Hirsute Jurisprudence: An Essay in Constitutional Methodology

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HIRSUTE JURISPRUDENCE:
AN ESSAY IN CONSTITUTIONAL
METHODOLOGY

JOSEPH E. FORTENBERRY*

"Doth not even nature itself
teach you, that, if a man
have long hair it is a shame unto
him?"
—1 Corinthians 11:14

"Kids, be free. Be whatever you
are, do whatever you want to do,
just as long as you don't hurt
anybody."
—Hair, Act 1

A court which is asked to recognize a new constitutional right is very much like a person offered a pig in a poke. The court can always refuse to buy the pig, but it cannot very well go out of the hogbuying business. If it buys, the court may discover that it has purchased a duck, a pony, or a rock. It may also learn that it has bought a very prolific shoat, one whose offspring become so


1 The classic statement of the duty of the courts is that of Chief Justice Marshall: So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.


2 Among the many cases in which the Supreme Court recognized a new constitutional right and got something other than what it bargained for are Robinson v. California, 370 U.S. 660 (1962), where a decision that the eighth amendment and due process clause forbade criminalization of drug addict status fostered the contention that criminal capacity was a constitutional requirement, and Thornhill v. Alabama, 310 U.S. 88 (1940), where the recognition of a right to openly and truthfully discuss matters of public concern led to the advancement of picketing as a protected exercise of free speech.
numerous as to threaten the business of other legitimate sellers of porcine merchandise.  

One way out of this dilemma is to put off the decision whether to purchase. The court can say: "We may buy the pig, but not from you" (standing); "We believe you ought to offer your hog to someone else first" (exhaustion of remedies); "We think your pig is too young for market" (ripeness); or "By George, your pig is dead" (mootness).

The body of rules on deciding not to decide, known as "avoidance doctrines," is well recognized and of ancient lineage. Properly used these rules can be of enormous benefit in assuring that the court decides constitutional issues in the context of a genuine controversy at the behest of a plaintiff who is "in a position to raise the ultimate issue in the clearest and most fully developed fashion." Thus, important constitutional decisions are arrived at only when there is no reasonable alternative basis for decision by the court and the constitutional questions which must be answered are fully and fairly developed by the parties before the court. "Avoidance techniques," however, are not in and of themselves "passive virtues." They may be utilized by the cowardly as well as the prudent, and their use can leave the plaintiff and defendant unsure as to whether a claimed constitutional right and correlative constitutional duty exist. Clearly, for many litigants an adverse decision is better than no decision at all.

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3 See, e.g., Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954). The Court in Baker spawned increased litigation by restricting the political question doctrine and opening the reapportionment field to judicial scrutiny. The Brown Court initiated a continuing caseload of segregation cases by holding that the "separate but equal" doctrine is violative of the equal protection clause of the fourteenth amendment.


8 See A. Bickel, The Least Dangerous Branch 111-98 (1962) [hereinafter cited as BICKEL]. For an outline of avoidance techniques used by the Court see Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), aff'g 78 F.2d 578 (5th Cir. 1935).

Most studies of judicial artful dodging have concentrated upon the Supreme Court of the United States because of its preeminence as an interpreter of the Constitution and the great variety of avoidance techniques from which it can choose. Lower federal courts, however, have also been in a position to utilize avoidance doctrines when asked to decide significant constitutional questions.

In the late 1960's and early 1970's, the United States Court of Appeals for the Fifth Circuit was repeatedly called upon to decide whether teenage male students could, consistently with the Constitution, be required to choose between foregoing the opportunity to attend public secondary school or college and grooming themselves in a manner acceptable to the local school authorities. In other words, does the Constitution protect the right to grow one's hair and beard in the manner one chooses and therefore circumscribe state interference with that right? The process of avoidance in which the Fifth Circuit engaged is especially instructive because the question could neither be evaded, as it was time and again by the United States Supreme Court, through denial of certiorari, nor resolved by waiting for higher authority, such as Congress or the Supreme Court, to act. It is the thesis of this essay that the Court of Appeals for the Fifth Circuit began its campaign of avoidance hopefully, but soon departed from proper methods.


11 But see BICKEL, supra note 8, at 198, wherein the author remarks that "the lower courts can act in constitutional matters as stop-gap or relatively ministerial decision-makers only."

12 For brevity's sake, these cases will be referred to as haircut cases, although in some instances they involve beards and mustaches while in others the issue was hairstyle rather than hair length.


Recently, however, the Supreme Court agreed to hear an appeal from a decision holding that police department guidelines on hairstyle violate the due process clause in the absence of a legitimate state interest requiring such regulation. Dwen v. Barry, 508 F.2d 836 (2d Cir.), cert. granted, 421 U.S. 987 (1975). See 44 U.S.L.W. 3034-35 (July 22, 1975).
and began a long slide into outright evasion of the constitutional issue of a student's right to control his own grooming. It is not my purpose to pull the court of appeals out of this "Slough of Despond" but only to indicate that there were "certain good and substantial Steps" which the court, like Bunyan's hero Christian, overlooked.14

FROM Ferrell TO Stevenson — FIFTEEN JUDGES IN SEARCH OF A DOCTRINE

"If I be shaven, then
my strength will go from me,
and I shall become weak and
be like any other man."
— Judges 16:17

The Fifth Circuit's earliest haircut case, Ferrell v. Dallas Independent School District,15 is an excellent illustration of the adage that the first case coming before a court is usually a poor one to announce new principles.16 The Ferrell litigation has strong overtones of the theater, and it is conceivable that the plaintiffs were more concerned with publicity than with their "right" to long hair.17 If there is such a right, the plaintiffs were injured. Since their assertion of that right had all the earmarks of a pretext, however, they were not "in a position to raise the ultimate issue in the clearest and most fully developed fashion."18 Nonetheless, the Fifth Circuit in Ferrell ignored such impure standing and still managed to avoid deciding the constitutional issue directly.

The Ferrell plaintiffs were members of a musical group called "Sounds Unlimited," and their contract called for them to maintain "Beatle" haircuts.19 On the eve of the first day of class and in view of their long hair, the plaintiffs' business manager, Mr. Alexander, called the school principal, Mr. Lanham, to discuss the plaintiffs' enrollment and to inform Lanham that he was coming to the

16 See Bickel, supra note 8, at 176.
17 See text accompanying note 23 infra. For discussions of the controversy over hair regulations in New York schools which occurred at the same time as Ferrell, see N.Y. Times, Oct 16, 1966, § 4, at 11.
18 Bickel, supra note 8, at 123.
19 261 F. Supp. at 546-47.
school. Lanham replied that he would talk only with students and their parents. The following day the three plaintiffs, the mother of two of them, and Mr. Alexander showed up at Lanham's office. Refusing to meet with Alexander, Lanham told the students and their parent that "the length and style of the boys' hair would cause commotion, trouble, distraction and disturbance in the school and, therefore, it was necessary for their hair to be cut or trimmed before admittance would be allowed." The plaintiffs refused, whereupon two of them were denied admission to the school. After this meeting the plaintiffs attended a prearranged press conference. In addition, they recorded a protest song, played on several local radio stations, about their plight.

Plaintiffs proceeded to bring a civil rights action claiming that denying them their right to attend school because of their hair was "arbitrary, discriminatory, and violated the constitutional right . . . to equal opportunity for a public education." The district court refused to grant the temporary injunction requested. After noting its annoyance at what appeared to be a manufactured controversy, a challenge to the principal's authority in general rather than a challenge to the hair regulations in particular, the district court disposed of the constitutional issue of self-grooming by subjecting the regulation of hair to a "reasonableness" test and deciding that the lack of any showing of unreasonableness defeated the challenge to the regulation. Apparently, the court reasoned that

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20 Reporting to the principal was contrary to the usual procedure for students which called for them to report to their homerooms. Id. at 546. The appearance of the students at Lanham's office and the ensuing publicity efforts, see text accompanying note 23 infra, lends credence to the notion that the controversy was "staged."

21 392 F.2d at 699.

22 The third plaintiff had cut his hair during the summer and could not be refused admission until nature restored his "standing." Id.

23 261 F. Supp. at 548-49.


26 Id. at 553. In addition to denying plaintiff's motion for a temporary injunction, the district court dissolved a temporary restraining order granted prior to the hearing. Id. at 546, 553.

27 Id. at 552.


29 Before reaching the merits, however, the district court denied defendants' motion to dismiss for want of jurisdiction. Failure to exhaust administrative remedies, the court noted, had not been required in other civil rights contexts under § 1983 and therefore was not required here. 261 F. Supp. at 549, citing McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963).
the school officials were authorized by state law to regulate hair length,\textsuperscript{30} that this right is a corollary of the officials' right to control pupils under a grant of general police power,\textsuperscript{31} that school regulations are part of the educational process,\textsuperscript{32} and finally, that the application of the regulations in the face of a "takeover bid" by some of the students was clearly justified.\textsuperscript{33} Thus, if there is no violation of state law and the school rule is reasonable, the district court argued, that is the end of the matter.

The Court of Appeals for the Fifth Circuit apparently did not believe that this was an adequate disposition of the constitutional question, for it devoted a considerable portion of its opinion to exploring issues not touched on by the district court. Judge Gewin, writing for the majority, began by saying "that a detailed statement of the facts . . . is necessary."\textsuperscript{34} This observation is made more significant by the facts he recites. While the district court opinion suggested that there was little evidence of disruption caused by the presence of long hair,\textsuperscript{35} the court of appeals indicated that the evidence of actual and potential disruption in the form of fights and obscene language was fairly strong.\textsuperscript{36} Judge Gewin relied on (relief sought pursuant to a federal claim asserted under § 1983 need not first be sought in a state court). See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 983-85 (2d ed. 1973). As to defendants' assertion that a substantial federal question was lacking, the court reasoned that the right to attend school on an equal basis with others is guaranteed under the Federal Constitution and therefore the denial of that right would present a "frivolous" issue. 261 F. Supp. at 549. Contra, Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932, 939 (9th Cir. 1971), cert. denied, 404 U.S. 979, 1042 (1972).

30 261 F. Supp. at 551 (semble).
31 Id. at 552 (semble).
32 Id. (semble).
33 Id. at 552-53 (semble). The court noted that:
The school principal felt that his authority was being challenged when the boys did not follow the usual registration procedure, but came instead to his office with the proposition that they were under contract to keep their hair "Beatle Length" and did not intend to cut it. . . . [T]he terms upon which a public free education is granted in the high schools of Texas cannot be fixed or determined by the pupils themselves.

34 392 F.2d at 698.
35 261 F. Supp. at 552.
36 392 F.2d at 700-01.
this data to uphold the validity of the rule under Texas law\textsuperscript{37} and then, turning to the federal constitutional issue, announced that "a hair style is a constitutionally protected mode of expression."\textsuperscript{38} This is not, however, the crucial part of the opinion. The critical phase occurs in the next paragraph, wherein Judge Gewin stated that each case must be analyzed within its own framework before a determination concerning its constitutional implications may be advanced.\textsuperscript{39} Judge Gewin thus armed the court with two formidable avoidance techniques for use in later cases: First, the constitutional right can be assumed "for the purpose of this opinion," thus leaving it open for future courts to decide whether there is in fact any constitutional right of expression through hair; and second, the particular facts can be deemed not to violate the right of free expression without having to decide whether or not the right actually exists.

Having done his part for posterity, Judge Gewin proceeded to extricate himself from the problem created by the case before him. Freedom of expression may be abridged if there are compelling reasons to do so, and

\begin{quote}
[t]he compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the
\end{quote}

\textsuperscript{37} In view of the testimony of Mr. Lanham as to the various problems which arise in the school due to the wearing of long hair by members of the student body and the testimony of certain students that their hair style had indeed created some problems during school hours, we cannot say that the requirement that appellants trim their hair as a prerequisite to enrollment is arbitrary, unreasonable or an abuse of discretion. Therefore, the school regulation as promulgated by the principal, banning long hair, is not violative of the state constitution or statutes.

\textit{Id.} at 702.


\textsuperscript{39} 392 F.2d at 702.

An interesting comparison may be drawn to those cases involving the military reserves since the impact of a hair regulation on reservists and students extends beyond the reserve meeting and the schoolroom. \textit{See, e.g.,} Stull v. School Bd., 459 F.2d 339, 345 (3d Cir. 1972); Crews v. Cloncs, 432 F.2d 1259, 1264 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970); Harris v. Kaine, 352 F. Supp. 769, 775 (S.D.N.Y. 1972). In Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971) (per curiam), Anderson v. Laird, 437 F.2d 912 (7th Cir.), \textit{cert. denied,} 404 U.S. 865 (1971), and Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), \textit{petition for cert. dismissed,} 396 U.S. 976 (1969), requiring reservists to cut their hair was held to be a proper exercise of authority in light of military regulations calling for a "neat and soldierly appearance." When it came to the wearing of wigs as part of one's right to self-grooming, however, the Marine Corps' ant wig policy was upheld, Whitis v. United States, 368 F. Supp. 822 (M.D. Fla. 1974), while similar regulations were invalidated in the National Guard, Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972), and in the Army Reserve, Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y. 1972).
best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.\textsuperscript{40}

This statement may be puzzling at first glance in that it seems to elevate "effectiveness" and "efficiency" to the status of compelling reasons, a status which they clearly do not enjoy.\textsuperscript{41} What Judge Gewin appears to have been saying, however, is that if long hair is shown to have a serious disruptive effect on the educational process in the context of the case before the court, as it was here, it may be proscribed. This same thought is expressed by Judge Godbold, who, in a special concurring opinion, observed that the public expects and demands a safe and orderly atmosphere, maintained by limited enforcement, wherein children may obtain a solid education.\textsuperscript{42}

Judge Tuttle dissented on several grounds, and acceptance of his reasoning would have put an end to "avoidance techniques" in haircut cases once and for all. If there is a constitutional right, he argued, "there is no countervailing state need or requirement that would warrant such interference with the constitutional first amendment right,"\textsuperscript{43} hence, balancing and factual distinctions would be excluded. Furthermore, basing a decision on the ground that potential disturbances might result because of attacks upon or insults hurled at students with long hair would not save the regulation since such a stance would recognize a "bystander veto" over free expression.\textsuperscript{44}

Even if hairstyles are not constitutionally pro-

\textsuperscript{40} 392 F.2d at 703.
\textsuperscript{41} See, e.g., Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969), wherein it was noted that although "administrative and related governmental objectives" may bear a rational relationship to the state's purpose with respect to its welfare assistance program, such a classification was not compelling enough to justify infringement of a fundamental interest such as the right to travel. Id. at 633. See also Dunn v. Blumstein, 405 U.S. 330, 347-51 (1972); Carrington v. Rash, 380 U.S. 89, 96 (1965).
\textsuperscript{42} Judge Godbold remarked:
Citizens expect and demand that their children be physically safe in the schools to whose supervision they are consigned, and the citizenry is outraged if the schools are less than safe and orderly. At the same time we expect that the requirements of order, and of protection and implementation of the educational program of the school, will be met by limited enforcement means—the force of the school establishment itself and of the school-related disciplines of reprimand, suspension, and expulsion—recognizing that the schoolroom is an inappropriate place for the policeman to be either called or needed.
\textsuperscript{43} 392 F.2d at 704 (Godbold, J., concurring).
\textsuperscript{44} Id. at 705 (Tuttle, J., dissenting). Judge Tuttle, however, states that "the method of wearing the hair is not constitutionally protected under the First Amendment . . . ." Id.
\textsuperscript{44} Id. at 705-06 (Tuttle, J., dissenting). To recognize a "bystander veto" is to allow a restriction to be imposed on the right of free expression because it is feared that a bystander hearing the expression will be inspired to cause a breach of the peace by attacking a person exercising the right. See Z. CHAFEES, FREE SPEECH IN THE UNITED STATES 151-52 (1941). The
tected, Judge Tuttle concluded, the state has created "an utterly unreasonable classification of students ... in granting or denying the right of a public education." Such an "unreasonable classification" argument would apparently always require a decision in favor of the student; for if excluding students thought likely to provoke disturbance is "utterly unreasonable," it is hard to imagine what a reasonable classification could be.

*Ferrell* is significant as not only the first but also, for a long time, the leading Fifth Circuit opinion on haircuts and the Constitution. Its careful though somewhat oblique treatment of the constitutional problem and skillful avoidance of a direct decision on the constitutional issue are its great strengths. Its one weakness is that anyone wishing to stretch or bend it can easily do so by taking out selected paragraphs, such as the one extolling "effectiveness" and "efficiency," and using them to reach a result not foreseen by the court. This weakness was not without its consequences; however, a brief examination of a district court opinion decided before *Ferrell* reached the court of appeals adds insight to the problems which were to develop.

In *Zachry v. Brown*, distinguished by Judge Gewin in *Ferrell*, a district court in Alabama had shown how the constitutional issue could be sidestepped and the student and his hair kept in school. Zachry and his coplaintiff were also members of a band and wore pageboy haircuts. They were enrolled at Jefferson State Junior College until they refused to cut their hair and were "administratively withdrawn" for disobeying the rule. The college officials sued by the *Zachry* plaintiffs were uncommonly candid. They admitted dismissing the plaintiffs because they disliked "exotic" hairstyles and offered no disciplinary or other institutional justification for their rule. Aided by these helpful admissions, Chief Judge Lynne made short work of the regulation on equal protection grounds. Without alluding to any constitutional right to long hair, he merely


*Ferrell* F.2d at 705 (Tuttle, J., dissenting).

*Zachry* F. Supp. at 1360. This distinction was based upon the lack of findings in *Zachry* that long-haired students "had any effect upon the health, discipline, or decorum of the institution." *Id.*

*Ferrell* F. Supp. at 1361.
noted the unreasonableness of such regulations in support of which no moral or social rationalization was offered.\textsuperscript{49}

Other judges were to be confronted with less cooperative officials and more perplexing problems of avoidance. In fact, in the same month that \textit{Zachry} was decided, a district judge in New Orleans was confronted with both. In \textit{Davis v. Firment},\textsuperscript{50} Dave Davis, a high school sophomore and apparently unconnected with any rock band, was suspended for violating a school regulation requiring that hair not be exceptionally long. After losing an administrative appeal, he immediately had his hair cut and was readmitted to school.\textsuperscript{51} Davis' case, then, was free from any of the "impure standing" problems which were present in \textit{Ferrell}.\textsuperscript{52}

Davis, like the \textit{Ferrell} plaintiffs, relied on freedom of expression.\textsuperscript{53} Although the district court denied that hair could symbolize anything,\textsuperscript{54} Judge Comiskey in \textit{Davis} anticipated Judge Gewin's approach in \textit{Ferrell} by arguing that, assuming long hair was a form of free expression, it could be regulated in these circumstances. Judge Comiskey departed from Judge Gewin, however, in likening hair to picketing, which can be regulated for less than compelling.
reasons. Thus, in *Davis*, the questions were "whether the School Board had a legitimate interest in enforcing grooming regulations and whether this rule was a reasonable means of accomplishing this interest." The questions having been posed in such a manner, the court's affirmative answers came as no surprise.

Of unusual interest in the case, however, is the testimony on disruptions. Judge Comiskey characterized it as "uncontradicted evidence that hair grooming regulations by the Orleans Parish School Board is [sic] based on disciplinary considerations." The evidence of disruptions, composed of the sentiments of local school officials, was far from overwhelming. The superintendent seemed to be merely expounding his educational theories, and the principal only related past experiences at other schools and his apprehension that they will recur. No evidence of any actual disturbance at the Kennedy High School, where Davis was a student, appears anywhere in the opinion.

On these facts one might have anticipated a reversal of *Davis* by the court of appeals. But the Fifth Circuit disposed of the merits by holding that "there is no material difference between this case and *Ferrell*" and thereby applied *Ferrell* as controlling. It is difficult to know what to make of the *Davis* opinion. That Davis had "better" standing than the *Ferrell* plaintiffs may be immaterial, but, unless one believes that the result would necessarily have been identical under either test, the same cannot be said of Judge Comiskey's application of the "reasonable basis" test for constitutionality instead of the "compelling interest" test laid down by Judge Gewin. And what of the *Ferrell* insistence that the validity of each restraint

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55 269 F. Supp. at 527. See, e.g., Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). Picketing, which is more than free speech, is subject to restrictive regulations and, as such, even peaceful picketing may be enjoined when it is aimed at preventing the effectuation of the state's announced public policy. Id. at 293.

56 269 F. Supp. at 528.

57 Id.

58 From my experience, I know that gross deviation from the norm does cause a disruption of the learning atmosphere and can create an undesirable separateness among students. Furthermore, gross deviation can be and has been dysfunctional in the social adjustment of children. . . . Dress and appearance do have an effect upon conduct and decorum.

59 During my tenure as principal of the McMain Junior High School and the John McDonogh Senior High School fights occurred because of derogatory remarks made to students with extreme hair styles. In addition to this, these extreme hair styles have created distractions and disturbances in classrooms; therefore I instituted a regulation at the John F. Kennedy Senior High School that prohibited long and shaggy hair or exaggerated side burns. I am very concerned with preventive discipline.

60 Id. at 528-29.

61 408 F.2d at 1086.
of free expression "be decided in its own particular setting and factual background and within the context of the entire record before the court . . . ." The record in Ferrell showed actual past disruption of a serious nature at the school, not, as in Davis, mere fear of disruption. If the court in Davis is implying that this is an insignificant distinction, it never says so.

Davis' extreme brevity makes it difficult to determine what the court is trying to do. Is it saying that anticipation of disruption is a "compelling reason," or that since a "compelling reason" is unnecessary, anticipation of disruption need only pass the less stringent "reasonable basis" test? Is it modifying the Ferrell decision or limiting it? It is impossible to say. The Fifth Circuit opinion in Davis is thus an exceedingly cryptic one. It purports to follow Ferrell but on facts that seem quite distinguishable. By refusing to do more than announce a result and claiming to be compelled by Ferrell, it avoids the necessity of deciding a constitutional question. It is hard to be satisfied with an "avoidance technique" which fails to adequately explain the result reached.

Griffin v. Tatum presented two new wrinkles in the haircut law: First, it involved a regulation that proscribed not only long hair but hair that was cut in particular ways; second, the justification for the regulation was based not upon "minimum public order," i.e. the absence of fist fights and obscene language, but upon "optimum public order," i.e. the absence of any conduct the school authorities deem to be undesirable. Bobby Griffin was suspended from school and denied readmission for having his hair "blocked" in the back rather than "shingled" or "tapered" as required by the school's tonsorial regulations. The defendant school authorities offered a variety of justifications for these regulations: The students whose hair did not conform spent excessive amounts of time combing their hair, failed to wash their hair, were insufficiently eager to participate in sports,

61 392 F.2d at 702.
62 The Davis court, in justifying the constitutionality of the haircut regulation, obviously did not heed the advice of the Supreme Court. Although faced with the task of construing a statute rather than a regulation, Justices Holmes and Cardozo warned:

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." . . . But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.

63 300 F. Supp. 60 (M.D. Ala. 1959), modified, 425 F.2d 201 (5th Cir. 1970).
64 The terms "minimum public order" and "optimum public order" are derived from M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD ORDER 121-22 (1961).
65 300 F. Supp. at 61.
and caused resentment on the part of those students who did not like the forbidden hairstyles.66

Chief Judge Frank M. Johnson, Jr., had little patience with the rule or its purported justification. While choosing not to resolve the free expression issue, he upheld the "right to groom" on the basis of a right of privacy.67 In addition, he invalidated the action of the school board on the basis of equal protection:

[I]n this instance the application of this haircut rule to this plaintiff . . . constitutes an arbitrary and unreasonable classification . . . . More succinctly, compliance with this haircut rule imposes an utterly unreasonable condition to the plaintiff's continuing as a student in the Alabama public educational system.68

The school's attempts to justify the rules on the basis of prevention of undesirable conduct were quickly disposed of. Although the school might act directly against the conduct these hairstyles supposedly cause, less drastic means than banning the hairstyles were plainly available. The court also dismissed the school officials' "undifferentiated fear" of disruptions, echoing Judge Tuttle's remarks on the "bystander veto,"69 and concluded by invalidating both Bobby Griffin's suspension and the haircut rule itself.70 Chief Judge Johnson thus became the first district judge in the Fifth Circuit to recognize explicitly the constitutional right to groom one's hair as one pleases. When principal Tatum and a codefendant appealed the Griffin decision, the court of appeals was presented with the avoidance problem in an acute form.

The Fifth Circuit rose to the occasion, however, and managed to uphold Bobby Griffin's reinstatement without ruling on the new constitutional right.71 Judge Bell began by observing that the precise complaint made by Griffin did not attack the overall regulation as invalid, but was limited to his suspension "for not having his hair

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66Id. Defendant Tatum also raised a "slippery slope" argument. If the court invalidated the hair regulations, he suggested, the students would begin to wear their hair in "indecent" styles. Id. at 63. Unfortunately, the opinion leaves the reader to speculate as to the nature of these hairdos.

67[T]here can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. . . . [T]he freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification.


68300 F. Supp. at 62.

69Id. at 63. See note 44 and accompanying text supra.

70300 F. Supp. at 64.

71425 F.2d at 204.
'cut to the liking of the School Administration.' He then affirmed the decision, citing *Zachry*, on the basis that it was not clearly erroneous to invalidate the "blocked" hair prohibition as applied to Griffin. Apparently, the court felt that the district judge was justified in reinstating Bobby Griffin because he, like the plaintiffs in *Zachry*, was the victim of arbitrary and unreasonable discrimination based on nothing more than the whim of the school officials. Judge Bell, however, then proceeded to reverse the action of the district judge in striking the entire haircut regulation as unconstitutional, noting that the issue presented must be limited to the regulation as applied to Griffin's "blocked" hairstyle. Judge Bell concluded by referring explicitly to the avoidance doctrines as expounded by Justice Brandeis and, curiously, to the doctrine that federal courts will not render advisory opinions.

Perhaps the most significant portion of the opinion from the standpoint of the haircut doctrine is Judge Bell's comments on the regulations themselves. Much of what he says reiterates the *Ferrell* principles supporting regulations necessary for the maintenance of a safe and orderly educational process. Whether he was trying to soothe the ruffled feelings of the school officials or suggesting that *Ferrell* be extended to treat minor inconveniences as "compelling reasons," Judge Bell proceeded to apply the *Ferrell* principles to the case at hand and suggested that the justifications for the rule, had they been before the court, would have been upheld.

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72 Id. at 203.
74 425 F.2d at 204.
75 Id. The court, in a footnote, alluded to the problem of exhaustion of administrative remedies, saying only that since no claim was made by appellants, the court would not sua sponte apply the doctrine in this case. *Id.* n.2.
76 We have not denied school authorities . . . the right to promulgate reasonable regulations concerning hairstyles. Such regulations and regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance as between the rights of individual students and the rights of the whole in the functioning of schools. The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process. *Id.* at 203.
77 *See* notes 39-41 and accompanying text *infra*. In other courts, however, the requirement of fulfilling a "compelling reason" has often led to the demise of haircut regulations. *See*, e.g., *Long v. Zopp*, 476 F.2d 180, 181 (4th Cir. 1973) (per curiam); *Arnold v. Carpenter*, 459 F.2d 999, 944 (7th Cir. 1972); *Dunham v. Pulsifer*, 312 F. Supp. 411, 417 (D. Vt. 1970).
78 425 F.2d at 203-04.
Stevenson v. Wheeler County Board of Education brought to the courts still another wrinkle, this time a racial one, and signaled a further broadening of the category of "compelling reasons." The Stevenson plaintiffs' decision to make a claim of race discrimination, however, worked to their disadvantage. One had to feel sorry for Chief Judge Lawrence. He had, after all, just succeeded in fully integrating the Wheeler County high school system by combining an all-black school into a largely white one when three black students refused to comply with the school's clean-shaven rule and were suspended. No matter which way he ruled he was likely to jeopardize the peaceful settlement of the desegregation question. Many local blacks were keenly interested in the result and would be likely to interpret a ruling in favor of the school as racist. Whites, having just been deprived of their cherished freedom of choice plan, would interpret a decision for the plaintiffs as another victory for "them." Judge Lawrence grimly faced the task and upheld the regulation.

The plaintiffs relied on a privacy argument combined with an "ethnic identity" argument, the latter presumably to circumvent the fact that the regulation forbade both blacks and whites to have beards and mustaches and had not been applied discriminatorily. The school sought to justify the regulation on the ground that unshaven students were "distractive." Relying on some Supreme Court language about hairstyle in Tinker v. Des Moines Independent Community School District and Judge Comiskey's opinion in Davis,

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80 Chief Judge Lawrence noted that he had entered an order on the desegregation issue only two months earlier. Id. at 97-98. For a discussion of Chief Judge Lawrence's involvement in these cases, see Acree v. County Bd. of Educ., 336 F. Supp. 1275 (S.D. Ga.), modified mem., 458 F.2d 486 (5th Cir.), cert. denied, 409 U.S. 1006 (1972).
82 Id. at 99. This "ethnic identity" argument was accepted by Judge McRae in Braxton v. Board of Pub. Instruction, 303 F. Supp. 958 (M.D. Fla. 1969), wherein a black schoolteacher was ordered reappointed after having been dismissed for sporting a goatee. Observing that the goatee was worn "as an appropriate expression of his heritage," Judge McRae held that this type of expression was thereby guaranteed by first amendment "peripheral protection." Id. at 959.
84 393 U.S. 503 (1969), wherein the Court remarked that the "problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment." Id. at 507-08 (emphasis added). Further attention has been drawn to this quotation in other decisions upholding haircut regulations. See, e.g., Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972); Freeman v. Flake, 448 F.2d 258, 260 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932, 937 n.9 (9th Cir. 1971), cert. denied, 404 U.S. 979, 1042 (1972); Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir.) (per curiam), cert. denied, 400 U.S. 850 (1970). In Torvik v. Decorah Community Schools, 453 F.2d 779 (8th Cir. 1972) (per
Chief Judge Lawrence held that hairstyle, including facial hair, was not a form of pure speech and that school regulations should be upheld whenever there is a rational basis for them. Therefore, there was no necessity for the school board to show actual disruption of school affairs to have its rule upheld.

At the district court level, the Stevenson conclusion was precisely opposite to that of Griffin. Griffin upheld a constitutional right to hair; Stevenson denies that such a right exists. The Fifth Circuit in Stevenson was therefore confronted with an opportunity to rule that there was no constitutional right to hair by merely affirming Chief Judge Lawrence. Judge Bell, again writing for the court of appeals, began by taking up where he had left off in Griffin. Thus, exhaustion of remedies, merely mentioned in a footnote in Griffin, became in Stevenson a prerequisite to federal court action. Stating that the district court should have required the plaintiffs to bring their complaint before the board of education, the court of appeals nonetheless proceeded to consider the case on the merits since members of the board had testified in the lower court that they would have sustained the suspensions. The court, having thus imported yet another technique for not delving into the haircut law, reduced the school's burden of justification to one of proving that the rule is reasonable. The opinion ends on this ominous note:

[T]he rule in question is founded on a rational basis, and... it was not arbitrarily applied. It follows that no substantial federal constitutional question was presented. There the matter ends.

curiam), however, Tinker was cited to invalidate the regulation without specific reference to the quoted passage.

85 306 F. Supp. at 100-01.
86 Counsel for plaintiffs makes much of the fact that the existence of facial hair growth of a student has never created any incidents or commotion in the Wheeler school system and that the regulation requiring shaving is therefore without basis in reason and is arbitrary. The mere fact that a particular hair style or hirsute growth on one's face has not created a classroom disturbance is not conclusive of its unreasonableness. Students wearing mustaches or beards in a high school may be a distracting influence on a student body which does not wear them. Teachers have a right to teach in an atmosphere conducive to teaching and learning and unkempt faces do not contribute much to it.

Id. at 101.

87 The Stevenson court stated that school officials, not judges, are the proper ones to establish rules of conduct and applied a rational basis test to the rules promulgated by the school authorities. Id. The student, therefore, is left with no right to long hair at all since an unreasonable school regulation would be invalid whether the regulation pertained to constitutionally protected subjects or not.

88 See note 75 supra.
89 426 F.2d at 1157. In Ferrell, however, exhaustion of administrative remedies had not been required. 261 F. Supp. at 549.
90 426 F.2d at 1158.
Stevenson appears to be the end of the line for long-haired plaintiffs. The court of appeals is now provided with a whole armory of avoidance techniques\(^9\) and the school's burden of proving a compelling reason for the hair regulation, as required by Ferrell, has been so lightened that the only school which would seem likely to be unable to meet it is one which is run for the amusement of the administration rather than the education of the students. The Fifth Circuit's days of dodging the constitutional issues in haircut cases, however, were far from over.

*Calbillo, Wood, Whitsett, Glover, and Dawson*

— Theme and Variations

"[A]nd his strength went from him."

— Judges 16:19

San Jacinto Junior College officials decided that an excellent way of keeping radicals and hippies from disturbing the serenity of the campus was by forbidding students to have beards. Not unexpectedly, a student grew a beard to test the validity of such a regulation. In *Calbillo v. San Jacinto Junior College*,\(^9\) the Court of Appeals for the Fifth Circuit not only twice successfully avoided ruling on the constitutional issue but also added new "avoidance techniques" to its repertoire.

Although Judge Singleton of the *Calbillo* district court entertained a number of possible justifications for haircut rules,\(^9\) he warned that the school had the burden of proving that the rules were necessary to deal with a genuine problem, not an imagined one.\(^9\) There was no evidence of disruptions caused by the wearing

\(^9\) *Stevenson* added exhaustion of remedies to the avoidance techniques of assuming the constitutional right arguendo, suggested by Ferrell, and limiting the decision to the particular facts, suggested by both Ferrell and Griffin. Of course a court could also follow *Davis*’ lead by merely citing *Ferrell* as controlling. *See* text accompanying notes 88-89, 38-39, 72-74 & 60 supra.


\(^9\) *See* 305 F. Supp. at 859. The various justifications for haircut rules included "discipline, health, morals, physical danger to others, or ‘distraction’ of others from their school work." *Id.*

\(^9\) *Id.* In so warning, Judge Singleton stated that the school authorities must demonstrate "that the exercise of the forbidden rights would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.’" *Id.*, quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509 (1969) (students’ right to wear black armband upheld in the absence of school disruption), quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (students’ right to wear "freedom buttons" upheld
of beards; indeed, the only evidence of adverse reaction was that of a female student who had complained of the hippies' appearance and odor. The school's contention "that beards and hair styles are a sufficient indicator of potential campus troublemakers" was dismissed as unsupported by the facts, common sense, or logic. The rule against beards, Judge Singleton concluded, was therefore an unreasonable classification in violation of the equal protection clause of the fourteenth amendment. Although the district court felt it unnecessary to reach Calbillo's claim of first amendment protection for the beard, Judge Singleton remarked that the regulation "was used as a catchall to enable school officials to deny admission to those students whose beliefs might differ from those of the school officials, clearly a First Amendment violation."

The district court's opinion in Calbillo presented the Fifth Circuit with three areas where clarification would have been helpful. First, while Judge Singleton makes the analogy to Zachry in rejecting mere individual preference as a justification for the regulation, the underlying justification involved prevention of campus disruptions. Although the rule may suffer from overbreadth, prevention of disruptions had been frequently recognized as a valid justification, and it is therefore difficult to see how the regulation on beards could be explained away as a mere personal whim. Second, like Stevenson, Calbillo measures school regulations against a "reasonableness" standard and uses similar language to describe the test. Nevertheless, although Judge Lawrence in

in the absence of a showing that such expressive conduct interfered with the educational process).

95 305 F. Supp. at 859-60.
96 Id. at 860-61. This, the court held, was no more than expression of distaste which could not count as a justification.
97 Id. at 861.
98 Id. at 861-62. Here, the court also noted that the regulation forbade beards but not mustaches.
99 Interestingly, Judge Singleton, citing Ferrell, referred to the Fifth Circuit's avoidance of deciding whether a hairstyle may be considered expressive conduct protected by the first amendment. Id. at 862 n.7.
100 Id. at 862.
101 Id. at 861.
102 Judge Singleton stated that since the court in Zachry refused to permit the school's administration to promulgate haircut regulations based upon the administration's personal preferences, it would be anomalous for the court to accept as justification for the regulation the individual preference of a single student. Id.
103 See id. at 859-61 and cases cited therein; text accompanying notes 34-42, 56-60, 76-78 and notes 37, 42, 76 supra.
104 305 F. Supp. at 862; see text accompanying note 90 supra. For examples of other decisions where the "reasonableness" standard was used see note 28 supra.
Stevenson seemed willing to allow the school to do anything which is not clearly unreasonable, Judge Singleton in *Calbillo* requires the school to prove that the regulation bears a reasonable relationship to the well-being and discipline of students. Finally, although Judge Singleton relies upon a variety of cases involving high school regulations, nothing in *Calbillo* indicates that there is any legal distinction between high school and junior college students or that the regulation of one will be tested differently from the other.

The Fifth Circuit, however, did not need to address any of these intriguing points or the constitutional questions. Between the date of issuance of the injunction against the beard rule and the time the case was heard by the court of appeals, Calbillo was reinstated in school, shaved off his beard, and withdrew from San Jacinto Junior College. Instead of reaching any decision, the Fifth Circuit remanded the case to the district court to consider whether the controversy is now moot, whether it remains appropriate to enjoin the College from enforcing, in whole or in part, the regulation against all students, and to provide the College with the opportunity to revise its regulations so that they are clearly related to the maintenance of reasonable discipline and decorum.

Although Judge Singleton duly dismissed the case as moot, one month later, on his own motion and without notice to either Calbillo or the junior college, he entered an order alluding to a new grooming regulation adopted by the school after the Fifth Circuit had remanded the case. The Fifth Circuit had no trouble sidestepping any constitutional issues lurking in the postdismissal order:

> Since the district court . . . did not have before it any justiciable cause or controversy, requisite to jurisdiction, Article III, Constitution of the United States, the [postdismissal] Order . . . is vacated and the [dismissal] is affirmed, terminating this litigation.

Thus, *Calbillo* adds mootness and case or controversy to the Fifth Circuit's long list of techniques used to avoid decision on

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105 305 F. Supp. at 858-62, wherein Judge Singleton draws upon *Tinker*, *Ferrell*, and *Griffin*, as well as *Zachry*.
106 434 F.2d at 610.
107 See *Calbillo v. San Jacinto Junior College*, 446 F.2d 887, 888 (5th Cir. 1971) (per curiam). Judge Singleton's sua sponte order reinstituted the litigation, this time directed against the school's amended regulation.
108 *Id.* at 888.
109 See note 91 supra.
whether there is a constitutional right to groom one's hair as one pleases.

In *Wood v. Alamo Heights Independent School District*,\(^{110}\) students had participated with school officials in drafting the challenged regulations.\(^{111}\) Assuming that the constitutional right applies and forbids oppression by one's peers as well as by one's superiors,\(^{112}\) how student participation confers reasonableness upon the regulation is unclear. Nonetheless, the district judge upheld the haircut regulation.\(^{113}\) Interestingly, however, he distinguished *Zachry* and *Calbillo*, reasoning that there is a significant difference between high school regulations and junior college regulations,\(^{114}\) a difference which neither Judge Lynne nor Judge Singleton had noticed. Perhaps indicating that haircut cases were becoming routine fare, the court of appeals decided *Wood* without oral argument\(^{115}\) and held that the district court did not err in concluding that the regulation "is not arbitrary or unreasonable and . . . is sufficiently related to alleviating interference with the educational process."\(^{116}\) There was no need for a lengthy opinion; the result followed a fortiori from *Stevenson*.\(^{117}\)

In *Whitsell v. Pampa Independent School District*,\(^{118}\) the high school reinstated the challenged regulations only after an experi-

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\(^{110}\) 308 F. Supp. 551 (W.D. Tex.), aff'd, 433 F.2d 355 (5th Cir. 1970) (per curiam).

\(^{111}\) Neale Wood was suspended as a result of his violation of the school's dress and grooming code which was based upon recommendations submitted by a student committee as well as advice received from "fashion and grooming experts." 308 F. Supp. at 551-52.

\(^{112}\) See Arnold v. Carpenter, 459 F.2d 939, 943 (7th Cir. 1972) ("mere student participation" alone does not justify infringement of students' constitutional rights).

\(^{113}\) 308 F. Supp. at 552-54. The district court closely followed the reasoning of Judge Comiskey in *Davis*, wherein the responsibilities of the school in relation to the proper maintenance of an educational atmosphere are held to support reasonable regulations necessary to assure this objective. See text accompanying notes 53-56 supra. Additionally, Chief Judge Spears dismissed Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), aff'd, 424 F.2d 1281 (1st Cir. 1970), as dissimilar on its facts and distinguished Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis.), aff'd, 419 F.2d 1094 (7th Cir. 1969), *cert. denied*, 393 U.S. 937 (1970), as lacking the substantial justification put into evidence in *Wood*.

\(^{114}\) 308 F. Supp. at 553-54, wherein it is observed that "considerations of discipline and decorum" would appear to be quite different in applying regulations to a 14-year old high school student, on the one hand, and a college student on the other.

\(^{115}\) 433 F.2d at 355. The court utilized 5TH CIR. R. 18 which permits disposition of a case without oral argument.

\(^{116}\) 433 F.2d at 356.

\(^{117}\) *Stevenson* approved delegating to school officials the authority to promulgate conduct regulations reasonably related to the proper operation of the school system. See note 87 supra.

The Fifth Circuit in *Wood* noted that, since the decision below had been handed down prior to its decision in *Stevenson* requiring exhaustion of administrative remedies, see text accompanying notes 88-89 supra, it would make a determination on the merits rather than remand. 433 F.2d at 355.

\(^{118}\) 316 F. Supp. 852 (N.D. Tex. 1970), aff'd, 439 F.2d 1198 (5th Cir. 1971) (per curiam).
ment with no regulations on hairstyles had failed. The school officials' apparent willingness to modify the rules when they were no longer necessary to the good order of the school gave added weight to their opinions that the rules were now actually needed. The district court upheld the regulation on the basis of this showing of necessity only after saying that first, the wearing of long hair "is a right protected . . . by the Constitution;" and second, that "[a]bsent a strong showing of disruption or interference with the educational process or with the rights of other students, such a regulation would not be permitted to stand." Since the Fifth Circuit had studiously avoided deciding the first of these propositions and indicated in Davis, Stevenson, and Wood that it did not agree with the second, it is not surprising that on appeal the district court received less than enthusiastic approval for its version of the law. The Fifth Circuit held that "the conclusions of law not being inconsistent with the appertaining law, it follows that the judgment of the district court should stand."

At this point it begins to look quite certain that, despite the language in some district court opinions about the constitutional right to grow one's hair as one pleases, the Court of Appeals for the Fifth Circuit would never squarely face the question of the existence of that right or, in the alternative, would decide that the right did not exist. After all, no plaintiff save Bobby Griffin had ever won in the Fifth Circuit, and his victory was a pyrrhic one since the court leaned over backwards to show that the regulation was not invalid per se, but only as applied. Furthermore, no school board's attempted justification for its rules, whether weakly or strongly supported by the evidence, whether eminently reasonable or plainly farfetched, had ever failed to secure the approval of the Fifth Circuit. Indeed, in Glover v. Pettey, the court of appeals affirmed without opinion a determination in favor of a school

119 It would appear that the disturbances which necessitated the reinstatement of a dress code were more likely the result of a lack of supervision or a lack of a code regulating wearing apparel than the consequence of no hairstyle regulations. See 316 F. Supp. at 853.
120 Id. at 854.
121 Id. at 855. Similar to the district court in Wood, the district court in Whitsell also noted the difference between college and high school disciplinary rules. Id. at 854.
122 439 F.2d at 1198.
123 Civil No. 70-784 (N.D. Ala., Oct. 26, 1970) (Grooms, J.), aff'd, 447 F.2d 495 (5th Cir. 1970) (per curiam). Plaintiff, Gary Glover, was suspended when, in contravention of the school hair code, he arrived at the Morgan County High School with hair that reached below the collar of his shirt. Although he wore a hairnet so as not to appear to violate the rule, his requests for a temporary restraining order and permanent injunction were denied. The district court stated that the rule was neither unconstitutional nor unconstitutionally applied. Civil No. 70-784, at 3 (N.D. Ala., Oct. 26, 1970).
board’s haircut regulation. By invoking local rule 21, only used when the court has determined that the writing of an opinion would have “no precedential value,”124 the Fifth Circuit found still another avoidance technique available for the dodging of constitutional issues. Ironically, the court had theretofore remarked that local rule 21 should be “sparingly used” and should never be applied “to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues.”125

Perhaps if the Dawson brothers had thought harder about these developments, they might have considered it more prudent to visit the barbershop instead of the federal court. Surprisingly, however, their lack of circumspection was rewarded as they demonstrated that, even in the Fifth Circuit, the school does not always win haircut cases. No one could call the Hillsborough County school officials complacent. When their hair regulations were challenged in Dawson v. Hillsborough County School Board,126 the school establishment struck back with the full panoply of justifications: prevention of distraction127 or disruption,128 the participatory way in which the rules were adopted,129 the educational value of having rules,130 the correlation between long hair and underachievement,131 the correlation between long hair and disciplinary problems,132 a tendency on the part of long-haired students to be socially maladjusted and clannish,133 and the need for short hair on the part of students seeking part-time jobs under the school system's vocational education program.134 Nevertheless, the litany was weighed in the balance and found wanting, either for lack of evidence or irrelevancy to evils which the school had a right to control.

The district court noted that the Fifth Circuit had “never ruled explicitly on the question of whether the right to wear one’s hair in

124 5TH Cir. R. 21.
125 NLRB v. Clothing Workers Local 990, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J.).
126 322 F. Supp. 286 (M.D. Fla.), aff’d, 445 F.2d 308 (5th Cir. 1971) (per curiam).
127 Id. at 299. The school superintendent's testimony on this point, rejected as unpersuasive, is very similar to the testimony of the superintendent in New Orleans, see note 58 supra, cited with approval in Davis. Compare Davis v. Firment, 269 F. Supp. 524, 528 (E.D. La. 1967) with Dawson v. Hillsborough County School Bd., 322 F. Supp. 286, 290-01 (M.D. Fla. 1971).
128 322 F. Supp. at 299-300.
129 Id. at 300. Justifying a challenged regulation by reference to student participation in its drafting had proven successful in Wood. See text accompanying notes 111-13 supra.
130 322 F. Supp. at 301.
131 Id. at 301-02.
132 Id. at 302-03.
133 Id. at 303.
134 Id.
any desired manner” is constitutionally protected, but went on to conclude that the court of appeals had decided that there was such a right by implication:

This Court concludes that the right to wear one’s hair at any desired length or manner is a federally protected right. If this conclusion were incorrect, then the Fifth Circuit would not have required a showing of interference with the educational process for a hair regulation to be sustained. Stated differently, there would be no reason for the courts to require evidence of classroom disruption if individuals did not have the right to wear their hair as they wish; a compelling State interest is needed only where the State encroaches upon personal freedoms, i.e., constitutional rights. Whether this right is characterized as protected by the First Amendment (freedom of expression), the Ninth Amendment (penumbral rights), or the Fourteenth Amendment (right to reasonable and nonarbitrary classification) is of no import; the fact remains that hair style is a right because the Fifth Circuit permits it to be regulated only upon a showing of a subordinating State interest.

Dawson represents a return to the basic principles of Ferrell with one difference: it decides that there is a constitutional right instead of assuming it. The intervening cases, with their ready acceptance of justifications offered for haircut rules, are swept aside and the school board’s reasons subjected to close (and withering) scrutiny. The district judge in Dawson threw down the constitutional gauntlet to the Fifth Circuit by refusing to follow the lengthy line of cases which accepted reasonable apprehension of disorder or fear of distraction as proper reasons for upholding hair regulations. Surprisingly, the court of appeals did not accept the challenge.

The court of appeals, only 18 days after Glover and without

135 Id.
136 Id. at 304. This is not, strictly speaking, a correct conclusion. A rule that all students must carry all their schoolbooks with them at all times would not be invalid for violating any constitutional freedom from unnecessary burdens, but because it is patently unreasonable. Due process and equal protection forbid the federal government and the states from engaging in utterly irrational regulation of conduct even though the conduct is itself not constitutionally protected. See Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974). On this basis Zachry and perhaps Calbillo are correctly decided even if there is no constitutional right to wear one’s hair as one pleases. But the district court is correct in concluding that if there is no constitutional right to long hair, the “compelling interest” test used in Ferrell would not have been the proper test, and, therefore, that its very use in Ferrell implies the existence of a constitutional right. The district court in Dawson seems to overlook the language in Ferrell which indicates that the constitutional right was only assumed to exist and the use of the “rational basis” test—appropriate to regulation of conduct which is not constitutionally protected—by the district court in Davis and the court of appeals in Stevenson.
oral argument, held the district court's factual determinations "not clearly erroneous" and affirmed, citing Ferrell and Griffin.137 A petition for rehearing en banc was denied, with none of the judges requesting a polling of the court.138 The constitutional question which had so carefully been avoided for years had apparently been decided in three short, unremarkable sentences. Nothing about the Dawson opinion indicated that a storm was brewing in the Fifth Circuit, a storm which would soon shatter the serenity of the entire court.

Karr v. Schmidt — An End to Long Hair?

"O dark, dark, dark, amid the blaze of noon,
Irrecoverably dark, total eclipse
Without all hope of day!"
— J. Milton, Samson Agonistes, Act I

Karr v. Schmidt139 started out in familiar fashion with the teenage boy being kept out of high school because his hair was too long, the boy and his father suing the school board, and the board rounding up the usual justifications in its defense. Nor is there anything new about the elements of the district court's reasoning. As in Griffin, classification by hair length was found to be violative of equal protection and the right to wear one's hair in the way one wants was deemed protected by the due process clause of the fourteenth amendment.140 Karr, however, differs greatly from most earlier cases in its tone: the district court seemed tired of hearing the school board advance the necessity for haircut rules as some sort of a priori proposition which needs no evidentiary support.141 Indeed, the court seemed determined to make an end of hair regulations. Length of hair, the court insisted, is irrelevant to any reasonable classification which the state may make, since "there

137 445 F.2d at 308. See note 115 supra. It must be noted, however, that the judges affirming Glover were Judges Gewin, Bell, and Morgan while those affirming Dawson were Judges Coleman, Simpson, and Wisdom. For a comparison of their future positions on these issues see notes 150 & 162 infra.
138 445 F.2d at 308.
139 320 F. Supp. 728 (W.D. Tex. 1970), rev'd, 460 F.2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972). The only novelty in Karr was that it was brought as a class action under Fed. R. Civ. P. 23(a), (b)(2). 320 F. Supp. at 731; accord, Lansdale v. Tyler Junior College, 318 F. Supp. 529, 534-35 (E.D. Tex. 1970). The district court in Karr noted that in view of the court's dismissal of the claim for damages, it hardly mattered that this was a class action, "since any grant or denial of the declaratory and injunctive relief sought . . . would . . . satisfy the alleged class." 320 F. Supp. at 730.
141 320 F. Supp. at 736.
is no reasonable relationship between the length of male high
school students' hair and any alleged disruption of the educational
process it is defendants' duty to maintain." While the opinion
limited itself to the facts of the case, the implication of the
decision is clear: in ordinary circumstances, the schools have no
power to enforce hair length regulations because those regulations
are not reasonably related to a valid governmental purpose. The
existence of a constitutional right to wear one's hair as one pleases,
which the court affirmed, is thus not essential to establish the
student's right to be free from regulation of hair length by schools.
Karr pointed the way toward a constitutional ban on haircut regula-
tions regardless of the answer courts may give to the question of
whether the Constitution guarantees a right to long hair. It is thus
not surprising that the case created considerable disquiet in the
court of appeals, for it threatened to undo the balance between
school rights and student rights which the Fifth Circuit had taken
great pains to maintain.

The district court had, of course, enjoined the enforcement of
the hair length regulation. On motion of the school authorities, the
court of appeals stayed the injunction pending appeal. Karr then
petitioned Mr. Justice Black, in his capacity as circuit justice for the
Fifth Circuit, for an order vacating the stay of injunction. The
great Alabama jurist saw the issue as bordering on the frivolous
and seemed annoyed that anyone should seek to have the Supreme
court waste its time on matters so inconsequential. Justice
Black's opinion denying Karr's petition ended with the suggestion
that hair length is a matter better left to the states than to the
federal courts.

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142 Id.
143 Id. at 733 n.18. See also text accompanying notes 74-75 supra.
144 320 F. Supp. at 735-36.
146 Id. at 1201-03. In McCune v. Frank, Civil No. 74-C1279 (E.D.N.Y., Dec. 13, 1974)
(Mishler, C.J.), vacated and remanded, 521 F.2d 1152 (2d Cir. 1975), Justice Marshall, acting as
circuit justice for the Second Circuit, denied a similar motion, this time for a temporary
injunction, Newsday, Sept. 16, 1975, at 24 (Sept. 15, 1975). The motion had been made in
hopes of blocking departmental disciplinary action by the Nassau County Police Department
until the Supreme Court ruled on the constitutionality of a similar hair length regulation
already before the Court. See Dwen v. Barry, 508 F.2d 836 (2d Cir.), cert. granted, 421 U.S.
987 (1975).
147 401 U.S. at 1202-03. Accord, Freeman v. Flake, 448 F.2d 258, 262 (10th Cir. 1971),
cert. denied, 405 U.S. 1032 (1972) (no substantial constitutional claim asserted); King v.
Saddleback Junior College Dist., 445 F.2d 932, 940 (9th Cir. 1971), cert. denied, 404 U.S. 979,
1042 (1972) (no substantial constitutional claim asserted); Greenwald v. Frank, 32 N.Y.2d
225 (2d Dep't 1973) (mem.) (Nassau County patrolman asserted no constitutional question).
148 401 U.S. at 1203. Accord, Freeman v. Flake, 448 F.2d 258, 259-61 (10th Cir. 1971),
When the Fifth Circuit decided, at length, the appeal in *Karr*, a plurality of the judges sought to use this suggestion of Justice Black as the means for disposing of the haircut cases once and for all. *Karr*, which had seemed at the district court level to signal the demise of school haircut regulations, ended in the court of appeals with an announcement that such regulations are per se valid.

The court of appeals decided *Karr v. Schmidt* en banc, producing a total of five opinions. The actual vote for reversal was eight-to-seven, and the opinion of the court by Judge Morgan represented the view of a seven-judge plurality. This plurality, like the district court, wanted to put an end to haircut cases but chose to do so by cutting off the student's right rather than by denying the school's power. A fundamental right to long hair, the court said, is not "to be found within the plain meaning of the Constitution." The question reserved in *Ferrell*, and apparently answered positively in *Dawson*, thus received a resounding "no." Although the plurality recognized that mere negation of the constitutional right did not require reversal because the haircut regulation might pass the reasonable relation test, it had no trouble in discerning that the regulation met this standard. Lest the reader

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149 460 F.2d at 609.

150 To enable the reader to tell the players, I offer the following scorecard. The authors of the various opinions are the first judges listed in each column:

<table>
<thead>
<tr>
<th>Opinion of the court</th>
<th>Special concurrence</th>
<th>Dissent</th>
<th>Dissent</th>
<th>Dissent</th>
</tr>
</thead>
<tbody>
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151 460 F.2d at 613.

152 Id. at 616.

153 In such cases, the appropriate standard of review is simply one of whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective. . . .

. . . The record nowhere suggests that their [the school authorities'] goals are other than the elimination of classroom distraction, the avoidance of violence between long and short haired students, the elimination of potential health hazards, and the elimination of safety hazards resulting from long hair in the science labs.

Id. at 616-17. It is unclear whether the court is saying that haircut rules are plainly rational, contrary to the decision of the district court, or whether the court means that the absence of any proof of bad motive on the part of the school board is proof of reasonableness. See id. at 622 (Wisdom, J., dissenting). The Court of Appeals for the Fourth Circuit has refuted the claim made in the plurality opinion that long hair constitutes a safety hazard in the science
fail to discern where all this was leading, the conclusion of the opinion removes any lingering doubts about the validity of haircut regulations:

Given the very minimal standard of judicial review to which these regulations are properly subject in the federal forum, we think it proper to announce a per se rule that such regulations are constitutionally valid. Henceforth, district courts need not hold an evidentiary hearing in cases of this nature. Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.¹⁵⁴

The Karr plurality managed to enlist seven judges to deny the existence of a constitutional right to wear one's hair as one desires. The minority rallied six judges to the defense of such a right,¹⁵⁵ leaving the remainder of the court, Judges Bell and Godbold, standing squarely in the middle. Judge Bell specially concurred in the result, indicating that he thought the rational basis standard for judging haircut regulations was properly invoked by the plurality and observing that Stevenson had already applied that test. He seemed content to find that the reversal was required by application of prior case law and indicated that the plurality could have reached its result through clarification of the principles of that case law.¹⁵⁶ Judge Godbold, dissenting, would likewise have continued to follow existing case law, but would have affirmed the district lab by stating that hairnets, rubber bands, etc., can be used to prevent such hazards. Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972).

¹⁵⁴ 460 F.2d at 617-18 (footnote omitted), citing Freeman v. Flake, 448 F.2d 258, 262 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972). The opinion ends with a curious confession that the federal courts are incapable of protecting all the rights of every American:

The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life.

460 F.2d at 618. This is a surprising admission in light of the fact that the court has just declared that there is no constitutional right to long hair. It makes one wonder whether, if there were more federal judges, students would be held to have more rights.

¹⁵⁵ Four judges concurred with Judge Wisdom who would have upheld the right on equal protection and due process grounds, 460 F.2d at 619-21 (Wisdom, J., dissenting), while Judge Roney, writing for himself alone, would have upheld the right on privacy grounds in special circumstances such as Karr where the student is required by law to attend school. Id. at 624-25 (Roney, J., dissenting).

¹⁵⁶ Id. at 618 (Bell, J., concurring), citing Stevenson v. Board of Educ., 426 F.2d 1154, 1158 (5th Cir.), cert. denied, 400 U.S. 957 (1970) (application of rational basis test); Griffin v. Tatum, 425 F.2d 201, 203 (5th Cir. 1970) (arbitrary application as denial of due process and equal protection) and Bicknell v. United States, 422 F.2d 1055, 1057 (5th Cir. 1970) (arbitrary law denotes absence of a rational basis). See text accompanying notes 88-90 & 71-78 supra.
court, reasoning that the "clearly erroneous" standard of review required acceptance of the facts as found by the lower court. He seemed equally appalled at those who wanted to use Karr to expand the scope of student rights and those who wished to use it "to get the courts out of hair cases."\(^{157}\) Karr v. Schmidt thus ends inconclusively with neither side in the constitutional battle able to obtain a majority. Technically, the law remained as it was after Stevenson. In fact, however, high schools were never again to lose on haircut regulations in the Fifth Circuit. The drama was at an end — or, almost at an end.

**Lansdale — A Right Revived**

"But the hair of his head began to grow again after it had been shaved."

— Judges 16:22

The immediate sequel to Karr was predictable — summary disposition of high school haircut cases.\(^{158}\) What was not predictable, however, was the advent of a second en banc haircut case which would produce an even more sharply divided court than did Karr.

On its face, Lansdale v. Tyler Junior College\(^ {159}\) was not very different from Calbillo.\(^ {160}\) The district court, rejecting the defense that the regulation served to eliminate hippies and radicals from the student body, invalidated the regulation on equal protection grounds as unreasonable and discriminatory.\(^ {161}\) The court of appeals affirmed in an en banc decision which featured no fewer than eight separate opinions.\(^ {162}\) The trend toward abandoning case-by-case adjudication in favor of judicial legislation, evident in Karr, became fully explicit in Lansdale. Judge Clark's opinion for the majority is the most original and startling disquisition on haircut law ever to issue from the Fifth Circuit. Although it is ultimately

\(^{157}\) 460 F.2d at 624 (Godbold, J., dissenting). Judges Thornberry, Simpson, and Chief Judge Brown joined in this dissent.

\(^{158}\) See, e.g., Goldsmith v. Quitman Indep. School Dist., 461 F.2d 1262 (5th Cir. 1972) (per curiam); Southern v. Board of Trustees for Dallas Indep. School Dist., 461 F.2d 1267 (5th Cir. 1972) (per curiam).


\(^{160}\) Perhaps the most significant difference between Lansdale and Calbillo was that one of the plaintiffs in Lansdale was an "ancient" veteran of the Vietnam conflict, 22 years of age. 318 F. Supp. at 531.

\(^{161}\) Id. at 552-53.

\(^{162}\) 470 F.2d at 659. The Lansdale scorecard, see note 150 supra, is as follows:
unpersuasive in its attempts to distinguish high school students from junior college students and its herculean efforts to square its results with those of Karr, it is deserving of high praise for its completely novel approach to the problem which had vexed the court for several years. Perhaps it demonstrates that the logical outcome of repeated avoidance of constitutional questions is not necessarily principled adjudication, but may instead be unprincipled judicial invention.

Judge Clark began by observing that the facts of an individual case are irrelevant to the validity of the regulation.\textsuperscript{163} If one has seen one haircut case, one has seen all haircut cases. Since facts do not matter, it is appropriate to announce a rule upholding all hair regulations or striking them all down. Karr took the path of upholding all haircut regulations for high school students, but Lansdale declared that one cannot follow that path in the case of college students, not because college students possess a constitutional right which high school students lack, but because as a matter of law

the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of this liberty is reasonably related to the fostering or encouragement of education. The value of the liberty hasn't changed, rather the setting in which it is to be exercised has.\textsuperscript{164}

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\textbf{Opinion of the court} & \textbf{Concurrence} & \textbf{Special concurrence} & \textbf{Special concurrence} & \textbf{Special concurrence} \\
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\textbf{FOR REVERSAL (6)}
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Dyer \hspace{1cm} Dissent
Dyer \hspace{1cm} Roney
Gewin \hspace{1cm} Coleman
Ainsworth \hspace{1cm} Ingraham

\textsuperscript{163} [T]his sameness of the campus life in the respective grade and high school and collegiate environments means that judicial scrutiny of haircut regulations in these institutions almost never calls for what is truly an adjudication of facts.

Id. at 661. Judge Clark also noted that:

The most important tenet in my reasoning is that the decision either that hair must be cut if the student is to continue his education at the school because the regulation is deemed reasonably related to a legitimate state interest, or that the school must strike the regulations from its records because it has no rational basis and therefore arbitrarily infringes a valid constitutionally protected liberty, is wrongly cast if put in the mold of a determination of fact from record evidence.

Id. at 661-62.

\textsuperscript{164} Id. at 662. Interestingly, in addressing the issue of whether the Constitution protects
Having reached this decision, Judge Clark is now obliged to untie a pair of difficult knots by justifying his line of demarcation and explaining how the *Karr* plurality's denial of the existence of a constitutional right to long hair can be reconciled with a decision that colleges have no power to regulate hairstyles.165

Judge Clark first justifies the line of demarcation by an appeal to certainty.166 Plainly, this is pertinent only to the desirability of having a line without giving any reasons for drawing it one place rather than another. According to Judge Clark, the line is drawn at college because college students, unlike high school students, often live away from home in a dormitory, can usually vote, and are subject to the draft.167 None of these factors is very convincing. Putting to one side the large number of junior college and college students who continue to live at home,168 it would appear to make greater sense for the college to have more regulations for students than the high school precisely because students are living away from home and are no longer subject to parental protection and supervision. The sudden change from being at home and subject to strict supervision to being on one's own at college appears to justify regulation rather than to counsel against it.


In determining whether there is a right to wear one's hair as one desires, distinction has also been made between prisoners and unconvicted detainees. Compare Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970) (per curiam) (prisoner's right to long hair denied) with Smith v. Sampson, 349 F. Supp. 268 (D.N.H. 1972) (right of unconvicted detainee to wear a beard or goatee is protected by the fourteenth amendment but subject to reasonable regulation).

The redeeming virtue of a per se rule, which far outweighs its shortcomings, is that it is more realistic and more equitable in its overall operation than random judicial "fact" fiat that treat one student one way and another virtually identically circumstanced student another. By differentiating between grade and high schools on the one hand and colleges on the other, we bring to academic regulation of hair style as much order as the inherent vagaries of a system of judge make [sic] law will permit.

470 F.2d at 662.

166 Compare *Karr* v. Schmidt, 460 F.2d 609, 611, 613, 615-16, 618 (5th Cir. 1972) (en banc) with *Lansdale* v. Tyler Junior College, 470 F.2d 659, 663 (5th Cir. 1972) (en banc).

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470 F.2d at 662.

168 Id. at 662-63.

169 It is suggested that one of the chief reasons for the existence of a junior college system is to enable students to save money by living at home while attending college.
the large number of 18-year olds in high school and 17-year olds in college, the arbitrariness of drawing the line based on educational attainments rather than on age is evident. Furthermore, it is clear that there was no constitutional right to vote at age 18 until the twenty-sixth amendment to the Constitution was adopted. As a result, any independent constitutional significance to that age is difficult to support. The right of college students to vote presumably means that they can influence haircut rules at public colleges through the political process, an option not open to most high school students. The draft argument is also insubstantial. Like the right to vote, the draft is based on age and, consequently, should apply to some high school students and not to all college students. In addition, half the students in college are not subject to the draft at all because of their sex, while presumably both men and women are subject to dress and hair codes. No one can quarrel with the proposition that the average college student is more mature than the average high school student; however, this proposition by itself cannot justify denying colleges the right to regulate students' hair while permitting high school officials to do so.

Judge Clark's reconciliation of Lansdale with Karr fares no better than his attempt to justify his line-drawing. Karr, we learn, upheld the constitutional right to choose one's hairstyle while holding that the school's power to regulate hair was, in the case of high school students, paramount to that right. This proposition is justified not by quotations from Karr, but by the argument that first, Judge Morgan, who wrote the Karr plurality opinion, joins in Judge Clark's Lansdale opinion; and second, the Karr opinion would not have been so lengthy and weighty had it only announced the nonexistence of the constitutional right. While there are passages in Karr's plurality opinion which intimate that hairstyle is constitutionally protected, there are a great many more places in which it is flatly stated that there is no such constitutional right.

Judge Morgan's concurrence may only indicate that he has changed his mind in the matter, and the length and substance of


170 470 F.2d at 663. But see Karr v. Schmidt, 460 F.2d 609, 611, 613, 615-16, 618 (5th Cir. 1972) (en banc), denying the existence of a constitutional right to wear one's hair at a particular length.

171 470 F.2d at 663 n.3.

172 See 460 F.2d at 618, quoted in note 154 supra; 460 F.2d at 615 n.13.

173 Judge Dyer's dissent in Lansdale quotes five statements from Karr to this effect. Id. at 665-66 (Dyer, J., dissenting), citing 460 F.2d at 609, 611, 613, 615-16, 618.
Karr may as easily be ascribed to the fact that it sought to overrule a long line of cases as to concern with preserving the constitutional right to long hair. Judge Clark ends the opinion with a ringing declaration of the constitutional right to choose one's hairstyle, accompanied by a loophole for "unusual circumstances" comparable to the Karr loophole for "irrational regulations":\footnote{See text accompanying notes 149-54 and note 153 supra.}

In the absence of a showing that unusual conditions exist, the regulation of the length or style of a college student's hair is irrelevant to any legitimate college administrative interests and any such regulation creates an arbitrary classification of college students. Because no such unusual circumstances existed here, the regulation adopted in the instant case violates both the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.\footnote{470 F.2d at 664. See also Mick v. Sullivan, 476 F.2d 973 (4th Cir. 1973) (per curiam) (right to choose one's hairstyle protected by the due process and equal protection clauses of the fourteenth amendment); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) (protected by the due process clause of the fourteenth amendment); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (protected by the equal protection clause of the fourteenth amendment); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (protected by the due process clause of the fourteenth amendment).}

Chief Judge Brown concurred, applauding the court for rejecting the tyranny of facts, but questioning the advisability of the use of per se rules.\footnote{470 F.2d at 664 (Brown, C.J., concurring).} Judge Bell also concurred, referring to the necessity of a "legislative judgment of the kind involved here."\footnote{Id. at 664-65 (Bell, J., concurring).} Judges Wisdom and Godbold wrote short concurring opinions adhering to their dissenting opinions in Karr.\footnote{Id. at 664, 665 (Wisdom & Godbold, JJ., separately concurring).} Judge Simpson concurred in the result, but stressed that he believed no haircut regulation was consistent with the Constitution and pointed out the arbitrariness of Judge Clark's line-drawing. Judge Simpson's closing remarks are very much to the point:

This Court en banc strained mightily and conscientiously over these two cases. The net result of the effort is unfortunately not a glorious one. Our stance as a court emerges as unsatisfactory—because it is arbitrary and inconsistent—to members of the Court with directly opposing views. Surely these are grounds for re-examination of both decisions.\footnote{Id. at 665 (Simpson, J., concurring).}

As the dissenting judges correctly observed, there is little or nothing in Karr to support the Lansdale result, and a great deal in
which indicates the nonexistence of the right upheld in Lansdale.\textsuperscript{180}

On this discord, the haircut saga ends. Excessive avoidance of the constitutional issue had led to litigation and more litigation; the court reacted by proclaiming "No more" in Karr; but when confronted by the absurdity of the Karr rule applied to grown men, the court was forced to back off and amend Karr to make it inapplicable to college students. Perhaps if the court had not been so eager to avoid the issue in the first place, it would not have been so perplexed in the end.

CONCLUSION — "CERTAIN GOOD AND SUBSTANTIAL STEPS"

\begin{quote}
"As thou knowest not what is the way of the Spirit, nor how the bones do grow in the womb of her that is with child: even so thou knowest not the works of God who maketh all things."
\end{quote}

-Ecclesiastes 11:5

In explaining where the Fifth Circuit went wrong, one ought not overlook the conditions under which the court worked. During most of the haircut years the court had its present contingent of 15 judges, ordinarily sitting in panels of 3. Having 12 judges staring over one's shoulders cannot make the decision any easier, and it must inevitably predispose the 3 sitting judges to compromise and make ambiguous statements. Nor does the possibility of a rehearing en banc facilitate the judges' task, since the entire panel of 15 may, as in Karr and Lansdale, be unable to agree. As if this were not enough of a problem, the Fifth Circuit had to operate under a crushing caseload\textsuperscript{181} which included a variety of decisions of greater difficulty and wider impact than the haircut cases.\textsuperscript{182} Even

\textsuperscript{180}Id. at 665-66 (Dyer & Roney, JJ., separately dissenting).

\textsuperscript{181}See Comm'n on Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, 62 F.R.D. 223, 230-34 (1973), where it is stated that the Fifth Circuit handles "almost one-fifth of the total filings in the 11 circuits," with a caseload per judge which is "23 per cent more than the national average." Id. at 230. See also NLRB v. Clothing Workers Local 990, 430 F.2d 966, 968-69 nn. 4-7 (5th Cir. 1970).

after taking all of this into account, the performance of the court is still far from exemplary, and one contributing factor must certainly have been the court's continuing refusal to decide the constitutional question before *Karr* arose. That the proper case for deciding the issue was lacking cannot be used to justify avoidance of the constitutional question. *Davis v. Firment* \(^{183}\) presented the constitutional question plainly and simply. Certainly, *Davis*, in this respect, was a better case than *Ferrell, Stevenson*, or *Griffin*, all of which were complicated by their unusual facts. Nor can the possibility that the Supreme Court was likely to act and resolve the constitutional conflict be used to justify the Fifth Circuit's continued avoidance. By 1970 at the latest it must have become apparent that the high court would not hear haircut cases.\(^{184}\)

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\(^{184}\) See note 13 supra. No guidance having been offered by the Supreme Court, conflicting decisions as to the constitutionality of grooming regulations have issued from the several circuits. The Fifth, Sixth, Ninth, and Tenth Circuits have been the least sympathetic towards the existence of a constitutional right to grooming. As shown herein, although the Fifth Circuit has held that in absence of "unusual circumstances" college regulations are violative of the due process and equal protection provisions of the fourteenth amendment, high school regulations have been upheld. The Sixth Circuit was content to follow the Fifth Circuit's *Ferrell* decision and applied a "reasonableness" test to uphold hairstyle regulations in *Gfell v. Rickelman*, 441 F.2d 444 (6th Cir. 1971), and *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.) (per curiam), cert. denied, 400 U.S. 850 (1970). The Ninth and Tenth Circuits disposed of the issue by viewing an alleged right to grooming as an insubstantial question involving no constitutional issue. See, e.g., *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); *King v. Saddleback Junior College Dist.*, 445 F.2d 992 (9th Cir. 1971); cert. denied, 404 U.S. 979, 1042 (1972).

Although the First, Third, Fourth, Seventh, and Eighth Circuits have all recognized the existence of the right to choose one's own hairstyle and generally forbid interference with that right, these courts of appeals differ on both the origin of and protection to be afforded the right to grooming. In *Stull v. School Bd.*, 459 F.2d 339 (3d Cir. 1972), and *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1971), the courts located the right within the personal liberty guarantee of the fourteenth amendment; the regulations themselves, however, were tested against a reasonableness standard. The Fourth Circuit, while also relying upon the fourteenth amendment as the source of the right to choose one's own hairstyle, has, on the other hand, required authorities to show a "compelling necessity" for interference with that right. See, e.g., *Mick v. Sullivan*, 476 F.2d 973 (4th Cir. 1973) (per curiam); *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972). The Seventh and Eighth Circuits, agreeing that hairstyle regulations must be justified by necessity and that a substantial burden of proof should be placed on the school authorities, have disagreed on the origin of the right. The Seventh Circuit relied on the ninth, penumbra of the first, and equal protection clause of the fourteenth amendments, see, e.g., *Arnold v. Carpenter*, 459 F.2d 959 (7th Cir. 1972); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970), while the Eighth Circuit listed the ninth amendment, privacy penumbra of the Bill of Rights, and the due process clause of the fourteenth amendment, see, e.g., *Torvik v. Decorah Community Schools*, 453 F.2d 779 (8th Cir. 1972) (per curiam); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

In *Dwen v. Barry*, 508 F.2d 836 (2d Cir.), cert. granted, 421 U.S. 987 (1975), the Second Circuit recognized that police department guidelines on hairstyle were, in the absence of a compelling state interest, violative of the fourteenth amendment. See U.S.L.W. 3034-35 (July 22, 1976). Thus, the Court of Appeals for the Second Circuit joined a number of their district courts in recognizing a right to personal grooming. See, e.g., *Harris v. Kaine*, 352 F.
Finally, the failure to decide the issue cannot be justified by invoking the specter of the *Dred Scott* case. A court which had been interfering with school boards almost continually since the early 1960's and administering desegregation decrees in spite of protests, letters, and "segregation academies" could not honestly argue that it feared that school boards would resign rather than allow students to have long hair or that children too young to vote would rise up and defy haircut regulations the court held constitutional. Indeed, the school district in Pampa, Texas, which voluntarily abandoned hair regulation, can hardly have been unique. If failing to decide the constitutional question in the haircut cases cannot be justified on grounds of necessity or prudence, can it be justified on the basis that it did no harm to delay decision?

No matter how one feels about the constitutional issue, it is difficult to avoid the conclusion that prejudice resulted from the court's delay. As long as the court was committed to both the existence of an assumed constitutional right to long hair and a desire to avoid substituting its judgment for that of the school board, the rights of one party or the other were bound to be lost in the vague generalities of the decisions. Either the school board was forced to meet a "compelling interest" standard for its regulations when the proper standard was that of "reasonable relation," or the student had to demonstrate an utter lack of rationality in the regulations when all the constitution required was a less burdensome alternative. The court's refusal to take a stand necessarily


See text accompanying note 119 supra.
meant that one side had fewer rights than it would be entitled to had the court made up its mind.

As Karr demonstrated, a flat decision for either the existence or nonexistence of the constitutional right would have put an end to litigation. The absence of such a decision made it easier for school boards to promulgate grooming regulations in the hope that such regulations would survive challenge in the courts, and, encouraged the students to attack the regulations on constitutional grounds. The exasperation of the Karr plurality with the proliferation of litigation is plainly open to a *tu quoque* objection. What, then, should the court have done? What steps should it have taken?

*Davis* is plainly the point at which the court left the proper path. Its failure to produce a full, written opinion explaining the disposition of *Davis* resulted in uncertainty as to whether “proof of disruption,” “suspicion of disruption,” or some third standard of proof was applicable. After the court’s refusal to make the *Davis* case the occasion for decision of the constitutional question, and by the time the question of constitutional right was raised again in such a pure fashion, the tradition of avoidance and ambiguity was firmly established, and the court could take refuge in past opinions no matter how it decided.

The court, whatever its decision in *Davis*, could also have taken steps to clarify the doctrine of “efficiency” expounded by Judges Gewin and Godbold in *Ferrell*. If the *Ferrell* opinion had been made more concrete by subsequent decisions, the constitutional question would have been much more difficult to avoid, and the court’s work in enforcing or refusing to recognize the constitutional right would have been plainly visible. As it was, the vague generalities of *Ferrell* grew more vague through age.

Finally, the court of appeals could have paid greater attention in its earlier opinions to the implications of the plaintiffs’ different ages. There was ample precedent, even in constitutional matters, for treating children differently than adults. The Fifth Circuit’s

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188 See, e.g., Ginsberg v. New York, 390 U.S. 629, 634-37 (1968) (minors under 17 barred from receiving sex-related magazines); *In re Gault*, 387 U.S. 1, 14 (1967) (different treatment of adults and minors within the judicial system noted); Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944) (statute prohibiting a minor under 12 from selling newspapers or other articles upon the street or other public places upheld). *But cf.* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).
failure to exploit nonage as a factor enabling the school board to interfere with the student’s rights and its emphasis on the existence or nonexistence of a right rather than the propriety of interfering with that right based on the student’s age led to the embarrassing juxtaposition of *Karr* and *Lansdale*. Moreover, it resulted in the unsatisfactory rule that college and high school students, regardless of age, are entitled to different treatment.

The Fifth Circuit’s haircut odyssey is over. It effected no great change in legal relationships, produced no startling new principles, and resulted in no enduring opinions. It did, however, demonstrate the perils of continually postponing constitutional choice. It showed that, even in matters of ephemeral interest, a refusal to decide the meaning of the Constitution, however justifiable that refusal, will eventually serve to weaken the court and ultimately the Constitution itself.