on added symbolic resonance in light of the traditions and religious prohibitions that Orthodox Jews embrace concerning hair.<sup>65</sup> The Nazis may have intended the shaving procedure as an explicit form of dehumanization and, perhaps, given Nazi ideology concerning sexual contact between Jews and Aryans, desexualization and removal of any signs of individual identity. As survivor Livia E. Bitton Jackson wrote:

The haircut has a startling effect on every woman's appearance. Individuals become a mass of bodies. Height, stoutness, or slimness: there is no distinguishing factor—it is the absence of hair which transformed individual women into like bodies. Age and other personal differences melt away. Facial expressions disappear. Instead, a blank, senseless stare emerges on a thousand faces of one naked, unappealing body. In a matter of minutes even the physical aspect of our numbers seems reduced—there is less of a substance to our dimensions. We become a monolithic mass. Inconsequential.”<sup>66</sup>

#### D. *The Power of Hair Remains*

More than a half century after the public had its first glimpses into the incomprehensible evil of the extermination camp system, the world is still struggling with the question of how to honor the million or more people who died at Auschwitz. The hair collected from the prisoners at Auschwitz represents one of the delicate issues. The majority of the hair continues to symbolize the destruction of European Jewry: the hair lies in heaps on the second floor of Block IV, a former Auschwitz barrack.<sup>67</sup> Although only a small remnant remains, there are nearly two tons of it on display, plaits and braids, curls and tresses of every color, originally found by the Russians ready-baled for delivery.<sup>68</sup>

The question of what to do with hair has mainly focused on the conservation challenges involved in preserving two tons of hair. However, the hair has also generated debate about the dignity that should be afforded the hair as human remains.<sup>69</sup> Although Jewish law does not regard hair as a human remain, many involved in Holocaust

65. See discussion *infra* Part III.B.

66. Livia E. Bitton Jackson, *Blond Braids at Auschwitz*, LILITH, Spring 1995 at 16, 17.

67. See *Ryback*, *supra* note 60, at 69.

68. See *id.*

69. See *id.*

studies regard the hair as part of a victim's body deserving of a proper burial.<sup>70</sup> This issue became significant when the United States Holocaust Memorial Museum received from the State Museum of Auschwitz-Birkenau a large shipment of artifacts for inclusion in the museum's exhibitions.<sup>71</sup> One box contained approximately twenty pounds of human hair.<sup>72</sup>

The hair presented museum organizers and staff with a unique philosophical challenge. According to Jacek Nowakowski, who was in charge of acquiring objects for the exhibition, "[W]hen we first received the hair, we regarded it as just another artifact for the museum . . . but then, when the Content Committee met to discuss the best way to display it, it became clear that the members viewed human hair differently from the other objects."<sup>73</sup>

Many on the committee felt that the hair should be displayed in the museum, based on the argument that the museum's mission was to make a convincing case against any possible Holocaust deniers.<sup>74</sup> Other vehemently opposed the idea of such a display.<sup>75</sup> According to Jeshajahu Weinberg, director of the museum and chairman of the Content Committee, "[T]he women survivors, in particular, objected to the presence of the hair in the exhibition."<sup>76</sup> One argued, "[F]or all I know, my mother's hair might be in there . . . [and] I don't want my mother's hair on display."<sup>77</sup>

As Nowakowski said, "It is not only part of the human body, it is also a part of the human personality—part of one's identity. How you wear your hair tells a lot about you as a person. Hair is so simple—but it is so fundamental."<sup>78</sup> This view of the fundamental nature of hair as a signifier of human identity and individuality resulted in the museum's eventual decision not to display the twenty pounds of actual hair but install a wall-length photographic mural of the human

70. *See id.*

71. *See id.* at 68.

72. *See id.*

73. *Id.*

74. *See id.*

75. *See id.*

76. *Id.*

77. *Id.* *See generally* James E. McCarroll et al., *Working with Traumatic Material: Effects on Holocaust Memorial Museum Staff*, 65 AM. J. ORTHOPSYCHIATRY 66 (1995) (discussing a program of psychological consultation designed to lower distress among museum workers and volunteers and assist the management in developing procedures for dealing with anticipated public reactions to the museum).

78. Ryback, *supra* note 60, at 68.

hair on exhibit at the Auschwitz Museum.<sup>79</sup>

### III. THE LEGAL STATUS OF HAIR

Although hair is a biological phenomenon, it also has social and political meanings. As demonstrated, humans assign a myriad of powerful emotions including mourning, love, and sexual desire. Moreover, hair defines our identity and communicates messages about individuality or conscious adherence to the customs and standards of a group.

Although there are a myriad of social, religious, and personal meanings attributed to hairstyle and adornment, hair, as a result of the developments in genetic technology, has been transformed into a revealer of more than just social identity. Specifically, hair has become a nonliving biologic material that, unlike other regenerative tissue or cellular structure, can be used to reveal genetic identity with minimum physical intrusion. Unfortunately, judicial decisions and administrative regulations offer individuals only limited protection from state or institutional intrusion into the information revealed by genetic hair analysis. Genetic identification techniques present unique challenges as the law struggles with disputes over the rights of individuals to control their biological products and maintain their privacy. Yet, many contemporary legal opinions involving hair do not acknowledge the complex social meanings associated with this body material. Most importantly, the law and current social attitudes provide little protection against the forced taking of hair.

#### A. *Hairstyles*

The majority of litigation concerning hair focuses on hair governing policies of employers, school officials, and prisons. These policies have been challenged on constitutional grounds, under Title VII,<sup>80</sup> and state fair employment laws. Constitutional challenges to hair regulations are usually based on the right to personal expression or to equal protection against either gender or religious discrimination. Despite statements by the Supreme Court that the Fifth and Fourteenth Amendment “liberty” clauses afford some protection against governmental interference in personal appearance, the courts have only afforded minimal protection to the liberty

79. *See id.*

80. *See* 42 U.S.C. § 2000e-2(a) (1994).

interest in appearance autonomy.<sup>81</sup>

Courts have had little sympathy for litigants claiming gender discrimination for hair grooming policies and have almost uniformly rejected assertions that hair regulations should be the subject of attempts to eliminate gender-based discrimination. One court analogized hair-length requirements to mandates that men not wear dresses and that men and women use separate toilet facilities and found that these requirements were logically indistinguishable.<sup>82</sup>

In *Kelley v. Johnson*,<sup>83</sup> the leading case involving constitutional challenges to hair policies, a police officer challenged a county regulation that limited the length of male police officers' hair.<sup>84</sup> Based on a rational basis analysis, the Supreme Court held that the regulation did not violate any right guaranteed by the Fourteenth Amendment.<sup>85</sup> The majority noted that law enforcement officers are subject to many regulations that are not applied to the public at large including requirements for specific dress and behavior.<sup>86</sup> Under this rubric, the hair regulation was deemed a reasonable restriction.<sup>87</sup> Moreover, the Fourteenth Amendment liberty interest in personal grooming is subject to abridgment by the state police power.<sup>88</sup> Essentially, the county's interest in a disciplined and easily recognizable police force outweighed the plaintiff's right to wear his hair as he wished.

Plaintiffs have brought cases alleging that employers' grooming policies violate the Title VII prohibition against discrimination in "terms, conditions, or privileges of employment."<sup>89</sup> Typically, these cases involved different hair-length standards for male and female employees. A few early cases held that grooming policies that mandated different hair-lengths for male and female employees violated Title VII.<sup>90</sup> Another court also held that the requirements of

81. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1402 (1992) (analyzing the gender politics of regulations governing employee appearance).

82. See *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973) (holding that hair-length restrictions applicable to males but not females did not discriminate within the meaning of Title VII).

83. 425 U.S. 238 (1976).

84. *Id.* at 239-40.

85. See *id.* at 248-49.

86. See *id.*

87. See *id.*

88. See *id.* at 247.

89. 42 U.S.C. § 2000e-2(a)(1).

90. See, e.g., *Donahue v. Shoe Corp. of Am.*, 337 F. Supp. 1357 (C.D. Cal. 1972) (holding

hats for male foodservice employees and hairnets for females were discriminatory on the basis of gender.<sup>91</sup>

The majority of courts, however, have found that hair-length policies that do not cause disparate treatment among male and female employees are not discriminatory under Title VII. For example, in *Dodge v. Giant Food, Inc.*, the D.C. Circuit held that gender-based hair-length standards were nondiscriminatory because the requirements did not create employment standards that favored one gender over the other.<sup>92</sup> Moreover, courts have held that grooming standards allowing different hair-lengths for employees holding different positions within the same company are not discriminatory.<sup>93</sup>

The reasoning for these decisions vary. One court held that an employer has the right to impose standards deemed necessary for the success of the business.<sup>94</sup> Another court provided an analysis based on a strict interpretation of the purpose of Title VII.<sup>95</sup> The court explained that discrimination is illegal only when based on immutable or protected characteristics.<sup>96</sup> Examples of these immutable gender characteristics include being married or having children.<sup>97</sup> In contrast, hair-length is a characteristic that is easily changeable at will and, as a result, it does not qualify as an immutable characteristic.<sup>98</sup>

Challenges to hair regulations based on religious claims have also had varying success. One police officer argued that a department requirement that officers be clean-shaven and have short hair infringed upon his First Amendment right to the free exercise of religion because of his religious vow not to cut his hair or shave his beard.<sup>99</sup> The court ruled that the plaintiff's rights were not violated and that the police department did not have a duty to accommodate the plaintiff.<sup>100</sup> The public health and safety interest promoted by the

that plaintiff alleged a prima facie case of discrimination against an employer who allegedly discharged a male employee because of the length of his hair but who permitted female employees to wear long hair).

91. See, e.g., *Roberts v. General Mills, Inc.*, 337 F. Supp. 1055 (N.D. Ohio 1971).

92. 488 F. 2d at 1336-37.

93. See generally *Earwood v. Continental S.E. Lines, Inc.* 539 F.2d 1349 (4th Cir. 1976); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975); *Fagan v. Nat'l Cash Register*, 481 F.2d 1115 (D.C. Cir. 1973).

94. See *Fagan*, 481 F.2d at 1125.

95. See *Willingham*, 507 F.2d at 1088.

96. See *id.* at 1091.

97. See *id.*

98. See *id.*

99. See *Marshall v. District of Columbia*, 392 F. Supp. 1012, 1013 (D.C. Cir. 1975).

100. See *id.* at 1015.

rule outweighed the plaintiff's interest in observing the dictates of his religion regarding hair.<sup>101</sup> Recently, however, a New York court found that a correctional facilities hair-length policy violated the religious freedom of a guard of the Longhouse faith, the religion of the Mohawk Nation.<sup>102</sup>

In cases involving allegations of racial discrimination, courts have also been unwilling to find a constitutional basis for the claim that hairstyles are immutable and should enjoy constitutional protection. In one such case, the plaintiff alleged that her employer's refusal to allow the plaintiff to wear a "corn-row" (i.e., a tightly bound multi-braided hairstyle) imposed on her the "badges of slavery" forbidden under the Thirteenth Amendment.<sup>103</sup> The claim was dismissed based on the court's ruling that hairstyles are not immutable characteristics entitled to constitutional protection.<sup>104</sup>

Despite the logic of the immutable characteristic argument, the doctrine has not been uniformly applied in cases where an immutable characteristic adversely effects an individual's ability to comply with a grooming requirement. Most employment-based race discrimination claims related to hair involve no-beard rules. Fifty percent of African-American males suffer from pseudofolliculitis barbae ("PFB"), while only one percent of Caucasian males are affected by PFB.<sup>105</sup> PFB is a bacterial infection caused by shaving.<sup>106</sup> The most effective remedy is to grow a beard.<sup>107</sup> Black plaintiffs have argued that, because of the difference in the rate of PFB among blacks and whites, policies banning beards are disparate impact race discrimination. This argument has been successful in some cases where courts have found that because no-beard policies constitute disparate impact race discrimination, employers must demonstrate that the policies are directly related or necessary to the job.<sup>108</sup>

101. See *id.* at 1015-16.

102. See *Rourke v. New York State Dep't of Correctional Servs.*, 615 N.Y.S.2d 470, 472 (N.Y. App. Div. 1994).

103. *Rogers v. American Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981). For an analysis of the racial and gender implications of *Rogers* and other forms of hair-related employment discrimination against African-American women, see generally Caldwell, *supra* note 55.

104. See *Rogers*, 527 F. Supp. at 231.

105. See *Bradley v. Pizzaco of Neb., Inc.*, 7 F. 3d 795, 796 (8th Cir. 1993).

106. See *id.*

107. See THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 815 (17th ed. 1999) (describing pseudofolliculitis barbae).

108. See, e.g., *Bradley*, 7 F.3d at 798-99 (holding that the employer failed to show a substantial business justification for not allowing a narrowly limited medical exception to its no-beard policy for African-American males who suffer from PFB).



However, other courts have upheld no-beard policies finding that hygiene, cleanliness, and public image concerns outweigh the disparate impact of the no-beard policy.<sup>109</sup>

The relationship between school administrator and student is similar to that of employer and employee.<sup>110</sup> Specifically, school officials enunciate specific standards of behavior and exert control over students as part of the socialization process intended to prepare young people for the workplace.<sup>111</sup> This view dominates judicial thinking about the constitutionality of regulations governing students' hair-length.<sup>112</sup> Frankly, the United States Supreme Court has demonstrated a clear lack of interest in hair-length matters in schools. The circuit courts are divided on the constitutionality of such regulations, and the Supreme Court has refused to grant certiorari to any case involving this issue.<sup>113</sup>

Although the Supreme Court has chosen not to examine hair-length disputes, it has indicated that it would find that school hair regulations do not violate constitutional rights. In *Tinker v. Des Moines Independent Community School District*,<sup>114</sup> the Court held that school officials violated the First Amendment rights of high school students when they were suspended for wearing black armbands in protest to the Vietnam War.<sup>115</sup> The Court characterized the armbands as closely akin to "pure speech"<sup>116</sup> while the regulation of clothing and hairstyle was seen as part of "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the

109. See, e.g., *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) (denying firefighters a trial on the merits of their discrimination claim because the city's evidence concerning safe use of respirators established a business necessity defense).

110. See *Board of Trustees v. Toungate*, 958 S.W.2d 365, 371 (Tex. 1997).

111. See *id.*

112. Although this analysis dominates the majority of court decisions regarding regulation of student hair-length, it is not universally followed by all courts. See *Alabama & Coushatta Tribes of Tex. v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1333 (E.D. Tex. 1993) (granting plaintiffs a preliminary injunction enjoining the defendants from enforcing a regulation that would require Native American students to cut their hair because defendants failed to show that the restriction was a valid means of achieving specific disciplinary objectives).

113. See generally *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1969); *Ferrell v. Dallas Indep. Sch. Dist.*, 92 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968).

114. 393 U.S. 503 (1969).

115. See *id.* at 514.

116. *Id.* at 505.

schools.”<sup>117</sup>

Hair regulations in prison are often used as a method of social control that often transcend issues of security<sup>118</sup> and enter into the realm of dominating prisoners by humiliating them and stripping them of any vestige of political or cultural identification or religious identity.<sup>119</sup> The Supreme Court has held that “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.”<sup>120</sup> Traditionally, courts are open to subjecting prisoners to a much more restrictive environment than, for example, students at public schools because of natural concerns about safety and the penal purpose of the institutions.<sup>121</sup> Surprisingly, given these considerations, prisoners have had more consistent luck than public school students when petitioning courts to find that prison hair regulations violate free exercise rights.<sup>122</sup> However, the right of prisoners to wear their hair as dictated by their professed religion is not uniformly applied because, as in cases involving public school students, the Supreme Court has declined to examine this issue.<sup>123</sup>

### B. Hair Takings

An individual could attempt to assert a Fourth Amendment right to refuse the taking of hair for genetic analysis. Courts have long held that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>124</sup> Applying this rule, the Supreme Court has held that

117. *Id.* at 507.

118. *See, e.g.,* Taveraz v. Goord, 655 N.Y.S.2d 189 (N.Y. App. Div. 1997). In this case, prison officials imposed a penalty of 365 days of solitary confinement on a prisoner who possessed a ball of hair. Officials discovered the hair during a search of certain cells following the discovery of an escape plot. The court found that “while such an item may be innocuous in many situations, when possessed by an inmate after an escape plot has been uncovered, ‘reasonable grounds exist to believe that the inmate intends to utilize the item in an attempt to escape.’” *Id.* at 190.

119. *See generally* LORI B. ANDREWS, *WHITE BLOOD, BLACK POWER: THE LIFE AND TIMES OF JOHNNY SPAIN* (1996) (describing how prison officials employed this “technique” and the impact on the formation of activist Johnny Spain’s social and political identity).

120. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

121. *See, e.g.,* O’Lone v. Shabazz, 482 U.S. 342, 349 (1987).

122. *See generally* Gallahan v. Hollyfield, 516 F. Supp. 1004 (E.D. Va. 1981) (finding that a prison hair-length regulation violated a Cherokee inmate’s rights); *Moskowitz v. Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977) (holding that a prison ban against wearing beards is unconstitutional as applied to prisoners, such as the plaintiff, who wore a beard for sincerely held religious beliefs).

123. *See generally* Goulden v. Oliver, 442 U.S. 922 (1979) (denying *certiorari*).

124. *See, e.g.,* *Schmerber v. California*, 384 U.S. 757, 767 (1966).

mandatory blood testing is considered a search and seizure that must comply with Fourth Amendment standards.<sup>125</sup> Naturally, the state would likely argue that taking a hair only creates a minimal intrusion on the individual and does not infringe on any constitutional rights. In support of this argument, a state would likely point to several Fourth Amendment cases that have viewed a blood test as creating a minimal risk.<sup>126</sup> Similarly, courts have also found that hair taking for genetic analysis for a criminal investigation or employment purpose is too insignificant an intrusion to trigger any constitutional scrutiny. Moreover, since hair samples can be taken with minimal pain or intrusion, the use of hair analysis in criminal courts for suspect identification or in family courts for paternity testing clearly promotes judicial economy and administrative efficiency.

When evaluating forced hair-taking cases, courts must realize that it is not the level of physical intrusion that must be scrutinized. Rather, courts must consider the significance of the genetic information that can easily be obtained from a single hair. Specifically, one hair, albeit obtained with minimal intrusion, can be used to discover genetic information that reveals information about an individual's current or potential future health status and uncovers genetic information that could impact the test subject's family. For these reasons, courts must move the self-serving analysis that focuses on judicial economy and efficiency.

Courts should regard hair analyses that reveal genetic information as the federal government treats blood tests that are used for genetic tests. Blood tests used in federally funded research may be exempt from full Institutional Review Board scrutiny since they are viewed as entailing "minimal risks."<sup>127</sup> However, the Federal Office of Protection from Research Risks has indicated that genetic tests present greater than minimal risks due to psychological risks and social risks including "stigmatization, discrimination, labeling and potential loss of or difficulty obtaining employment or insurance."<sup>128</sup>

125. *See id.* at 767-68 (balancing the nature and quality of the intrusion against the state's interest).

126. *See id.* at 772.

127. *See* 46 C.F.R. § 46.110(b)(1) (1998).

128. OFFICE OF EXTRAMURAL RESEARCH & OFFICE OF PROTECTION FROM RESEARCH RISKS, NATIONAL INSTITUTES OF HEALTH, PROTECTING HUMAN RESEARCH SUBJECTS 5-45 (1993).

## CONCLUSION

Legal scholars have long argued that people have an interest in their extra-corporeal body parts.<sup>129</sup> Hair, however, has seldom been considered in arguments asserting that people should have a property interest in their bodily materials to preserve individual autonomy and dignity.<sup>130</sup> Despite the social and historical significance of hair and the dehumanizing effects of forced hair-takings, hair is often considered a mere waste product that can be used for various forensic and medical analysis with a minimum of intrusion and pain. Moreover, courts continue to ignore the social meaning of hair and decline to hold that individuals have an absolute right to assert their identity and reveal personal information through hair rituals or grooming.

The explosion of technologies that use hair to reveal intimate details of an individual's biological identity challenges society to reconsider the meaning of hair. Ultimately, courts must focus less on the perception that the physical intrusion involved in hair sampling is minimal and more on the cultural and social significance of the biological material being analyzed and the potential impact of the genetic information that may be revealed.

129. See Lori B. Andrews, *My Body, My Property*, HASTINGS CENTER REP., Oct. 1986, at 28, 29.

130. See *id.* at 37.

