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In the

Supreme Court of the United States

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Petitioners,

v.

KATIE MAE ANDREWS, et al.,

Respondents.

No. 74-1318

Washington, D. C.
March 3, 1976

Pages 1 thru 49

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Washington, D. C.,

Wednesday, March 3, 1976.

The above-entitled matter came on for argument at 10:15 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHAMP T. TERNEY, ESQ., 100 Court Street, Indianola, Mississippi 38751; on behalf of the Petitioners.

WILLIAM A. ALLAIN, ESQ., 101 Bankers Trust Plaza Building, Jackson, Mississippi 39201; on behalf of the Petitioners.

CHARLES VICTOR McTEER, ESQ., P.O. Box 634, 819 Main Street, Greenville, Mississippi 38701; on behalf of the Respondents.

APPEARANCES [Cont'd]:

MS. RHONDA COPELON, Center for Constitutional Rights, 853 Broadway, New York, New York 10003; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 74-1318, Drew Municipal Separate School District against Andrews.

Counsel, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHAMP T. TERNEY, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TERNEY: Mr. Chief Justice, and may it please the Court:

I am Champ Terney, from Indianola, Mississippi, representing the Petitioners, Drew Municipal Separate School District and the individuals, the Superintendent and the Board of Trustees of the School District.

The Court has in this case permitted divided argument for both the Petitioners and the Respondents. I will speak first on behalf of the Petitioners and Mr. Allain of Jackson, Mississippi, will argue in rebuttal, for the Petitioners.

I think that it is important in this particular case to discuss the factual background against which the rule in question was adopted.

The town of Drew, Mississippi, is located in a rural area of the Mississippi Delta, in Sunflower County, Mississippi, and according to the 1970 Census had a population of 2574.

The School District is comprised of the town of Drew

and some additional territory, added territory, outside the town and within the county of Sunflower. The entire District has a population of approximately five to six thousand residents.

The school itself is divided into an elementary school, a junior high school, and a high school; in all twelve grades, with approximately 1200 students. Eighty percent of which, at the time of this litigation, were black; twenty percent white. It is a public school system in Mississippi.

QUESTION: How many separate schools?

MR. TERNEY: There are three separate schools. There is Hunter High School, Hunter Junior High School, and A. W. James Elementary School.

QUESTION: So the whole school population goes successively to each of these three schools; is that it?

MR. TERNEY: Yes, Mr. Justice Stewart; that's correct.

QUESTION: Are all the buildings in one location?

MR. TERNEY: They are all, Mr. Justice Brennan, within the town of Drew. They are scattered in locations throughout the community.

The school system is fully integrated, and the district court so found in this particular case, that it's fully integrated as to faculty, staff, and students.

During the school year 1971-72, within this school system, there were 28 school-girl pregnancies, requiring those

children, 13 to 17 years of age, to be forced to withdraw from school, to give birth to children out of wedlock.

In Sunflower County, Mississippi, alone, the statistics in this record, as introduced by the respondents as an exhibit in the record and is incorporated in the Appendix, the statistics for 1971 show that of all live births in Sunflower County, Mississippi, 35.2 percent were illegitimate.

Now, faced with this situation, the alarming rise in school-girl pregnancies, and an alarming rate of illegitimate births within the community and county, the Superintendent, after having learned of the fact that there were teachers within -- teacher's aides within his school system that were parents of children born out of wedlock, Mr. Pettey, the Superintendent, activated his rule. And I'll discuss the rule in just a moment. Which resulted in the non-rehiring of one of the respondents herein, and the non-hiring of the other respondent herein.

Now, the rule has been much discussed. It was not a codified rule. The rule was Mr. Pettey's, and it was subsequently approved by the Board of Trustees.

I would like to state what we feel and submit to the Court constitutes the rule: that no individual who is the natural parent of a child born out of wedlock may be employed in the Drew schools as a teacher or teacher aide or in any other

position or capacity in direct contact with the students, and that has a potential role model status.

The rule was to regulate the status and not the present morals of an individual seeking employment.

Now, the respondent Rogers was employed during the 1971-72 school year as a teacher aide.

QUESTION: Mr. Terney, could I just interrupt for a second?

Where did you quote the rule from? Is that from the principal's testimony or is that in writing somewhere?

MR. TERNEY: Mr. Justice Stevens, this is from a distillation of the testimony in the record, and the way the rule is applied.

QUESTION: But is it counsel's distillation, the trial court's, or the witnesses', or whose is it exactly?

MR. TERNEY: At this point I can only say that it's counsel's, arrived at through rereading the record and the testimony in the record. And the application of the rule.

QUESTION: I see.

QUESTION: So the rule applies to much more than just teachers and teachers' aides, doesn't it?

MR. TERNEY: That's correct, --

QUESTION: A much broader spectrum of employees.

MR. TERNEY: That's correct, Mr. Justice Stewart. It does, it would affect any individual that had direct contact

with the students and who served in a role model capacity. In other words, an individual to whom the students related and looked up in a role model status.

QUESTION: Well, that would be just about everybody, except maybe the people who were --

MR. TERNEY: Cafeteria workers are excluded, --

QUESTION: -- there at the night when the students aren't, to do janitorial service, wouldn't it?

MR. TERNEY: Correct. Unless -- I think the Superintendent was unclear at the time of his testimony as to whether it would affect school bus drivers and some such things as this.

But I think it's fair to say that it would affect anyone to whom the students could relate in a role model capacity, and that would, in the District's opinion, have an impact upon their learning experience.

QUESTION: You've been referring to this, counsel, as a rule. Might it not be more accurate to say that this was an employment policy or a personnel policy?

MR. TERNEY: Mr. Chief Justice, you are exactly right. I think it has been designated as a rule. It is not codified, it is not written. I think you are correct in saying it is a policy of employment. Yes, sir.

QUESTION: Can you tell us to what employees specifically this policy, personnel policy applied in addition

to teachers and teacher aides?

MR. TERNEY: Mr. Justice Stewart, there has been no other individual within the school system that has been caught by this rule and excluded from employment, other than teachers or teacher aides.

Now, a reading of the record will reflect that the Superintendent at the time of his testimony was not completely certain as to the full application of the rule. I think it had to be taken on a case-by-case basis.

QUESTION: It was his rule, wasn't it, his policy?

MR. TERNEY: That's correct. But I think --

QUESTION: If he wasn't certain, how could anybody else be?

MR. TERNEY: Mr. Justice Stewart, he was not certain as to the particular jobs; he would have to look at the particular job at the particular time. In other words, he was questioned -- and it's in the Appendix, his testimony in the Appendix on cross-examination begins on page 35. And he was questioned at length about this.

Reading on page 38 of the Appendix, he was questioned as to whether or not the policy would extend to teachers, and his answer was "Yes."

"To teacher aides?" "Yes."

"Librarians?" "Yes."

"Extends to gym teachers?" "Yes."

"Would it extend to a cafeteria workers?" "Yes. I have never had that to occur, but I think it would, yes."

"What about a secretary?" "Yes."

"A janitor?" "I'm not sure about janitors."

"Why not?"

His answer was: "A janitor runs into the children each day. I think each one of us can remember some janitor who gave us candy or was close to us. Would it extend to a janitor?" That's still the question.

His answer is: "I don't know. It hasn't occurred and I haven't made that decision yet."

"Would it extend to a bus driver?" No response.

"A school bus driver?" "I can't say."

"Would it extend to a nurse?" "Yes."

"A social worker?" "Well, if we had a social worker."

"A principal?" "Yes."

"A party who volunteers to do school work or to work with teachers?" His answer was, "If we had those, it would, yes."

"Would you object to a PTA president on the basis of his unwed parenthood?" "I would."

QUESTION: Well, do you think that -- there are just teachers involved in this case, aren't there?

MR. TERNEY: Yes, Mr. Justice White, the only two involved -- this is not a class action, the only two individuals

involved were applicants -- one was an applicant for a teacher aide position, and the other --

QUESTION: Do you think you need to defend the outer boundaries of this rule or not?

MR. TERNEY: Our position is that we do not. And our brief so reflects. That these individuals who were caught by the rule cannot be put in the position of asking that the rule be stricken down because someone, some other individual may be caught by it.

QUESTION: One minor question: Was this rule published?

MR. TERNEY: Mr. Justice Marshall, it was disseminated through the staff level of the school by the Superintendent down to the individuals responsible for recommending teachers for employment.

QUESTION: And to the teachers?

MR. TERNEY: And to the teachers, through the principal; that's correct.

Going back to -- and it may be helpful to the Court, to give a little background on the respondents involved.

The respondent Rogers, who was employed and was in the employ of the School District from -- in the 1971-72 school year, served as a teacher aide. Now, teacher aides are not teachers as such. They assist the teachers. They have probably more direct contact with the students than the teachers

themselves. They go with the students to recess, to the cafeteria, they assist them in different activities throughout the day.

The respondent Rogers, serving in this capacity, was single and had one child, which there's no question, there's no conflict of evidence to the effect that this child was born out of wedlock. She was notified during the spring of 1972 that she would not be reemployed for the 72-73 school year.

At the time she was notified she was pregnant with a second child, and still was not married.

Now, the respondent Andrews made application for a teacher aide position in December of 1972. Her application indicated that she was single and had no children, when in fact she did have one minor child which was born out of wedlock.

A routine investigation into this individual's qualifications for employment revealed that she did in fact have one child.

I want to emphasize to the Court that no one was fired as a result of this policy, only not employed.

Now, in February 1973, this suit was filed in the United States District Court, not as a class action. Hearings were held during March through May of '73. The suit was filed under 42 U.S.C. 1981, 1983, Title VI, and the Fifth and Fourteenth Amendments. And of course we submit to the Court that it is not a Title VII case. It's never been pled, the

procedures were not followed.

QUESTION: Did you say it was filed under Title VI?

MR. TERNEY: They alleged in their complaint, Mr. Justice Rehnquist, that this was a violation of Title VI, and as I understand Title VI --

QUESTION: I didn't think Title VI conferred a private right of action.

MR. TERNEY: It is the position of the respondents that it does.

QUESTION: Is that right?

MR. TERNEY: Yes, sir.

Now, the district court, after exhaustive evidentiary hearings, found that the rule, policy had no rational basis to the purpose for which it was made. And in the alternative, the court took a further step, and declared that the policy created a discriminatory classification based upon sex, and that the school district had the burden of showing a compelling state interest, and struck down the policy on both grounds.

The court did not reach -- the district court did not reach the issues of race or privacy there were urged upon it by the respondents. An injunction was issued to the school district compelling the school district to employ these individuals.

On appeal to the United States Court of Appeals for

the Fifth Circuit, the Court of Appeals affirmed on traditional equal protection grounds and found it unnecessary to decide on any other issues, including the issue of sex always.

Now, it is our position that given the factual background in this particular case, that the rule has rational basis for the purpose for which it was adopted; and we submit to the Court that the purpose for which this rule was adopted was to -- an attempt by the School District to curb an alarming rate of illegitimate births within the school population itself.

The respondents say that there were other methods to do this, but we submit this was the only way that the School District could handle this situation. There were other ways it could be augmented, that could augment this policy. But to -- as suggested by respondents, to give sex education is good, to provide contraceptive devices is good, but for the School District to give tacit approval to this status of parenthood out of wedlock of children, that this -- permitting that to remain -- as a policy of their School District permitting these people to teach would undermine any other method that they attempted to enact to curb this situation.

It is our position that an individual in that status is an improper role model.

Now, the expert testimony is to the effect that teachers -- and I think this Court is on record -- that teachers

are in a very sensitive area in a classroom, where young minds are molded and shaped for the future, where ideals are instilled upon them, the mores of society; and there are some moral overtones involved. We submit that this --

QUESTION: Mr. Terney, is there anything in the record to show that the students knew that these two teachers were mothers of illegitimate children?

MR. TERNEY: Mr. Justice Stevens, there is nothing in the record to reflect that.

We take the position there that the potential exists, whether it in fact existed at that time, that the potential knowledge exists. And once that knowledge does exist, it may not -- the knowledge may not exist today, but it could exist tomorrow; and in a small rural School District, that, where people know their neighbors and know what their neighbors are doing, and they know about their teachers and what their teachers are doing, that knowledge is readily obtainable in a situation such as this.

And once that knowledge is obtained, that the effectiveness of that teacher is completely destroyed. If the teacher admits that she does, he or she does, in fact, have a child out of wedlock, then if the student has respected that teacher, then we feel that the child loses some respect.

QUESTION: Now, one of the respondents here answered the question in the application in the negative on the subject

of any illegitimate children. Was any issue made in the litigation of the false answer, having in mind that in a federal application it is a felony to give a false answer to an application for a federal position.

MR. TERNEY: Mr. Chief Justice, it was only elicited on cross-examination, her purpose -- this was respondent Andrews -- her purpose in falsifying her application. Her only response was that she knew of the existence of this policy and in order to get a job, she knew the only way she could get a job was to falsify her application in this regard.

QUESTION: Well, did any of the judges dealing with this, or did the School Board make an issue out of false answers, as distinguished from the substantive aspects of the case?

MR. TERNEY: In the trial of this matter, it did not go beyond that; no, sir.

I see that my time --

QUESTION: Mr. Terney, I take it that the rule would be effective even though the applicant married the father of the child later?

MR. TERNEY: Mr. Justice Blackmun, that's correct. This was much discussed in the lower courts. The reason for that is that once an individual, male or female, black or white, has a child out of wedlock, that they fall into a status at that point of having an illegitimate child. Regardless of a

change in circumstances, they still remain in that status.

QUESTION: Do you have to defend that position here? Is that an issue in this case?

MR. TERNEY: No, sir. We take the position that -- Mr. Chief Justice, that we are regulating merely a status of employment; that we are not attempting to regulate present moral status.

If there are no further questions, my time has expired. I would be happy to attempt to answer any other questions that the Court may have.

QUESTION: Well, did either of these respondents marry the person who fathered their child?

MR. TERNEY: Mr. Justice Rehnquist, the record does not reflect that they have; no, sir.

QUESTION: Well, the one did marry later, did she not?

MR. TERNEY: There is one -- Mr. Justice Blackmun, the one that has married subsequent to the litigation --

QUESTION: That's Mrs. Peacock.

MR. TERNEY: It would be outside the record, that's correct. And, quite frankly, I don't know whether this would be the father of the child or not.

Thank you.

MR. CHIEF JUSTICE BURGER: Now, your co-counsel is reserving all of his time for rebuttal; is that correct?

MR. TERNEY: That's correct.

MR. CHIEF JUSTICE BURGER: Very well.

You may proceed whenever you're ready, counsel.

ORAL ARGUMENT OF CHARLES VICTOR McTEER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. McTEER: Mr. Chief Justice, and may it please the Court:

In response to one point, I'd like to make this issue exactly clear.

Katie Mae Andrews, who came to me in 1973, is now married, and she's married to a young man, Mr. Lonzo Peacock. As to the status of whether or not he was the father of the child, I have no idea whatsoever. But she's a married individual.

Your Honors, I'm going to describe to you in this divided argument, the basic --

QUESTION: Well, is that in this record now, Mr. McTeer?

MR. McTEER: Unfortunately, Your Honor, it is not in this record at this time.

QUESTION: Well, then, you couldn't really expect us to give it any weight or consideration here, would you?

MR. McTERR: I would expect mere logic, Your Honor, if the fact were to become known to the Court, to demand basic --

QUESTION: Well, that isn't the way appellate review

is conducted, counsel.

MR. McTEER: I understand,sir. However, the fact is evident.

I will discuss the basic irrationality of the rule, sir, and at the same time set forth the rule's racially discriminatory aspects. My co-counsel, Ms. Copelon, will set forth the sex discriminatory aspects of the rule as well as the standard of review, and the basic privacy rights which we claim have been deprived in this cause.

The rule precisely stated notes the fact that all teachers, teacher aides, cafeteria workers, dietiticians, librarians, gym teachers, secretaries, principals, PTA presidents, nurses, social workers, volunteer workers, and perhaps even maids, janitors and school bus drivers, who have ever bore or sired a child out of wedlock are forever barred from employment at the Drew Municipal Separate School District.

The rule is solely the brainchild of George F. Pettey, who enacted this rule without talking to any member of the faculty, without talking to any principal, supervisor or advisor, and made this rule solely upon his own action. In fact, the School Board did not even know of the rule's enactment until after this lawsuit had been filed.

The first time that many of our clients were aware of the rule was after a group of --

QUESTION: But the School Board did ultimately adopt

it, didn't it, or ratified it?

MR. McTEER: It did ratify it. There's no evidence on the face of the record there was mere approval, or whether there was a majority vote, or a unanimous vote; just a simple ratification.

QUESTION: Does that have any constitutional significance, in your view?

MR. McTEER: Only as to the basic rationality, Mr. Justice Rehnquist, of the rule's application, in view of the fact that we are saying that the rule is solely the creation of Mr. Pettey.

QUESTION: Well, if, in fact, the body charged with administering the School District does ratify it, I don't see how the fact that -- you know, someone has to think of every rule -- the fact that a board member rather than the Superintendent thought it up would bear on the rationality.

MR. McTEER: This would bear on the rationality only as to the concern, as I'm trying to point out here, sir, that no other individuals were involved in the creation of the rule, until after this lawsuit became evident. No one else, frankly, knew about the rule until after this became evident. Certainly the School Board did not know until after the suit was filed.

During three days of testimony before the United States District Court in Greenville, Mississippi, and numerous

depositions which were taken, these defendants attempted to set forth some basic rationality for the rule. They claimed, in essence, that the rule was necessary in order to maintain a proper moral climate in the School District because, as Mr. Pettey testified, all unwed parents are simply immoral people.

As a second justification they claim that the rule was necessary to reduce school-girl pregnancies, because somehow or another the mere presence of a school girl -- or, excuse me, the mere presence of an unwed parent in the School District would somehow or another increase school-girl pregnancies.

And I might note for the record that although there was reference to 28 school-girl pregnancies, there was no reference whatsoever to any increase. We don't know whether or not the figures had increased over the past years or what; we just know that there were 28 school-girl pregnancies at one period of time.

In their most recent submission before this Court last week, the defendants have set forth a third justification; that third justification being that an individual who was an unwed parent gives the appearance, if you will, of impropriety.

I trust we've come full circle now back to our morality justification.

However, the question decided before the courts below, and the question which is presented to this Court, is

whether or not all unwed parents are moral lepers, so infected with irredeemable moral disease that they actually endanger the moral development of children.

The trial courts and the Fifth Circuit, looking at this basic concept, using its own language, noted that this concept was patently absurd, mischievous, prejudicial, and would only create stigma where it had never been evident before.

The court found this rule to be clearly irrational, because, as a matter of fact, the morality is not the logical consequence of unwed parenthood; and, furthermore, all unwed parents are simply not immoral. But, more importantly, the rule completely ignores such aspects of supposed immorality, as pre-marital sex, extra-marital sex; the rule doesn't concern itself at all with the present moral worth of any individual, their reputation or character.

QUESTION: Mr. McTeer, do you think that the State of Mississippi could prohibit, by law, fornication or pre-marital sex if it wanted to, and make it a crime?

MR. McTEER: Yes, sir.

However, I do not believe that they can use such criteria for the purpose of stigmatizing individuals or punishing them --

QUESTION: Well, surely, if you're charged in a criminal court and convicted on a charge like that, you're

stigmatized, I would think.

MR. McTEER: There's no individual in this Court, none of these plaintiffs have been charged with any criminal crime or violation. These women have attempted to rear their children, rather than kill them or abort them. They have made a basic decision --

QUESTION: Well, why don't you address yourself to my question?

Is your contention that some sort of proof was lacking here, that these people in fact had sex out of wedlock? Because if the State can make it a crime to do that, I don't see why the school can't say: If you in fact do it, you're not fit to teach.

MR. McTEER: Mr. Justice Rehnquist, in response to your question, I'm trying to say here that these individuals cannot be stigmatized solely on the basis of having bore a child out of wedlock. If the sole purpose of the rule is to reduce school-girl pregnancies, then where is the correlation between unwed parenthood and an increase in school-girl pregnancies?

QUESTION: And yet you concede that if Mississippi were to make it a criminal offense to do that, and they were proven to have done it by a jury, they could go to jail.

MR. McTEER: In fact, Mr. Rehnquist, the rule here, as evidenced from our co-counsel's statement --

QUESTION: Well, will you answer my question?

MR. McTEER: I am answering -- I'm trying to, sir. I'm trying to.

Having sex out of wedlock is not a disqualification of this rule. It does not disqualify you from employment by way of the rule's operation. Bearing a child out of wedlock is what disqualifies you. You can have --

QUESTION: Do you concede they could, do you concede that the employment barrier could be based on a conviction for fornication if the State had such a law?

MR. McTEER: To answer your question, Mr. Chief Justice, there is no such law, to the best of my knowledge.

QUESTION: Well, we explore hypothetical propositions here.

MR. McTEER: Yes, sir.

QUESTION: If there was a State law making it a criminal act, could the conviction of a crime be a barrier to employment by a School Board?

MR. McTEER: In the absence of a showing, Your Honor, that that criminal act was directly correlated to either any of the justified purposes of the rule, there would be no basis for that conviction or otherwise evidence to be a criterion of employment.

QUESTION: You mean, then, a statute of the State that no person shall be employed as a teacher or teacher aide

and whatever the other categories are, where they are exemplars to the students, if they have been convicted of a criminal act in a judicial proceeding; that that would be an unconstitutional statute?

MR. McTEER: Well, Your Honor, you're taking me through the entire plethora of criminal acts that could be performed by a schoolteacher. I'm talking about women who are having children.

QUESTION: Well, you're not required to answer the hypothetical question. I'm just trying to test your argument.

MR. McTEER: To answer Your Honor, your hypothetical question, I'm trying to say here that the parent bears a child out of wedlock, or a woman or a man bears a child or sires a child out of wedlock, that criterion of employment, even if it led to a conviction of co-habitation or whatever under Mississippi law, is not a justifiable criterion or rationally related to any viable apparent goal of the School District.

QUESTION: Well, Mr. McTeer, is there any statute in Mississippi that makes the having of an illegitimate child a crime?

MR. McTEER: Your Honor, to the best of my knowledge, there is no such statute.

QUESTION: Just to rephrase Mr. Justice Rehnquist's question, do you think the STate could make it a crime to bear a child out of wedlock?

Isn't that the question he perhaps should have asked you?

MR. McTEER: Your Honor, --

QUESTION: Without any inquiry at all into the circumstances of the pregnancy.

MR. McTEER: Your Honor, I would think that that would bear directly upon basic fundamental interests this Court has recognized as to the decision to bear, to begat a child.

QUESTION: So you'd say the State could not make it a crime to bear a child out of wedlock?

MR. McTEER: I would certainly make that statement --

QUESTION: Without further -- without any other facts than that one fact?

MR. McTEER: That's correct.

But, Your Honor, this becomes more evident when we look at certain factual statements and background that is evident in the Drew area. And perhaps I can explain this a little bit more clearly.

There were more black illegitimate children born in Drew, Mississippi for a five-year period, from 1968 through 1971, than total white legitimate or illegitimate children born in the same period. Eighty percent of this School District is black. The facts that I've submitted to you in the Supplemental Brief clearly indicated that in the period from 1968 through 1971, the number of black faculty members at the

Drew Municipal Separate School District, which was desegregated by way of a court order 15 years after Brown vs. Board of Education, has decreased from 75 percent at the A. W. James Elementary School to 36 percent.

The point, which is evident, is that this rule, by its operation, Your Honors, can only affect black people. And the reason why it can only affect black people is because, for every 47 -- 46 illegitimate children born in Drew, Mississippi, only one is a white child; only one is a white child.

This is a clear Gomillion case. Gomillion v. Lightfoot is clearly applicable here, because the State has created a social policy rather than municipal boundaries, which can only affect black people; and, as a consequence, only black people will be affected by the rule's operation.

QUESTION: Well, Gomillion was a Fifteenth Amendment case.

MR. McTEER: It certainly was, Your Honor.

QUESTION: And this -- the Fifteenth Amendment isn't implicated here.

MR. McTEER: No, it's not, Your Honor, but I would presume that basic concepts of constitutional law, as they reflect upon racial discrimination, as concerns the creation of racial classifications only affecting a particular racial group would certainly be applicable.

The only individuals that have been stigmatized and eliminated from employment by this rule's operation are five black women, and although the defendants in this cause have repeatedly made reference to the supposed right of individuals to bear children out of wedlock, I would like to state that it was 1868 before black people in this country had the right to bear children in wedlock. And that is a clear consequence of the enactment of the Thirteenth and Fourteenth and Fifteenth Amendments.

I don't have to say anything about Dred Scott. It's clear in many places throughout this country that, as Judge Taney said in Dred Scott, clearly, black people had no rights which a white man was bound to respect.

And so, as a consequence of this rule's operation, the only individuals who will be clearly affected by the rule's operation are black people, it is an insurmountable, final exclusion from employment: thou shalt not work if thou hast a child out of wedlock in Drew.

And there can be no more and no greater stigmatizing effect upon any person, particularly young black women, who went to college -- he didn't tell you that Katie Mae Andrews Peacock had a college degree; that she worked nights in a factory in order to get it, and she had a child while she was still in high school. And it was four years later when the rule was made evident to her.

If a black woman struggles through high school, struggles through college, and then, at the moment when she finally gets out of the circle of poverty is told that because she bore a child out of wedlock four years ago she cannot have a job, then, indeed, the Constitution is senseless to us. And makes no possibility for any change.

Thank you, sir.

QUESTION: Mr. McTeer, the National Education Association and the government have both filed amicus briefs, suggesting that this petition be dismissed as improvidently granted. Does your client take a position on that question one way or the other?

MR. McTEER: I will take the position, Your Honor, that we have briefed this case thoroughly and throughout that, indeed, we recognize the fact there is a possibility for some right of action under Title IX.

However, there is no clear statement under Title IX that there is a private cause of action.

Additionally, under Title VII, I might note that at one time we did try to create this action to be a Title VII action; but in 1973, when the action was filed, the Title VII amendments had just been put into effect, and to be actually honest about it, Your Honor, EEOC was not very sure as to whether we could continue with this cause of action or create a cause of action against the School District.

Furthermore, there was a length-of-time problem involved in the enactment of Title VII and the period of time it takes to get a matter resolved.

Also, Your Honor, the fact of the matter is that we have here two federal -- excuse me, a Federal District Court and a Court of Appeals, which ruled that the flagrant nature of the violation here was so evident that the court granted injunctive relief within four months after the lawsuit was filed.

And finally, Your Honor, I would like to make note of the fact that in the Cohen case, Mr. Justice Stewart made it absolutely clear that although in that particular factual circumstance -- in footnote 8 -- in that particular factual circumstance it might be evident that all future cases would be governed by Title VII, clearly as to these individual plaintiffs, respondents, the Court could actually make a ruling.

And so for all those reasons, we ask that the nature of this flagrant constitutional violation be made evident.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, counsel.

Counsel, you may proceed.

ORAL ARGUMENT OF MS. RHONDA COPELON,

ON BEHALF OF THE RESPONDENTS

MS. COPELON: Mr. Chief Justice, and may it please the Court:

I will address myself here to the fundamental rights intruded upon by this rule, and also to the sex excommunicatory character of the rule.

Now, Mr. Justice Rehnquist, as I understand your question, you're saying why can't you use the unwed mother as a symbol of some sexual conduct that is not appropriate here for school-girls --

QUESTION: My question was whether Mississippi could make either fornication or, rephrased by Justice Stevens, the bearing of a child out of wedlock could impose criminal penalties was the question.

MS. COPELON: Well, I think, as we will show, that it is clear that they could not make the bearing of an out-of-wedlock child a crime. Moreover, fornication is not a crime under the law of Mississippi. You have to have co-habitation, you have to have continual conduct.

We would also question, but it is not before this Court to decide, whether Mississippi has the power to intrude upon the private lives of individuals. It is an not-in-force statute, to be sure.

QUESTION: Do you think Mississippi could make

adultery a crime?

MS. COPELON: I don't think under this Court's decisions it could, Your Honor. But I don't think that that question is before this Court.

I also think that the School District cannot --

QUESTION: Do I understand you correctly that -- did you just say that adultery no longer can be made a State crime under this Court's decisions?

MS. COPELON: Mr. Justice Blackmun, I'm saying that under this Court's decisions in Eisenstadt, in Roe, in a number of cases where the deterrence of pre-marital conduct is not a purpose for punitive treatment, it is not a useful way. If we look at the reality recognized by Mr. Justice Brennan in Eisenstadt, by this Court in Griswold, these kinds of statutes intrude deeply into personal freedom.

I don't think this Court has to decide that issue. That is not the issue. The issue in this case is whether a woman can be --

QUESTION: Well, I guess you're not answering the question, when you say that.

MS. COPELON: I'm sorry, Your Honor.

The issue in this case is whether a woman can be brought out as a symbol of her, and only her, pre-marital sexual conduct. And we say that --

QUESTION: Well, does this policy apply only to

women, females, or does it apply to all --

MS. COPELON: Your Honor, I would like to address that question. Yes, it does apply only to females.

That there are two reasons --

QUESTION: You mean it applies only to females, or its impact is greater on females?

MS. COPELON: The way the rule is defined, designed, and implemented, it applies only to females. It is directed at females. That is its purpose.

Now, let me try to explain. The reason we say you cannot single out a woman, a parent of an unwed child, here a woman, an unwed mother, as a symbol is for two reasons:

No. 1, you are intruding on fundamental human rights recognized by this Court; the right not to be forced to have an abortion, which is one way of avoiding the rule and maintaining your job, and the right not to be required to get rid of your child, but to hold onto your child.

Another right recognized by this Court as fundamental.

Thirdly, the way this rule is designed, the way it is defined by Mr. Pettey, the way it is implemented and its impact inevitably shows the sex discriminatory character of this illegitimacy classification.

First, let me address --

QUESTION: Do you argue that this kind of conduct has no impact on children if they are aware of it?

MS. COPELON: Yes, Your Honor, and that -- in fact, that is also absolutely true. There is no symbolic character to this rule. There is no impact on the schoolchildren. There is no knowledge demonstrated --

QUESTION: Of the rule or a violation of the rule?

MS. COPELON: Pardon me, Your Honor?

QUESTION: I was addressing my question to whether conduct, pre-marital conduct of this kind by teachers, men or women, if known in the community, would have no adverse impact on children who are students in the primary and junior high and high schools?

MS. COPELON: Your Honor, No. 1, just to bring it down to the facts in this case, there is no knowledge whatsoever shown by the schoolchildren. Beyond that, there is no basis to believe that schoolchildren, even if they knew, would do, as the NEA said, "monkey see, monkey do".

QUESTION: There was a good deal of expert testimony in this case on both sides of that issue, was there not?

MS. COPELON: Yes, there was, Mr. Justice Stewart.

I'd like to address myself first to the abortion question, because I think that the petitioners here are raising a straw person. They're saying we're coming to this Court and we're saying you've got -- you are espousing a right to bear illegitimate children.

We're not espousing that here. No one espoused it

in the schools in Drew, Mississippi. The respondents didn't espouse it.

What we're saying is that this Court said in Roe, that you can't prevent a woman from having an abortion, and you can't likewise compel her to have an abortion. This rule makes very clear one thing: if she has an abortion, she can keep her job. They're not investigating pre-marital sex, and they're not investigating abortions; and they couldn't. They say that --

QUESTION: There is also another possibility, too, isn't there?

MS. COPELON: Yes, Your Honor, there is another possibility, and that is, as the district court said, a woman could take the more circumspect or conventional route and surrender her children to others for upbringing.

So the other price of employment --

QUESTION: No. That she could not get pregnant.

[Laughter.]

QUESTION: That's a possibility, isn't it?

MS. COPELON: That is for certain a possibility, Your Honor. On the other hand, it wasn't a possibility for these respondents. They didn't know about contraception. They didn't have the counseling, as Ms. Peacock herself said, that white folks have, that tells them about how to not get pregnant. She didn't want to get pregnant. She said it's a

hard thing to have an illegitimate child, a child out of wedlock.

That option wasn't open there. And the School District is not helping that, though they say they're concerned about school-girl pregnancies.

Your Honor, their rule has its impact in terms of coercion and in terms of burdening fundamental liberties. Not only on the woman, but on the child. Because the child and the mother are bound up. If the child is abandoned, the child is estranged.

For a black child and for a black unwed mother, there aren't very many options about abandoning your child, because it is true abandonment. There aren't many homes that will take black children and adopt them. And so for the black child, it is a life of parentlessness, that that mother would be subjecting the child to. And a life of institutions, and a life of temporary shelters.

QUESTION: Is this primarily an equal protection clause claim, or -- because the way you're arguing, it doesn't sound like it, and I wondered.

MS. COPELON: It's dual, Your Honor. It is that we say there are fundamental human rights directly infringed here by the exclusion from employment.

And so there is due process liberty involved --

QUESTION: And then if you're -- so if you're right,

the equal protection clause has nothing to do with this case?

MS. COPELON: No, Your Honor, it --

QUESTION: If you're right, you would prevail on that basis.

MS. COPELON: We could prevail on that basis --

QUESTION: Without any reference to the equal protection clause.

MS. COPELON: We could prevail as well on the gorunds that this is race discriminatory and, as I will get to in a moment, that it's sex discriminatory.

I would like to say, however, in terms of the due process/equal protection contrast, this is not a case which involves due process, conclusive presumption analysis. Because that would import all of the discrimination and all of the deprivation that we're trying to prevent here, and it would perpetuate that stigma, to say that unwed parenthood or motherhood was relevant at all. So we don't reach that stage of individualized determination in this case.

QUESTION: While I've interrupted you, may I ask you, do you think it would be unconstitutional for this School District to require that no teacher should be hired who is under eighteen years old?

MS. COPELON: Your Honor, I think that would present a completely different question.

QUESTION: No, equal protection-wise, I think it --

I don't see the difference. On the part of the equal protection clause.

MS. COPELON: Well, No. 1, age has never been given quite the kind of constitutional scrutiny by this Court that classifications based on race and classifications based on sex and classifications based on illegitimacy --

QUESTION: Neither of which this purports to be. Neither of which this purports to be.

MS. COPELON: It purports not to be, but the question is, Is it? And by looking at -- if we -- counsel used the term "caught", and what we suggest to the Court is that there wasn't very muchsearch to catch anyone here. And that just as focusing on nurturance and on the woman who is rearing that child invades the fundamental right to keep that child, so it determines this rule to be a sex-based classification.

QUESTION: Ms. Copelon, a minute ago you referred to the scrutiny given by this Court in cases involving sex. What scrutiny do you concede that to be?

MS. COPELON: I don't think it's clear yet, Mr. Justice Rehnquist. I think that it is certainly greater than the scrutiny given to age classifications. I think that Mr. Justice Blackmun's words in Stanton clearly put the sex basis on a -- a sex classification and require a heightened scrutiny. We would -- in a case where it was required-- urge upon this Court it should be given suspect status. But we don't think,

with the constellation of fundamental rights and protected interests that are involved here, that we need urge upon this Court that sex be given suspect status in this case.

To look at the rule and why it's sex-based, part of it's common sense: unwed parent means, commonly, unwed mother.

The decisions of this Court, the cases that have come before this Court illustrate that historically and legally it means unwed mother. Peter Stanley has to come all the way here to be recognized as a parent under the law of Illinois. ? Surato Gomez had to come all the way here to have her father's duty to support her be recognized.

And fundamentally, illegitimacy means legal fatherlessness. If the father legitimates the child, the child is no longer, under law, illegitimate.

Mr. Pettey meant it, too. He tried to use the term "unwed parent", it sounds better; but he couldn't stick to it. He admitted at the hearing that his instruction to Ms. McCorkle, who implemented the policy, was that she should exclude unwed mothers. He admitted at the hearing he knew that something more would have to be done to find unwed fathers, because women were so obvious; but he didn't give her any instructions to investigate unwed fathers.

And finally, she did not investigate the one male in her employ. Why? Because she said he was married. But Mr. Pettey makes clear that marriage doesn't cure the disability.

Any pretense to neutrality is therefore removed by the fact that this rule focuses on the nurturing parent.

QUESTION: I think you're directing that statement about Mr. Pettey's view of the matter to a case, some other case, that's not yet here; that is, that it is overbroad in that respect.

MS. COPELON: I'm not sure I understand your question, Mr. Chief -- it seems to me that the rule is under-inclusive, --

QUESTION: This -- it is not -- it is --

MS. COPELON: -- because it doesn't reach the unwed father. And it is --

QUESTION: Is it shown here, or claimed, that the -- either of these teachers, any of the respondents, subsequently married the father of the child? That's not in this --

MS. COPELON: Mr. Chief Justice, I don't know whether Ms. Peacock married the father of the child. Fundamentally, that's irrelevant. If -- in terms of the --

QUESTION: Well, so the issue isn't -- so the issue isn't here, then, as to what would happen in that kind of case?

MS. COPELON: This woman, Ms. Peacock, or any other woman who is married and has a child at home, certainly negates any possibility to rationality of this role modeling concept. It could be thirty years ago that a woman had a child out of wedlock, and she could be married; but we don't consider that

that's relevant. We consider that illustrates the irrationality of the role modeling concept that's put forward here.

Just as the idea that dietiticians would have some role modeling capacity, when what Mr. Pettey said at the hearing was they handle food.

QUESTION: Well, we don't have a dietitician here, we have just teachers, don't we?

MR. COPELON: That's correct, Your Honor. And we are not trying to litigate this for dietiticians. We are simply saying that when you look at the way this rule developed, and how it's articulated, and you look at the justifications placed on it, that the origin of the role and its scope has a relevance to this Court's determination as to its reationality to our clients.

MR. CHIEF JUSTICE BURGER: Your time has --

MS. COPELON: May I have a moment, Your Honor, to sum up?

MR. CHIEF JUSTICE BURGER: If you'll make it brief, yes.

MS. COPELON: In sum, what we are saying here is that this rule violates an incredible constellation of fundamental rights and interests recognized by this Court. It discriminates against black people only. It discriminates against women only. It is a convenient pretext for exclusion from employment of black women, and women generally.

Moreover, it intrudes upon --

QUESTION: How many -- does the record show what percentage of the teachers in the school system were Negro?

MS. COPELON: In our Supplemental Brief, Mr. Justice Stewart, we submitted figures which show --

QUESTION: An increasing number of white people.

MS. COPELON: -- a substantially increasing number of white people, just in the period that this rule was adopted.

QUESTION: But still a majority of Negroes, is it not? No?

MS. COPELON: No, no. It's a minority. I think it's 25 percent now from what was 75 percent.

The final thing that this rule does is it illustrates the perversion of Roe vs. Wade, it illustrates -- this Court has removed sanctions on premarital sex, it's rejected the idea that contraception is going to stop that, it's rejected the idea that not having abortions is going to stop that; it's rejected the idea that you can force a woman to bear an illegitimate child in order to deter permarital sex.

What we have here in an area, in a time when abortion is available, is an inducement to abortion; and so, putting it all together, it illustrates that the black woman, the minority woman, the poor woman can very easily be the first victim of the perversion of the notion of reproductive control.

QUESTION: If there is an imbalance in the faculty

that violates constitutional principles as laid down by this Court in Mr. Justice Black's opinion of some years ago, that could be the subject of independent litigation, could it not?

MS. COPELON: Yes, Your Honor, but what we're saying under the Keyes opinion is --

QUESTION: It's not an issue in this case.

MS. COPELON: No, but what we're saying is that that context of whitening the faculty is something which has led this Court to look at neutral rules as presenting a prima facie case in racial discrimination.

MR. CHIEF JUSTICE BURGER: Very well. Your time has expired now.

MS. COPELON: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Allain, you have eight minutes.

REBUTTAL ARGUMENT OF WILLIAM A. ALLAIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ALLAIN: Mr. Chief Justice, and may it please the Court:

I do not intend to burden the Court, probably, with that much time, Your Honor; but we would like to say, and address ourselves for a few moments to this document which -- and the statistics which have been introduced at this late date. And say that the Court really should not consider them, for the simple reason there is no showing in the document, or no

shown statistics, any nexus between the rule which we now have under question here and the increase of the white teacher ratio in this School District.

Other statistics would show that also there's a white increase in the student body, which is not,of course, before this Court. And therefore we say to the Court that many variables have entered into this particular thing, and one of them is Title I money as being no longer available in the amount they used to be for teachers and teacher aides. So we do not think it adds anything to the case whatsoever, and should not be used in any determination or decision.

We would say to the Court, and we do not necessarily know whether this is of any import, but Mississippi does have statutes against fornication and adultery. And also counsel said that this rule did not apply as equally to males as it did to females.

QUESTION: Then, I take it, you disagree flatly with the last counsel as to the existence of a Mississippi fornication statute.

MR. ALLAIN: Yes, Your Honor, except maybe she was talking about there is a fornication statute, it may not act on one act of fornication, it may be co-habitation; that's where we may take issue, rather than there is a fornication statute in Mississippi. I think counsel would acknowledge that.

QUESTION: Would being the parent of an illegitimate

constitute a violation of that statute?

MR. ALLAIN: No, Your Honor, it would --

QUESTION: Clearly would not.

MR. ALLAIN: -- probably have to take more proof than that, maybe, to bring it about.

We say to the Court that we recognize and the Court has recognized in several cases that maybe there is a little more difficulty in ferreting out, I think as the Chief Justice said in one case, of the natural father.

But this Court is also on record by saying that mere fact that sometimes it is more difficult to find the natural father does not mean that the natural father --

QUESTION: Mr. Attorney General, if you justify the rule entierly on the basis of the role model theory, how can that possibly apply to a male?

MR. ALLAIN: It could apply to a male once it has been established that a male is --

QUESTION: Established to the knowledge of the students that the male was the parent of an illegitimate child; right?

MR. ALLAIN: Well, that would be right, Your Honor.

QUESTION: Is that very apt to happen, do you think?

MR. ALLAIN: Well, Your Honor, we're talking really here, I guess, about not knowledge, but we're talking about whether or not you're going to lie or not.

Now, if a male teacher is willing to tell the School District, "No, I do not have an illegitimate child" or has never been adjudicated so; but we're not here talking in the realm of determining when you have one of a knowledge, we're talking about then whether someone desires to lie about it.

Now, we do have in this particular case a falsification of an application, and Mr. Chief Justice says anything --

QUESTION: But that wasn't the basis of the discharge, was it?

MR. ALLAIN: That was not, Your Honor. And I was going to say the only reason that nothing probably was done further on that particular issue was because we were in litigation and we did not want to be seeming that we were punishing someone who had sued the School District. We'd get in another, maybe another lawsuit about that.

QUESTION: Well, to pursue Mr. Justice Stevens' suggestions, if there were a male teacher and a woman teacher on the particular school, and in this small community it became known that they, too, the two of them, whether both of them were single or married to other people, had produced a child, an illegitimate child, then you would have a grounds for dismissal of the father as well as of the mother.

MR. ALLAIN: That's right. Right.

It would apply across the board. And, as I say --

QUESTION: Well, what happens to your role playing

thing, I mean you -- as I understand, the role playing is you're trying to keep girls from having illegitimate children; right?

MR. ALLAIN: No, we're trying to keep also men from fathering illegitimate children, Your Honor.

QUESTION: Well, that's brand new. Was that in the record?

MR. ALLAIN: Well, I think it's in the record that illegitimacy, and it's in the record about artificial insemination, somebody else has got to be a partner. We are going, and we think --

QUESTION: Yes, but I just wanted to know why the father gets into this role playing.

MR. ALLAIN: Well, I think if you -- I think if you had --

QUESTION: Why don't you admit that it's aimed at the women, and get it over with?

MR. ALLAIN: I think if you had a known fact that a father had a child out of wedlock, this would have the same adverse example as it would the woman who had a child out of wedlock.

QUESTION: On the boys? On the boys?

MR. ALLAIN: You would have it, I think, on boys and maybe also on the girls. I think the girls would also look at this --

QUESTION: If you get something to slow down the boys, let me know!

[Laughter.]

MR. ALLAIN: Well, maybe age will take their jobs. But we -- I'm speaking of myself now.

QUESTION: Counsel, suppose you pursue that concretely, suppose the football coach, a man, and one of the women school teachers of whatever race, religion or creed, produced a child; does it need any expert testimony or anything in a record to show that that has an impact on all the people who know about it, all the children who know about it?

MR. ALLAIN: No, Your Honor, we think -- we think that's from experience, we think the Court has said that. And the reason we introduced expert testimony is that, as this Court is well aware, in certain employment cases they are bringing in experts and EEOC is talking about we need validated studies and empirical information. But this Court just recently, in the election cases, have, I think, set out that examples and appearances mean sometimes as much as realities. And that's what we're talking about in this case. We're talking about a teacher or a coach or what-have-we, or principal, as being an example, as setting an example in the community, and that therefore we think under -- especially under these particular situations, we think -- now, counsel says, oh, we had other ulterior motives, we're trying to get

rid of certain individuals.

There are probably 75 percent of the teaching staff in Drew, which is -- I'm going outside the record now, Your Honor -- which are females. So we're not trying to get rid of females.

And -- but the situation that exists there, I think, shows that there was a need, a necessity, a pressing need for something to be done by this School District in order to cut down on this rising rate of illegitimacy, not only in the School District but in Sunflower County itself.

QUESTION: Does the record show it was a rising rate? I thought it just showed static figures.

MR. ALLAIN: I think that the record shows, as to Sunflower County, it was a rising rate in --

QUESTION: Does it? Can you say where?

MR. ALLAIN: Yes, sir. I think maybe one or two points at a time.

But the record will either say I was uninformed about the record or I was correct.

QUESTION: All right.

QUESTION: Does the record show what happened the year after the rule was adopted?

MR. ALLAIN: We do not have any figures in the record, Your Honor. There are some that show that there is a decline now, at the time; but I'd be going outside the record, Your

Honor, in that case. They're not before the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 11:17 o'clock, a.m., the case in the above-entitled matter was submitted.]

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