

OCT 28 1971

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In the

Supreme Court of the United States

PETER STANLEY, SR.,

Appellant,

vs.

THE PEOPLE OF THE STATE ILLINOIS,

Respondent

No. 70-5014

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Appellant, : No. 70-5014
vs. :
THE PEOPLE OF THE STATE OF ILLINOIS, :
Respondent. :
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Washington, D. C.

Tuesday, October 19, 1971.

The above-entitled matter came on for argument at
1:46 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

PATRICK T. MURPHY, Esq., Legal Aid Bureau,
Chicago, Illinois, for Petitioner.

MORTON E. FRIEDMAN, Esq., Assistant Attorney
General, Chicago, Illinois, for Respondent.

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Patrick t. Murphy, Esq.,
on behalf of Petitioner

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Morton E. Friedman, Esq.,
on behalf of Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 5014, Stanley against Illinois.

You may proceed, Mr. Murphy.

ORAL ARGUMENT OF PATRICK T. MURPHY, ESQ.,

ON BEHALF OF THE PETITIONER

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

For eighteen years, Peter Stanley lived with his common-law wife, and from the time his two minor children, Peter Stanley, Jr., and Kimberly Stanley were born, he lived with, supported and built up a familial relationship with these children.

Q Is there a finding here of a valid common-law marriage.

MR. MURPHY: Sir, common-law marriage was outlawed in Illinois, I believe, at the turn of the Century in 1905.

Q Well, then how can you have a common-law marriage.

MR. MURPHY: I am using it in the generic sense of the word. He lived with the woman for eighteen years whom he called his wife.

Q Well, of course, we are dealing with legal issues here, so that colloquialism really isn't very relevant. Is it?

MR. MURPHY: I assume not, Your Honor.

Joan Stanley died and sometime thereafter Peter Stanley asked his long-time and trusted friends, the Nesses, to care for his children.

Two months thereafter a dependency petition was filed in Juvenile Court, Cook County, and there was a finding of dependency, and the children were made wards of the Juvenile Court of Cook County.

Inasmuch as a finding of wardship is a final order, his only way to get around this order was to appeal, which he did do.

Now the issue in this case is simply whether it is a denial of equal protection for the State of Illinois not to recognize Peter Stanley for what he was, that is the father of his two minor children, and the nonneglectful father of his two minor children, and whether it was a denial of equal protection for the State of Illinois to treat Peter Stanley as something less than a stranger, that is, give him no right to custody control or even visitation with his two minor children.

Q Was there any occasion in that procedure that you have just described to determine the paternity of the children?

MR. MURPHY: No, it was assumed by the State's Attorney and by the trial court and by all parties that he

was the father. In fact, the Assistant State's Attorney did state that they were not contending that Peter Stanley was not the father of the two children. That never came on issue.

Of course, for equal protection analysis the classification must be reasonable and not arbitrary and rest upon some ground of difference having a fair and substantial relation to the object of the legislature. So that all persons similarly situated shall be treated alike.

Further, of course, certain interests that are disadvantaged require a more strict scrutiny by this Court.

Now it is difficult for us to argue as to just what the State purposes behind this discriminatory classification are. The State in the Illinois Supreme Court argued one purpose and its brief in opposition filed in this Court argued a second purpose, and its brief in this Court seems to argue yet another purpose to make the statutory scheme stand the scrutiny of this Court.

However, there seems to be a thread running through it and that is that somehow it is in the best interest of minor children that their fathers who have built up a familial relationship but who have never married their mothers be treated as strangers to the children.

However, an analysis of Illinois law and of the historical background of Illinois law, will demonstrate, we

believe, that the purpose behind the discriminatory scheme in Illinois was simply for the better administration of the Illinois Adoption Act.

Now the State alleges that the welfare of children in Illinois is promoted by the making of the illegitimate father a stranger to his child by ferreting out good and bad unwed fathers.

We believe that an examination of this will show that this was not the purpose of the General Assembly, and secondly, even assuming it were, that there simply is no rational relationship between this alleged purpose and the classification.

First of all, it doesn't ferret out good and bad unwed fathers. It merely grants to the uninterested and abandoning and perhaps neglectful unwed father his wish of not being a father to the children, allowing him to do what he wishes to.

It places a burden upon the unwed father like state agency to come in and show, by a greater burden of proof than the neglectful parent has to, that he wants his children.

What the State simply does, it takes the children away from the parent, places them in either an orphanage or a foster home and then tells the father if you want them back you must go back through adoption court and show not

that you are nonneglectful, not that you are something less than indigent, but that you are not indigent and that you are a very suitable parent.

Q Was there any impediment that you can think of that would have prevented the Petitioner here from carrying out an adoption of these children -- a legal adoption?

MR. MURPHY: If Peter Stanley could have adopted his children, we would not be here today.

Peter Stanley was in the same position as any wed father would have been whose wife had just died, who was also indigent.

Q Where do we find that out?

MR. MURPHY: He left his children with his long-time and trusted friends, the Nesses, and said would you take care of them. It's in the record. The same thing that a wed father might have done. So obviously, Stanley was in no position to care for his children.

Furthermore, the probation officer states that Peter Stanley was indigent. So he's indigent. He's in a position not to care for his children at that time. Of course, he couldn't adopt them. There is no court in the world that would have allowed Stanley to adopt his children, plus having the ~~app~~robrium of being an unwed father and all through its brief the State says unwed fathers are bad people, through historically we know they are abandoning

people and then they come across and say well all Stanley has to do is run down to the adoption court to adopt. The same opprobrium the State attaches to Stanley in its brief, the adoption court is going to attach to Stanley also.

Q Did he institute an adoption proceeding?

MR. MURPHY: No, he has not.

Q He hasn't applied for custody either, has he?

MR. MURPHY: At the time that this proceeding arose, it was theoretically impossible for Stanley to apply for custody.

Section 62 of the Paternity Act in Illinois states that no parent has the right to custody -- no unwed father has the right to custody or control --

Q That may have been true at the time but do you get some other inference from the Supreme Court's opinion, or not?

MR. MURPHY: No, the State, and we have assumed for argument here that they would allow Peter Stanley to have custody.

Q But he hasn't applied for it. That's my question.

MR. MURPHY: No, and for this reason, that after the Stanley decision came down from the Illinois Supreme Court the Illinois Appellate Court in the case of Vanderlaan v. Vanderlaan upheld former Illinois Supreme and Appellate

Court decisions in denying the ^{putative} ~~punitive~~ father even the right to visit his children. And in fact, pursuant to that decision, the Attorney General's office moved in the Juvenile Court to terminate all visitation between Stanley and his children, and the Juvenile Court in fact did terminate such visitation.

It was only after this Court granted certiorari that they even allowed Stanley to start visiting his children again.

So it was theoretically impossible, even practically it was out of the question.

Stanley is still indigent and still not married.

I point out the State's Attorney in the court below when he suggested ways in which Stanley might regain some type of custody over his children, suggested Stanley marry and establish an orderly family situation. That at times can be a difficult thing for any male.

Q Isn't your sole Constitutional argument here equal protection?

MR. MURPHY: Equal protection, Your Honor.

We are not talking about custody.

Q As compared to the mother, aren't you --

MR. MURPHY: Well, these lines are so arbitrarily drawn here. There is over-classification from one point of view. We are putting Stanley and similar petitioners into

a classification of all unwed fathers. We are just making the presumption that all unwed fathers are bad people --

Q As against who?

MR. MURPHY: As against not only unwed mothers but as against wed but widowed fathers, for instance, or wed and neglectful fathers, or wed and neglectful mothers or unwed and neglectful mothers. We don't make these presumptions.

It's like saying that all Japanese are security risks. We are saying all unwed fathers are bad people and they must go through this long, arduous, degrading and expensive process to establish some rights.

Q You challenge the classification as being unconstitutional, per se. I take it, under the Fourteenth Amendment? The classification of wed or unwed, but aren't there some differences in a support proceeding, for example, if a support proceeding were brought against a father for the support of his illegitimate children under the State law, there would be a greater burden with respect to proof of his responsibility than there would be of a married father, is that not so?

MR. MURPHY: No. Under Section 53, if I understand your question, Mr. Chief Justice, under Section 53 of the Paternity Act, the unwed father has the responsibility of maintenance, support, education and welfare.

Q Once you have established that he is the

father. Now here he admitted it, so that the proof in this particular case is not required, but if he denied it the State -- someone would be put to the burden of establishing it as a fact, would they not?

MR. MURPHY: Well, I -- our argument --

Q Isn't that the --

MR. MURPHY: The State would have to prove that he were the father, that's correct.

Q Hasn't that been historically true in proceedings of this kind, for the support of illegitimate children, that someone must prove the paternity.

MR. MURPHY: In the case of abandoning fathers, that's correct.

Q In paternity cases, generally, it must either be established by proof or admitted, is that not true?

MR. MURPHY: That's true.

Q Well, then I come back to the question: is that not a valid basis for the classification?

MR. MURPHY: No, Your Honor, because again we are making the assumption that all unwed fathers are the type of people we have to drag into court by their neck and say pay. But that's simply untrue. There are thousands, obviously, of unwed fathers who simply cannot marry the mothers for many, many reasons, one of which the state admits is that there are many people who are too poor to get a divorce and simply take

up living with someone else and build a familial relationship with their wife. These people don't have to be dragged into court, but yet they are familial fathers, and why should we classify these familial fathers and put them in the broad classification of bad fellows?

And that's what the State of Illinois has done. That's what we are saying, these lines are so broadly drawn. The State of Illinois simply could have said unwed fathers who abandon their children, or who aren't known or who do not show up within two months should be considered strangers to their children, and they would have accomplished what they wished to accomplish.

Q What does the State have to show to declare dependent the children of a widow -- widower?

MR. MURPHY: The father and mother have never married?

Q Well, let's assume they were married and the mother is dead, and the father is indigent and can't --

MR. MURPHY: They can prove neglect.

Q But they have to prove neglect? And indigency is not enough?

MR. MURPHY: Indigency is not enough --

Q Because there are other State funds to support him and his child together.

MR. MURPHY: Indigency is never a requirement to

prove neglect. And you must prove it beyond a preponderance of the evidence and all your rights are not cut off. You have the right to visitation, the right to name religious affiliation and the --

Q He is not a parent, is that it?

MR. MURPHY: He is not a parent. He is a stranger to his children.

Q And his only recourse here is possibly to be appointed a guardian or to adopt the children?

MR. MURPHY: He can't --

Q Even if he could.

MR. MURPHY: Even if he could, it doesn't change the posture of the case.

Q He would be a guardian not a parent.

MR. MURPHY: That's correct.

Q And if he adopted them, he could become a parent?

Q Whereas the unwed mother, I gather, is regarded as a parent?

MR. MURPHY: Oh, certainly.

Q And if the children are taken from her it's only for neglect or some other similar reason?

MR. MURPHY: That's correct.

And while the mother is alive, the State will not interfere in a familial relationship with the father either,

except through a neglect proceeding.

Q Am I right then, the equal protection issue comes down to this: Illinois will allow an unwed mother in his circumstances -- to be regarded as a parent for whatever purposes that's important, but will not allow an unwed father in these circumstances to be regarded as a parent.

MR. MURPHY: That is true.

Q Is that the --

MR. MURPHY: That is the narrow equal protection argument. We think it's broader than that. We think the lines are just arbitrarily drawn. In other words, why treat Stanley any different than you would a wed father in similar circumstances?

We agree that is the primary equal protection argument.

Q Incidentally, I know that your brief was filed before this Court decided Labine v. Vincent; I notice you don't cite it in your brief although the Respondent does.

Do you think the decision of the Court in that case has any bearing on the issue in this one?

MR. MURPHY: No, Your Honor.

Q That involved -- the Court said there was no equal protection for illegitimates under the -- who were disinherited under the Louisiana statute.

MR. MURPHY: That's correct.

Q You don't think that has any bearing?

MR. MURPHY: An entirely different case.

Q The State says that the unwed father has limited responsibility for the child until or unless he adopts or something like that and, hence, that justifies treating him differently, but how are his responsibilities different from the unwed mother's responsibilities vis-a-vis the child?

MR. MURPHY: Well, of course, they are not different at all, as I pointed out previously. The Paternity Act says the unwed fathers have the obligation of support, maintenance, welfare and education. What other responsibilities does any parent have except love and we can't legislate that.

Secondly, the state really misstates the statutes. They don't say that no parent, and Your Honors can read the statute, they don't say no parent -- only a parent has the responsibility the State lays out. Most of the statutes say one who has custody and control or any father and mother or person who has custody and control. And I think, here -- and I would further point out that the Paternity Act and the Juvenile Court Act are the only two acts in the State of Illinois the General Assembly has attempted to define the word parent as excluding the unwed father.

Q Let's assume under the State law though it was perfectly clear that an unwed father until he adopted the

child had no obligation to support the child. Let's just assume that, but that the mother was treated as a parent with those responsibilities.

MR. MURPHY: It would not change the posture of this case. If the father had built up a familial relationship with his children and there was a biological relationship, as well, we believe that it would not change the posture.

I would further add to an earlier question that Mr. Chief Justice asked me as to why couldn't Stanley have adopted.

As soon as Stanley put in for adoption and if it were denied because he were indigent, and he is still not in any situation to adopt his children, he would then be forever in all probability restricted from adopting his children and they could be placed up for adoption, and someone else could adopt them without notice to Stanley.

That is a very practical matter why he did not and has not.

Q Is it my understanding that you implicitly concede that the State could make -- that the State could put some unwed fathers in this category of strangers to their illegitimate children, i.e., fathers who were, say, married and acting as father in another family, or fathers who were unidentifiable or unfindable, but that the State is Constitutionally compelled to create a subcategory for the class

to which you tell us your client belongs, that is, a good, suitable, interested unwed father. Is that my understanding? Is that a way of putting your case?

MR. MURPHY: If for the better administration of the Adoption Act, the State feels that it cannot notify abandoning unwed fathers, and if they are unknown, then we might concede.

It's not the case here and I simply haven't considered it but we might --

Q As I understand it, you claim that your client belongs to an identifiable subclassification of unwed fathers, which classification has a right to Constitutional protection under the equal protection clause of being not treated differently from wed mothers, i.e., that subclassification is good, suitable, interested, unwed fathers. That's your argument, isn't it?

MR. MURPHY: That's correct.

Q And, of course, unwed fathers such as that, I suppose, have it within their power to correct the situation by becoming wed fathers, unlike the previous case where if you are born a woman you are a woman and you can't -- I won't say correct the situation -- but you can't alter the situation.

MR. MURPHY: Unwed fathers in the situation that Mr. Stanley was in have an opportunity to correct the situation?

Q He could have married the mother of these children, couldn't he?

MR. MURPHY: Well, the problem does not arise while the mother is alive. It only arises when the mother dies and at that time it becomes biologically impossible, perhaps theologically possible, to marry.

Q It was in his power to become a wed father.

MR. MURPHY: The problem did not arise and the State did not interfere and cannot interfere in the relationship --

Q Do you think, Mr. Murphy, this case would have come out the way it did below if Stanley, instead of being indigent had been in a position financially to provide for these children?

MR. MURPHY: I tend to believe that if Stanley had not placed the children with the Nesses it would have come out differently. I don't know. It's difficult to say. Once charges were brought, the Court had to make the only finding it could have. There is no defense --

Q What I am trying to get at, did his indigency have a controlling weight in the decision?

MR. MURPHY: No.

Q I notice you quoted at page 5 of your brief a probation officer who said that if he had been in a position to provide properly for his children or in the future were to

become so, there might be reconsideration of the case.

MR. MURPHY: Well, the probation officer was talking about perhaps we can give him custody if he --

Q That's custody.

MR. MURPHY: Right.

And I think all these people -- I was not at the trial, but I think all these people were merely trying to placate Stanley, who presumably was very upset at the findings.

Q Who is this other child whose name keeps getting mentioned throughout the briefs here, Karen?

MR. MURPHY: Yes, there was an older daughter who was 17. There was a neglect petition filed against Stanley and it was proven against him. I was the prosecuting attorney in that case.

Q This was his legitimate child by a previous marriage?

MR. MURPHY: No, by the same marriage.

Q Same marriage. And he was the target of a neglect petition with respect to that daughter?

MR. MURPHY: That's correct.

Q Did that have anything to do with the decision in this case?

MR. MURPHY: I believe it may have had something to do with charges being brought. It had absolutely nothing to do with the decision.

From the Court's point of view and from the State's Attorney's point of view, it had nothing to do with the decision. From the probation officer's point of view, I don't know.

And I am speaking outside the record now from knowing the Court and the State's Attorney personally. These are matters, obviously, which are not relevant.

Q It may not be relevant, but Karen's name keeps being mentioned.

MR. MURPHY: That's part of the record. I was not the prosecuting attorney, I was the attorney who prosecuted the case. There is a slight difference.

The State's response -- well, we've covered most of the points already. I would just like to point out that the -- that we believe that the statutory scheme is what it is because the General Assembly wished to make plans for the better administration of the Adoption statute.

Between the years 1827 and 1949, in Illinois, unwed father had the right to the custody of their children merely for the asking. Between 1827 and 1872, all they had to do was demand from the unwed mother the child and she had to deliver him up or the father could stop support payments. Between 1872 and 1949, it was after the child's 10th birthday. In 1946, the Illinois Attorney General issued an opinion which held that -- which stated that adoption agencies would

after that point have to notify any unwed father of adoption proceedings, and if, in fact, the unwed father were unknown then the guardian ad litem would have to be appointed for this purpose.

In 1949, the first convened General Assembly thereafter, the Illinois amended the Bastardy Act to state -- which is the predecessor of today's Paternity Act, that no unwed father had any right to custody or control over his children.

The Illinois Law Review article that we cite here points out that this was merely to amend the Paternity Act to keep it in line with the Adoption Act. The Juvenile Court Act was passed in 1965. There is no historical background on why unwed fathers are excluded from the definition of parents except the obvious one of making this in line with the Paternity and Adoption Acts in the State of Illinois, and it seems quite obvious that better administration of the Adoption Act is not a compelling reason and in fact is not rationally related at all to the classification here.

And, as a practical matter, it doesn't succeed in what it wants to do because again it merely allows the uninterested, abandoning and unknown unwed fathers not from coming to court, while it forces the suitable and carrying for unwed fathers to come to court to demand some type of custody.

And if, in fact, the Adoption Act actually did force

these unwed fathers to come to court, it would merely clog the adoption courts with unwed but suitable fathers seeking to adopt their own children.

I think what happened here -- we believe what happened here is that the General Assembly never considered the subclass of fathers and simply made a law to make the Juvenile Court Act fit in with the Adoption Act never considering unwed familial fathers. And, of course, this type of father, like Japanese, Chinese and Black people and indigent criminal appellants, did not have at that time much of a lobby in the State Legislature.

So for the reasons we have stated in the brief, for the reasons we have argued, we would ask that this Court reverse the opinion of the Illinois Supreme Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Murphy.

Mr. Friedman.

ORAL ARGUMENT OF MORTON E. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Petitioner before this Court seeks automatic, legal control of these persons, these children, assumed to be his.

The State demands only that if he is to gain legal rights over them, and if he is to impose upon them legal

responsibilities towards him, that he do so by means of an adoption proceeding comparable for the purposes of this case to a marriage, the normal marriage between husband and wife.

Marriage, at least in part, is a contract between the parties and between the State in which the parties undertake from the moment of the birth of a child of the union legal responsibility, not just for the support of the child which is the case with an unwed father, but legal responsibility for a wide range of human activities, including the schooling of the child, the medical care and needs of the child, criminal penalties against abandoning the child.

Through the adoption proceeding the State is asking that the Petitioner Stanley signify his willingness to accept those same responsibilities which are imposed upon all families who bear children and upon married --

Q Tell me, under the Illinois law, what responsibilities does the unwed father have for his child?

MR. FRIEDMAN: Only monetary, sir.

Q For medical, for medicine?

MR. FRIEDMAN: Yes.

Q For education?

MR. FRIEDMAN: Yes.

Q For food and shelter?

MR. FRIEDMAN: That is correct.

Q Clothes. What are we talking -- what is the

difference between the married and the unmarried?

MR. FRIEDMAN: The married father cannot take his children -- cannot abandon his children, cannot walk away from them on the street. The married father cannot permit his children to associate in a place of prostitution or with thieves. The married father is responsible for attending to the medical care of his children, not just providing the money by which someone else can accomplish that act. There have been --

Q So the unmarried father, under Illinois law, is not subject to criminal penalties associated with neglect?

MR. FRIEDMAN: That is correct, sir. He has no criminal penalties attached other than those related to financial support of the child. Through an adoption proceeding, he would be regarded as a parent and he would have imposed upon him all the responsibilities of that parenthood.

Q This may be so, but you still have to reach the question of why does Illinois treat the man different than the woman in this respect. I mean this is sort of a boobytrap argument. We don't make him responsible, therefore we can treat him differently; but because we make the woman responsible, we can treat her differently.

MR. FRIEDMAN: Because of the fact, sir, that through a combination, both of history, cultural patterns and real physical differences between the sexes, they are

different, sir.

It is the position of the State that the combination of these factors, no one of which, we think, can be isolated, there are real differences between male and female, differences in their ability and drives directed toward child rearing.

Q You don't think the woman would have an equal protection claim who said that she should not be criminally penalized for certain acts when the father of her child is not subject to the same criminal penalty?

MR. FRIEDMAN: No, sir, she would have no such claim.

Unlike the case of the invidious discriminations of race or religion in which the classification is unrelated to a permissible State objective, the classification here imposing upon her burdens is related to the permissible or compelling State objective of promoting the welfare of the child.

The State imposes on the female the obligations that it does not impose on the married male.

Q Yes, but why shouldn't it -- in terms of the welfare of the child, why shouldn't it impose the same obligations on the male?

MR. FRIEDMAN: Because unlike the case of married male and female, in which the parties have signified their willingness to work together to the rearing of the children, the male and female in this case may or may not be willing to

work together towards the common end of child rearing.

What the State would be doing if it imposed upon the Petitioner the demand that he accept all the responsibilities of parenthood, is to interject him into the family of the mother and child and to create two conflicting parties competing for legal control of the child.

The situation does not arise in the marriage, at least initially, because the parties have signified their willingness to work together.

Since it is necessary to impose upon at least one of the parties legal responsibility for the welfare of children, and since necessarily the female is present at the birth of the child and identifiable as the mother, unlike the case of the married father where the law presumes quite overwhelmingly that he is in fact the father of the children born to his spouse. Unlike that case, as to the unmarried father, there are no presumptions as to who the father is. That is an unknown factor, except as the female may state who the father is.

In the case of the father who was married to a woman other than the mother of the child, requiring the putative father to accept all the responsibilities of a married father is to in effect create multi-family units and destroy the nuclear family, as we know it today.

One cannot impose on the unmarried father, the

father who is unmarried to the father of the child, responsibilities or rights without giving him responsibilities.

To require the State to impose on a potentially hostile father responsibilities outside of his own marriage unit is to tamper with the family as we know it in society today.

I would submit that that was one of the factors in the case Labine v. Vincent upon which the Court based its decision.

Unlike the case of race or religion, the distinctions between male and female are real, they are founded upon biological and historic facts which are valid today.

There have been a number of suggestions as to the facts of this case. The only fact that was relevant in the Juvenile Court below was whether or not Peter Stanley was the legal father as defined by statute.

No other fact was relevant to the inquiry below.

No suggestion was made as to the constitutionality or issue of it of the statute. The question of the proofs involved were thereby not relevant and are not properly before this Court.

Q Well, are you suggesting that in the present state of the record we should view this case as one in which there had been a paternity proceeding, and it had been judicially determined that this man was the father of the

child or children?

MR. FRIEDMAN: No, Mr. Chief Justice, to the contrary, suggesting that the only fact that this Court can take cognizance of is that Peter Stanley, Petitioner, was not married to the mother of the children.

The need for proceedings --

Q Let me put it in a different way. If there had been a paternity procedure and there had been a finding of fact and conclusion of law that he was indeed the father, would the case be any different?

MR. FRIEDMAN: No, sir, not at all.

The fact that he had been found to be the father of the child would not give him any greater rights than he has under the present state. The problem remains, however, that there has been no proof that Peter Stanley, in this record, there has been no proof that Peter Stanley, in fact, is the father of these children. He may well be.

Q That was irrelevant too, under your law, because even if he were the father he is not a parent.

MR. FRIEDMAN: That is correct, sir, which I suggested by noting that there has to be a judicial proceeding to determine the rights of one who claims to be a legal father over the children and who would seek to gain legal control over them.

As the matter now stands, Peter Stanley claims to

be the father. He may be. If, in a proper proceeding for adoption or guardianship, he asserts his parenthood, if he asserts his eighteen years, supposedly, of living with the children, these matters may be very relevant to a determination of what would be in the best interest of the child.

We suggest that is the only relevant consideration.

Q You are saying until he's proved to the the parent, the equal protection point is not ripe for any kind of consideration, is that it?

MR. FRIEDMAN: That is correct, sir.

Q Well, didn't your courts below deal with the question?

MR. FRIEDMAN: The Illinois Supreme Court did not pass directly on the matter, noting that the Petitioner had not challenged it in the lower court, and left him to his remedy of applying for adoption or guardianship.

Q Yes, but they didn't say -- it was not a denial of equal protection to treat the unwed father different from the unwed mother.

MR. FRIEDMAN: Correct, sir.

Q So the point was raised and passed on in the State Supreme Court, and it was preserved here.

Q Isn't the case here on that premise?

MR. FRIEDMAN: Yes, sir.

Q Don't we have to reach it and decide it then?

Don't we have to reach the equal protection issue on that premise and decide it?

MR. FRIEDMAN: Only if this Court does not accept the determination of the Supreme Court of Illinois that since the Petitioner --

Q No, no, that's not my question. My question is the premise on which the case is here is that he is the father of these children, isn't it?

MR. FRIEDMAN: Yes, sir.

Q All right, and the equal protection argument is made on that premise.

MR. FRIEDMAN: That is correct, but this Court need not accept as a fact that the Petitioner Stanley, as a matter of fact, is the father of the children. Otherwise, any party who claims to be the father of the children whether in fact he was or not would have the same rights as Peter Stanley to bring the case before the court.

The State, in this case, does not, nor hasn't, interfered with the relationship of those people who would come without or without marriage to rear children.

The statute in this case by not imposing hostile parents on the children of a union whether in or out of wedlock is seeking but to secure for the welfare of these children one responsible parent to account to the state for their welfare.

We think this interest compelling. We think it the most compelling interest the state may have.

The petition in this case reads as a neglect petition although it is not so. The petition as originally filed was not the dependency petition. It was filed as a neglect petition.

The question of Stanley's visitation is not before this Court. In fact, he has been visiting the children pending the outcome of this case.

Nor is the question of the Petitioner's indigency before the Court, the question not being raised by Stanley in the court below.

We submit that both based on history or culture the very real differences, both between male and female, the very real differences between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, that the statute here fulfills the compelling governmental objective of protecting children born in or out of wedlock and ought to be affirmed.

Q I am not sure I understand you when you talk -- rely upon what you call our culture, rely upon history and physical differences, that I understand. And I understand the interest in adoption in the interest of legitimizing the children. I don't quite understand what you mean by what you

call our culture.

MR. FRIEDMAN: Only that through a combination of historical circumstances brought about, sir, at least in part by virtue of physical differences between the sexes, it is a pattern within our society that the woman is primarily responsible in the rearing of young children. The State has properly taken cognizance of this existing condition which is the result of real differences between male and female, married and unmarried males.

Q So our culture, as you put it, is really -- that's not an additional support for the State classification, that is additional to history or to physical distinguishing characteristics?

MR. FRIEDMAN: No, sir. It is merely a product of those.

Q Product of those.

MR. FRIEDMAN: Yes, sir.

Q Is this what you've summed up at page 25? While temperament toward child rearing may be largely a product of societal condition, these temperamental patterns have been so deeply ingrained within Western Civilization they cannot be ignored?

MR. FRIEDMAN: Yes, Mr. Justice Brennan.

That is the holding of White v. Florida.

We think that holding particularly as noted by

Dr. Mead on the following page, the quote by her, is significant in the sense that it is a real fact of life that as a combination of these circumstances, none of which can be neatly isolated, as a combination of these, men and women do not have the same direct interest in child rearing, that the Illinois Legislature has properly taken cognizance of these very real differences which have never been suggested to be other than real differences in child rearing.

Q Suppose Stanley had married this woman he lived with two days before she died, what would be the issue then?

MR. FRIEDMAN: Mr. Justice Marshall, he would then be classified as a legal parent and entitled automatically to custody and control of them.

Q When he married he changed.

MR. FRIEDMAN: No, he did not change one bit. He performs a legal act that imposed on him by law responsibility for the children beyond mere money payments. By the act of marrying, he changed not at all. But by marrying the woman, he became liable, under law, for more responsibilities than he had before. He became liable for the schooling, for sending the child to school.

Q That makes him a more fit parent, a better fitted parent -- you said the primary interest was the child.

MR. FRIEDMAN: That is correct, sir.

That Peter Stanley now, after marriage, is legally responsible for his welfare and as to the child, that the child has legal duties towards Peter Stanley. He is responsible at the time of the legal relationship to support the adult parent who cannot support himself.

Q Isn't it true that Mr. Stanley in this Court by all of its custom and practice and everything that has been going on for all these years, this hasn't affected him at all, has it?

MR. FRIEDMAN: Not at all, Justice Marshall.

Q It has changed his status. It certainly, among other things, made him ineligible to legally marry anybody else, hasn't it?

MR. FRIEDMAN: Well, --

Q Well, once you marry again, at least in our culture and under our laws, the man marries a woman it changes his status, at least to the extent that he is legally ineligible to marry anybody else until he divorces that wife or she dies.

MR. FRIEDMAN: Yes, Mr. Justice, and in addition, he is responsible to not desert, to tend for the children. By the adoption formality, which is exactly comparable in this case to the formality of the marriage ceremony, he is merely undertaking the same rights as a male does by the act of marriage. But more importantly, with a human being who

is in existence, when a person gains the rights of parenthood over the child, there is imposed by Illinois law legal responsibility on the child.

To impose these responsibilities without consulting the interests of the child, either by the desire of the child's natural mother in marriage or by the supervision of the courts in an adoption proceeding, to impose legal responsibility on a child after he is in existence to care for an adult parent and to do so automatically without consulting the interests of the child, is to deny that child due process of law.

When the child gains a parent, he gains legal responsibility. It may or may not be in his best interest to gain those legal responsibilities toward his parents.

That problem does not exist between the married couple where the female gives birth to the child because the State imposes from the moment of birth onward those reciprocal rights and duties between male and female, between the children to the parents and the parents to the children.

The adoption proceeding which the State has required is but a substitute for that marriage ceremony, that social contract with the State where the parties have agreed to accept those responsibilities.

Q But here the unwed father cannot adopt just by going in and saying, look, I want to adopt and I'll file a

piece of paper that I'll accept all responsibility that you are saying I don't have. He can't just have it for the asking. He must shoulder a substantial burden of proof to show his fitness and his capability of taking care of the children.

MR. FRIEDMAN: That is correct, Mr. Justice White, but to give the father the children for the asking of him to make their legal custody and control dependent only on the will of the father is to make the children chattels and to deny to the children any opportunity --

Q We are still talking about the position of the father with respect to the unwed mother, the position of the father with respect to, say, the divorced father and several other categories.

MR. FRIEDMAN: But the unwed father, while he does have a biological relationship, or he may have, with the children, that is not the determining factor. Parenthood is more than biology and it is more than support. It encompasses within our society a very wide range of human activities.

Q But the State must concede that there is quite a category of unwed fathers who don't abandon their children or who refuse to act with respect to them like a parent and you must concede that there is quite a category of unwed mothers who abandon their children.

MR. FRIEDMAN: That is correct, sir.

Q And yet you treat all unwed mothers in one way and all unwed fathers in quite a different way.

MR. FRIEDMAN: Initially, I would observe --

Q It wouldn't do him any good in this dependency hearing to say look, I'm fit. I am ready to assume all the responsibilities that you want me to assume. That's just irrelevant.

MR. FRIEDMAN: In answer to your last question, Mr. Justice White, no, it would not do him any good to merely lay an automatic claim to the children. The state would require their interests to be consulted before they are handed over like chattels to the father.

Q But at the same time you concede that they are handed over, to take your terms, to the natural mother, without any inquiry of that kind, is that right?

MR. FRIEDMAN: That is correct.

Q And you justify that on the grounds of these cultural and biological and historical factors?

MR. FRIEDMAN: Yes, Mr. Chief Justice, and the fact that the woman is necessarily present when the child is born. She is there and identifiable.

Q Doesn't that go only to the question of whether he is in fact the father, which I have understood you to have conceded? In this proceeding, this record is filled with allusions to the fact that everyone seems to concede this

man to be the father. He insists upon it. He is referred to as the father, only with the adjective unwed. So, isn't the fact of the paternity out of the case?

MR. FRIE-MAN: The fact of paternity is not relevant to the case and in that sense the concession was irrelevant so whether or not the State has made it --

Q Then why does it help your case any that the mother is present at the birth, of necessity? You emphasize that.

MR. FRIE-MAN: Because in the case of the married couple the father will generally participate, not in the act of birth, but from that time on, in carrying for the child.

Q Well, this man is trying to participate but Illinois won't let him.

MR. FRIE-MAN: No, Mr. Chief Justice, most respectfully, Illinois encourages him to do so if he will accept the legal responsibility for those children by a formal proceeding comparable to the marriage ceremony, in which he is evidencing through a judicial proceeding his desire to accept legal responsibility for the children.

Q But didn't he do all of these things that you say a married father would do? From the birth of these children to the time that Joan Stanley died. I gather from this record that he didn't get into this difficulty until

after her death. But he did everything, apparently -- had he been married to Joan.

MR. FRIEDMAN: No, sir. I would not agree to that and the suggestions on the record that would tend to indicate that were not relevant to the trial court below --

Q Well, you say that the State should consider the interests of the children. Apparently the interests of the children were irrelevant in this proceeding in the sense that they were taken from what we concede to be the father and given to some guardians.

MR. FRIEDMAN: No, sir, they were not taken --

Q Well, they were declared dependent, and guardians were appointed for them.

MR. FRIEDMAN: That is correct, but it is the Petitioner Stanley who placed the children with the Nesses.

Q I understand that.

MR. FRIEDMAN: Whether that was done --

Q And the State as a result of this proceeding, automatically, without considering the interests of the children, specifically in this proceeding, legally forbade his custody in the immediate future.

MR. FRIEDMAN: No, sir. The State imposed upon the Nesses, the parties he had physically deposited the children with, upon some person, the State imposed legal responsibility. Stanley did not ask for custody. He did not ask for legal

responsibility. He only objected to someone having legal control over the children.

The question of his prior relationship, the question of his paternity or lack of it, or his misconduct or lack of it was not part of the trial below and is not relevant to the outcome of this case.

It is purely the question of the act of discrimination in requesting the Nesses to accept that legal responsibility, the custodians he had given the children to.

The State was merely attempting to secure the welfare of the children by providing a criminal penalty for anyone who would abandon the child.

Stanley did not ask to have them.

Q Let me call your attention to one or two comments from the Supreme Court of Illinois opinion which I am not too clear about. In referring, near the end of the opinion, page 33, to equal protection arguments, the Court concludes by saying that if that's his claim we need only respond in this instance by noting that the section was not so applied to him.

And here is the key part: In fact, the trial court's contents clearly indicate that court's willingness to consider a future request by the father. The court, apparently, then conceded he was the father, as custodian or guardian.

Now I notice it does not say -- there is no reference to an adoption proceeding.

Do you see any significance in their having omitted reference to adoption or was that just inadvertent?

MR. FRIEDMAN: I would submit that to be an inadvertence, sir. The adoption is clearly open as an alternative to Stanley in this case.

Q Mr. Friedman, do you know, do other States have situations similar to this one here, statutes like this?

MR. FRIEDMAN: Yes, Mr. Justice Blackmun. There is no State which imposes upon the unwed father the full range of parental responsibility and there is no State which grants the unwed father, outside of a common-law marriage State, the full range of legal rights of parenthood.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Murphy, you have a few minutes left here.

Would you care to comment some time on this language at page 33, Illinois Supreme Court's opinion, as to what the Court had in mind?

REBUTTAL ARGUMENT OF PATRICK T. MURPHY, Esq.,

ON BEHALF OF THE PETITIONER

MR. MURPHY: I would find it difficult to, Your Honor. The Court there did suggest he had a right to custody but in a later case they again agreed that unwed fathers had no right to custody.

Q Well, we are only concerned with this case.

MR. MURPHY: I would assume that the Illinois Supreme Court realized that he may have had the theoretical possibility to adopt the children, as he did at that time.

Q At least now that the law has been clarified in Illinois it's clear, isn't it, that he is an eligible applicant either for custody of the children or as an adoptive parent?

MR. MURPHY: I think the law is clear that he has the theoretical possibility to adopt. I believe the law is unclear as to whether he has a right to custody.

As I say, Vanderlaan came down after Stanley and Vanderlaan said no rights to custody.

Q Is there not some possibility that your client ought to be exhausting his state remedies before he asks this Court to get into this difficulty?

MR. MURPHY: We did exhaust our State remedies.

Q Including adoption?

Q Well, that's not your Constitutional claim, at all, is it? Your claim is that the State by making him just the equivalent of John Jones denies him equal protection of the law --

MR. MURPHY: Yes, that's correct. Our claim is that --

Q Let's stay on my question, if you will, and

address yourself to that, will you?

MR. MURPHY: Fine. First, of course, there is the point that why put the burden on him to go through the adoption when we don't do it to anyone else, and that is our claim, and that's the claim the Illinois Supreme Court answered negatively to us.

Secondly, once there is a finding of wardship, we have to appeal within 30 days, which we did.

Stanley, at that time, obviously from his placement of his children with the Nesses, as a practical matter, could not adopt. In fact, if he could have adopted and were not indigent we would not be before this Court today, as a practical matter.

I would like to address very briefly a point that the State raises that is that he could have married Joan Stanley while she was living. If we assume this, we are assuming that all women are weak, frivolous creatures, that any man has to say please marry me and she will. There is no evidence that it was not Joan Stanley that would not marry Peter Stanley. And we can assume in many cases that it is the woman who will not marry the man, and not the man who refuses to marry the woman.

So what happens to the man who lives for eighteen years with a woman, has two children by her, and she refuses to marry him and then she dies?

Q He would have been a fairly eligible suitor after that history, wouldn't he?

MR. MURPHY: I am a bachelor, I don't know, but they tell me the longer you live with a person, you might be less eligible.

Q What could she possibly gain by not marrying him under these circumstances?

MR. MURPHY: Your Honor, as I say, what makes a woman do what she does is beyond my comprehension very often, and I simply don't know why a woman might not marry a man.

Q A little while ago, you said that Labine v. Vincent was of no consequence here and yet there also the opportunity was afforded to the father to have legitimized these children for inheritance tax purposes, in any event, and he failed to do so.

Now I take it, you distinguish this because you say marriage is a two-way street.

MR. MURPHY: Well, the differences there are so different than here. There it was merely a father's interest in gaining the estate of his son. Here, it's the interest of a father who has built up a familial relationship in maintaining that relationship with his children. It's more than money that's concerned here.

Q Well, the father wasn't interested in gaining the estate of the son, he was --

MR. MURPHY: Excuse me, it was the other way around. It was the son. But again, it was just a matter of money. Here it's a matter of a familial relationship.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Murphy and Mr. Friedman.

The case is submitted.

(Whereupon, at 2:46 p.m. the case was submitted.)