In the

Supreme Court of the United States

SHARON ROE AND DOROTHY POE, on Behalf of Themselves and Others Similarly Situated,

Appellants,

v.

NICHOLAS NORTON, Individually, as Commissioner of Welfare of the State of Connecticut, and on Behalf of Others Similarly Situated.

Appellees.

No. 73-6033

Washington, D. C.
February 25, 1975

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Tuesday, February 25, 1975

The above-entitled matter came on for argument at 1 p.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

APPEARANCES:

FRANK COCHRAN, ESQ., Connecticut Civil Liberties Union Foundation, Inc., 57 Pratt Street, Hartford, Connecticut, for the parent appellants.

DAVID N. ROSEN, ESQ., New Haven, Connecticut, for the children appellants.

MICHAEL ANTHONY ARCARI, ESQ., Assistant Attorney General of Connecticut, 90 Brainard Road, Hartford, Connecticut 06114, for the appellee

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-6033, Roe against Norton.

Mr. Cochran, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANK COCHRAN ON BEHALF OF PARENT APPELLANTS

MR. COCHRAN: Mr. Chief Justice, and may it please the Court: The issue in this case is the validity of a Connecticut statute under which mothers of illegitimate children may be forced to name the father, to initiate and prosecute a paternity action to judgment, whether or not they believe it's in the child's best interests, under pain of up to a year in jail or fine of up to $200.

QUESTION: In Connecticut may the State bring the action on its own, Mr. Cochran, independent of the wishes or the actions of the mother?

MR. COCHRAN: The State has the power under a separate section of the general statute to initiate a paternity action in its own behalf for any child which is supported by State welfare, yes. That statute is not in issue here. The issue here is the requirement that the mother disclose the name of the father in the first instance and subsequently to initiate and prosecute.

QUESTION: Are you saying that the existence of that other statute has no bearing on the problems, the issues, of

this case?

MR. COCHRAN: I think it has some bearing. I merely meant to point out that decision adverse to the statute in this case does not strike down that interest of the State. The interest the mothers are attempting to protect is their own right of privacy and not the State's interest once it has the name.

This statute is applicable irregardless of the actual interests of mothers or the actual interests of the children, and in the record there are affidavits from, I believe, two mothers, who in fact had been beaten by the fathers before. There was one case in which there was a possible incestuous parentage, and also in which the actual paternity couldn't be determined with certainty. There are real reasons why the interests of mothers and/or children are opposed to bringing actions in many cases.

We submit that the questions involved in this case --

QUESTION: Mr. Cochran, were all of the mothers involved here AFDC recipients?

MR. COCHRAN: Yes, they were.

QUESTION: Is this a class action on behalf of AFDC recipients?

MR. COCHRAN: Yes, it is.

QUESTION: Certified as such?

MR. COCHRAN: It was certified by the district court.

QUESTION: I take it, then, that may make the new Federal statute particularly pertinent?

MR. COCHRAN: Yes, the new Federal statute does have pertinency here, and I was going to get to that in just a second.

QUESTION: In your own due time.

MR. COCHRAN: Because one of the specific classes of women to whom this statute is applicable is AFDC mothers, the Social Security Act is relevant to this case. Now, Congress --

QUESTION: Well, do you suggest these mothers have standing, and say all AFDC recipients and only such, to bring this attack on the statute on behalf of non-AFDC recipients?

MR. COCHRAN: The district court did not find that the appellants represented any other subclass subject to this statute, and we have not challenged that.

QUESTION: So then as it comes to us, it is confined to the framework of AFDC recipients?

MR. COCHRAN: That's correct, your Honor.

QUESTION: But the statute does apply to non-AFDC recipients?

MR. COCHRAN: The statute on its face imposes an obligation on all mothers of illegitimate children. However, there is enforcement of this statute, and a specific mechanism for enforcement set up for only three subclasses, which include

mothers who are on AFDC, mothers receiving town assistance, and mothers who for one reason or another are not the guardians of their children or for whom guardians ad litem had been appointed.

The Congress in public law 93-647 which was passed in the last day of the past session of Congress did enact extensive amendments to the Social Security Act, including a major part concerning child support. The basic thrust of that part was to strengthen the enforcement of child support obligations around the country. As part of the child support program which will be mandatory on the States as part of their AFDC programs, Congress required that States give an incentive payment to cooperating parents of 40 percent of the first $50 recovered from an absent parent in support. It also provided a sanction, termination of the mothers' welfare benefits. It made very clear that it was not sanctioning termination of the child's welfare benefits by providing that those continue in the form of protective payments which had to go to the child.

In the course of its deliberations Congress rejected a bill, S. 1842, which would have made it a Federal misdemeanor to refuse to cooperate with the welfare department. That is the equivalent to what Connecticut does here. As I say, this was rejected by the Senate Finance Committee. And I think that the legislative history clearly shows that Congress in

passing the provisions which it did pass set the limits of the powers of the State to infringe on the fundamental purposes of AFDC in pursuing its own financial interests, those purposes being to safeguard the best interests of children by providing support for them in their own homes and to maintain and strengthen family life.

In passing the provisions which it passed, Congress clearly indicated that no other, and certainly no more severe, sanctions could be employed in this regard.

Furthermore, the Connecticut statute does, it seems to us, clearly undermine the general requirement of regulations of the Department of Health, Education, and Welfare that methods of administration used in the AFDC program not undermine the privacy and dignity of recipients.

QUESTION: Mr. Cochran, I take it none of these named appellants has been receiving AFDC benefits by force of this Connecticut statute?

MR. COCHRAN: No, that's not correct. They have been receiving benefits.

QUESTION: By force of stays, or what?

MR. COCHRAN: No, this statute does not terminate them from receiving benefits. It provides only sanctions of imprisonment or fine, as a contempt. It does not provide for any sanction of termination. That is indeed one of the, if not the major points we are trying to make.

QUESTION: Well, have they in fact been subject to contempt proceedings?

MR. COCHRAN: The two named appellants here have been subject to contempt proceedings which are pending in State court and have been stayed for a considerable period of time.

QUESTION: But they have not actually resulted in contempt judgments?

MR. COCHRAN: No, they have not.

QUESTION: Were those contempt proceedings initiated before or after you brought this action in the district court?

MR. COCHRAN: They were initiated before. At that point we filed motions in those proceedings to raise the very constitutional issues which we have raised here, and the court determined to stay its hand -- simultaneously filed the Federal action, I believe, the court determined to stay its hand pending determination by the district court of the complaint in this case.

QUESTION: Isn't that kind of getting the cart before the horse? The first court to acquire jurisdiction, I gather, was the State courts in the contempt proceedings, right?

MR. COCHRAN: That's correct.

QUESTION: And you interposedyour constitutional and statutory defenses, right?

MR. COCHRAN: That's correct.

QUESTION: Why shouldn't that litigation have gone to its conclusion --

MR. COCHRAN: Well, the State court indicated --

QUESTION: -- and the Federal court stayed its hand.

MR. COCHRAN: The State court indicated its unwillingness to decide constitutional issues. It is about the lowest State court, at that time the circuit court, that's subsequently been transferred to the court of common pleas. But there is a doctrine in Connecticut of avoiding constitutional adjudications.

QUESTION: Was this the court's own decision or was this something that you asked the State court to do?

MR. COCHRAN: I honestly don't remember that. I believe -- we certainly didn't oppose it.

QUESTION: There is another doctrine about this Court and the Federal courts abstaining until States perform their function.

MR. COCHRAN: I would say a couple of things about that. There certainly is such a doctrine. It is not, I would say, a favored doctrine in Civil Rights Act litigation such as this.

QUESTION: It was born in one.

MR. COCHRAN: That's true. I'm not disputing that, but --

QUESTION: Well, this is criminal contempt, isn't it?

MR. COCHRAN: It's not clear what sort of contempt this is.

QUESTION: Was it a criminal case?

QUESTION: Did they go to jail?

MR. COCHRAN: It was not a criminal case. You can go to jail.

QUESTION: For a fixed time?

MR. COCHRAN: For a fixed national time. On the other hand, the State was of the opinion that it was a civil contempt in the sense that it could be purged.

QUESTION: I thought you said it was sort of like the misdemeanor that the Congress turned down.

MR. COCHRAN: I think that the sanctions of a year in jail or fine are similar in that respect.

QUESTION: Very close.

QUESTION: Would it not be a proceedings for official ... to bring it within the Younger rationale?

MR. COCHRAN: It might very well be, but I don't believe Younger applies here for a couple of other reasons, notably the State courts stayed its own action and the State's failure to raise any such issue here. I believe in the Broadrick case we have the same situation where the State did not raise any sort of abstention point.

QUESTION: The doctrine being comity of the State, the States may waive it if they want to.

MR. COCHRAN: That's correct, but --

QUESTION: You say that's what the State did here.

MR. COCHRAN: Well, the State certainly never raised it, hasn't to this point raised it at any time.

QUESTION: Did the district court address itself to the problem formally or informally?

MR. COCHRAN: It certainly didn't formally. I believe it didn't informally either. I have no recollection of --

QUESTION: Are your two clients in jeopardy?

MR. COCHRAN: They are in jeopardy in the sense that the petitions against them are pending at this time and will go forward at some point unless there is a definitive determination.

QUESTION: As I understand it, it is now stayed, that it will not go forward unless something else happens.

MR. COCHRAN: At this point, Mr. Justice Marshall, they are stayed until Friday of this week. Whether they will be stayed beyond that, I cannot --

QUESTION: That's an order that the State cannot proceed until Friday of this week.

MR. COCHRAN: The State court issued an order, I believe it was in December, to that effect, staying those actions until the 28th of February, which is Friday of this week.

QUESTION: And that's all it said?

MR. COCHRAN: Yes. That wasn't all it said, no. It said pending hearing in this Court. Obviously it was aware, however, there would not be a decision in this Court in that time.

QUESTION: And pending in both courts are the exact same constitutional points.

MR. COCHRAN: I would say they are not really pending in the State court in the sense that the State has declined to adjudicate those issues. Furthermore, I would point out that what we are looking for here, I think, is a declaratory judgment, principally I think it would be followed in the State, and I believe that this case is therefore very similar to Steffle v. Thompson in which there was a stay in the pending State action at the time the Federal actions were brought and through the time they were finally decided.

QUESTION: You also asked for an injunction.

MR. COCHRAN: We did ask for an injunction before. We are not pursuing that further at this time.

QUESTION: Steffle ultimately turned on the fact that there was no pending proceeding in the State court at the time the district court action was brought, didn't it? Because Samuels v. Mackel says that the Younger rule applies to a declaratory judgment when there is a pending State procedure.

MR. COCHRAN: I believe the determination in

Steffle was that there was not a pending State proceeding because there was a stay in the State court, and that is the same situation we have here.

Turning to the perhaps most basic contention which we made below that the Connecticut statute invades the rights of privacy in the sense of autonomy and family self-determination, this Court has recognized such a right as a basic constitutional right in an unbroken line of cases beginning with Meyer v. Nebraska and on through Stanley v. Illinois.

Now, the majority opinion below did not --

QUESTION: Doesn't your privacy claim have something to do with the power of the State which you conceded to bring this action independently? Would such an action not invade privacy to exactly the same extent as --

MR. COCHRAN: It would not to quite the same extent. I think it would invade privacy.

QUESTION: Why wouldn't it be to the same extent except that there wouldn't be any contempt sanction against this particular person, and that's really not a privacy aspect, is it?

MR. COCHRAN: No, that's not. There in fact might be a contempt if the mother failed to respond to a subpoena which was issued by the State in that situation. That would be a civil contempt. It would be not governed by the same rules.

Here we are attempting to safeguard the mother's right to keep secret the identity of the father. Once that is gone, then the issue becomes somewhat different.

QUESTION: Did you say the right of the mother to safeguard the secrecy?

MR. COCHRAN: That's correct.

QUESTION: Where does that right originate?

MR. COCHRAN: Well, that is the only way that the mother can exercise what we think is the basic right of determining whether it is in the child's best interest and in her best interest to bring a paternity action.

QUESTION: The district court decided both the statutory conflict issue and the constitutional question.

MR. COCHRAN: Correct.

QUESTION: Both against you.

MR. COCHRAN: Yes, it did.

QUESTION: And as I read your brief here, you suggested the conflict issue, the preemption issue or the so-called statutory issue is different than it was because of the amended statute.

MR. COCHRAN: It is somewhat different. I think it is --

QUESTION: That's quite an argument that it is different and that the Connecticut act even if it didn't collide with the old act, it collided with the amended one.

MR. COCHRAN: I think that's true, but I think --

QUESTION: Isn't that your argument?

MR. COCHRAN: My argument is that it makes it clearer that it conflicted right along and still does.

QUESTION: Why shouldn't we then ask the district court to address itself to this question in the first instance because that might dispose of the whole case for you and it might help us avoid a constitutional issue like it helped the Connecticut court.

MR. COCHRAN: Well, my answer to that is that, while of course that could be done, we would not favor it because there are a large number of these petitions being filed at all times in Connecticut courts, and that would involve a considerable risk of exposure for the future to a number of these mothers who have not yet been cited under this statute.

QUESTION: You mean it would delay things.

MR. COCHRAN: It would delay things. And there's a second reason --

QUESTION: But we might decide against you and the district court might decide for you.

MR. COCHRAN: I recognize that possibility.

QUESTION: This would give you two swings at it, you see.

MR. COCHRAN: I am saying that this Court cannot or should not if it chooses to remand the case. I believe that

that would be unnecessary, and I would point out one further point. The district court did not address in any substantive way what I think is our basic contention here about the mother's right to determine the course of the family fortunes. And that is a very important point for interpretation of the Social Security Act. The district court simply dismissed that without citing authority or really any rational basis for it whatsoever.

The concurring opinion in the district court, on the other hand, upheld the mother's right, subject to the same sort of limitations which exist on all parental rights.

QUESTION: So you do have a friend on the district court that might insist on serious consideration.

MR. COCHRAN: I don't know that I would put it that way, but we do have an opinion which agrees with this contention, that is correct.

QUESTION: Mr. Cochran, suppose one of the appellants had abandoned any claim to AFDC benefits after this suit was instituted. Could you have had the suit dismissed at that time?

MR. COCHRAN: I don't believe so.

QUESTION: Suppose the mother simply said, well, rather than provide the information which the State desires, I will just discontinue making any claim for welfare benefits. What would have happened?

MR. COCHRAN: The statute on its face appears to me to apply to that situation because the mother would have been receiving benefits from the time she was cited with the contempt citation. There are, however, at least some instances in which that was not done by the circuit court.

QUESTION: Has there been any construction by Connecticut courts that would shed any light as to the answer to my question?

MR. COCHRAN: There has been construction in the courts of some of the hearings under this statute. There has not been a written opinion. Those hearings seem to divide on that issue.

QUESTION: But if the statute clearly provided that if the mother abandons any right to the welfare benefits, she would not be required to respond to these inquiries, would you have any objection constitutionally to that statute?

MR. COCHRAN: Yes, I believe we would. The mothers here and presumably a large number of the class of mothers are recipients of State assistance and would continue to be so. I think the basic point to make here is that the Department of Health, Education, and Welfare in interpreting the Social Security Act have uniformly required methods of administration which do not violate the privacy and dignity of welfare recipients. That requirement seems to me to incorporate the constitutional arguments we are making here and to make

anything which is a violation of the basic right of -- I see my time is up -- of privacy to be a violation of the Social Security Act as well.

In sum, I think this statute clearly does show a punitive intent towards mothers of illegitimate children by the fact that it does not apply and there is nothing comparable applying to any other parents of any other class of children. That's not a legitimate purpose, and I do think that the case could be reversed.

Thank you.

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

Mr. Rosen.

ORAL ARGUMENT OF DAVID N. ROSEN ON BEHALF OF CHILDREN APPELLANTS

MR. ROSEN: Mr. Chief Justice, and may it please the Court: I want to say one word on the abstention question before I get into the substance of the argument that I am making here on behalf of the children of appellants, which is that in addition to the problem that Connecticut lower courts really do have a doctrine that they will decline in circumstances in which constitutional adjudication might seem to be appropriate to make that adjudication, and in addition to the second fact that --

QUESTION: If they can get a Federal court to do it, is that it?

MR. ROSEN: Well, that's the position taken in this case, but in general the courts have, to the bemusement of Connecticut practitioners as well perhaps as this Court, said that they have a restricted or almost nonexistent jurisdiction to decide the merits of constitutional questions.

QUESTION: Do trial courts take this view?

MR. ROSEN: Yes, they do, Your Honor.

QUESTION: I've heard that in administrative agencies, but I never heard that of a court.

MR. ROSEN: I have never heard it of any other court, but I have heard it --

QUESTION: So that a criminal case, if the statute had to be construed, you can never convict the man, you would just let him stay there?

MR. ROSEN: No, the position, as I understand it --

QUESTION: What do you do?

MR. ROSEN: The position as I take it of the Connecticut lower courts is that the statute is applied and if unconstitutional, is construed as unconstitutional only by a Connecticut appellate court.

QUESTION: Well, why in this case did they hold this one up?

MR. ROSEN: The Connecticut courts did not construe the statute to be -- have not addressed themselves to the constitutionality of the statute.

QUESTION: But there is a court in Connecticut that will pass on the statute, which is --

MR. ROSEN: The Connecticut Supreme Court.

QUESTION: As this particular case now stands, there is no way for the Supreme Court of Connecticut to decide this case. Am I right?

MR. ROSEN: Your honor, as this case now stands --

QUESTION: Am I right?

MR. ROSEN: Because the petitions are stayed, you are right, Mr. Justice Marshall.

QUESTION: In all other States we go up through the State supreme court up to this Court, but in Connecticut we take a short circuit and go on over to the Federal court with the cooperation of both the State court and the plaintiff.

MR. ROSEN: And the State.

QUESTION: Short circuits the State court and denies us the opportunity of getting the opinion of the State court on one of its own statutes.

MR. ROSEN: It seems to me --

QUESTION: Am I right? Am I correct?

MR. ROSEN: That would be the impact of that statute, but it would not --

QUESTION: That would be the impact on this particular statute as applied in this particular case.

MR. ROSEN: Mr. Justice Marshall --

QUESTION: There is no way for us to get a definitive opinion from the Supreme Court of Connecticut as to its own statute.

MR. ROSEN: Mr. Justice Marshall, if this Court abstains at this point, you will not get that adjudication and that's the point that I wanted to make. It seems to me that if this Court were to abstain today, what would happen would be that the named plaintiffs in this case would be faced with an immediate judgment of civil contempt involving their incarceration.

QUESTION: And they could appeal.

MR. ROSEN: Well, they could not appeal. There is a statutory proceeding for removal --

QUESTION: Well, whatever it is, they can get their constitutional question decided.

MR. ROSEN: Yes, your Honor, except that the point that I want to make from the perspective of my clients, which are the children of those appellants --

QUESTION: Well, the judgment might be stayed while they are appealing.

MR. ROSEN: It might be stayed. The problem is that the judgment might not be stayed. From the perspective of my clients, who are the children of the mothers, in the event that the judgment is not stayed, the mothers will be under what will in all likelihood be an irresistible pressure to do one of two

things: give the name or dissimulate in some way, but in any event not to serve the jail sentence while the case is being appealed. And from the perspective of my clients, who are the children --

QUESTION: Would you say the district court in Connecticut, the United States district court, might have jurisdiction in habeas corpus cases if they confined them under a contempt order of the State court?

MR. ROSEN: That would pose the same problem. That would bring this case up through the Federal courts again without going up through the State court.system.

QUESTION: Not necessarily. Not necessarily.

MR. ROSEN: You are referring to the possibility of habeas versus stay while the case is appealed through the State courts.

QUESTION: Right.

MR. ROSEN: They might have that jurisdiction.

QUESTION: That's been done many times in many States.

MR. ROSEN: But it would involve my clients being subjected to a risk that their mothers would be unable to resist the compulsion of the State. And my clients, the children, do not have control over their mothers' ability to resist such compulsion.

Let me speak about what, from the perspective of the

children, is the central issue in this case.

QUESTION: Let me ask you just one more question about the subject we have just been on, Mr. Rosen. When you say that the Connecticut lower court had this policy, is this Connecticut lower court of limited jurisdiction, or does the Connecticut superior court have that policy, the trial court of general jurisdiction?

MR. ROSEN: The policy is related to the fact that the court of common pleas and the Connecticut circuit court, which are the courts that we are dealing with here, are courts of limited jurisdiction, and that has been construed, and I will not comment on the appropriateness of that instruction, to limit the court's jurisdiction to consider constitutional questions as the jurisdiction of an administrative agency is familiarly limited.

QUESTION: Is this by constitution of Connecticut?

MR. ROSEN: It is a judicial construction of the Connecticut constitution which --

QUESTION: Where is it so I can read it, what you just told me it says.

MR. ROSEN: Well, the leading cases are two cases called State v. Townsend? and State v. Muolo?, and with the Court's permission, a supplemental submission on the extension question which has not been raised, as we say, previously would give us an opportunity to express our views on that point.

QUESTION: I don't need it for myself, and I can only speak for myself, because I just don't believe Connecticut has deprived this Court of an opportunity to have a State court decision deciding the constitutionality of a State statute. I don't think Connecticut can deny us that right.

MR. ROSEN: I am sure, your Honor, that you are right, as a matter of constitutional law.

QUESTION: Why are you arguing the other way?

MR. ROSEN: No. I am arguing it only as a matter of --

QUESTION: Of what your understanding of the Connecticut law is.

MR. ROSEN: Right.

QUESTION: You are not arguing that it's right.

MR. ROSEN: That's right.

QUESTION: But you did raise all the questions in the State case.

MR. ROSEN: The State case has never proceeded to a point where those questions might be raised.

QUESTION: Well, then, I understood -- did the gentleman, Mr. Cochran, say that all of the points were raised in the State case?

MR. ROSEN: I understand him to say they may have been raised formally or informally.

QUESTION: Well, this is your case.

MR. ROSEN: Yes, your Honor, but the State case was

brought by the mothers. I was appointed by the United States district court to represent the class of children in the Federal case, but in any event the --

QUESTION: I will go into it for you. I'll let you know.

MR. ROSEN: Thank you, sir.

May I address the merits for a moment from the perspective of the children of appellants which is that, Mr. Justice Rehnquist, your statement before the statute applies to all children is correct with a reservation that the procedural mechanism of the statute provides that for children who are not on welfare, the proceedings against the mother can be instituted if and only if there is a determination that instituting those proceedings will serve the best interest of the children. Whereas, with children on welfare, that determination is not made.

Now, the distinction arises in the following way: a proceeding may be brought in the case of a child not on welfare only by a guardian or a guardian ad litem of the child. Now, what this means first is that a court must determine that the best interest of the child will be served by appointment of a guardian or guardian ad litem. Second, the guardian or guardian ad litem prosecuting the action to compel the mother to give the name is required by fiduciary obligations to act only in the interest of the child. By contrast, the

Welfare Department, the Welfare Commissioner, the defendant in this case, is empowered to bring actions against children who are on welfare. It is his policy stipulated in the record and brought out in the evidence to bring those actions against each and every woman on welfare who fails to make disclosure whether or not the best interests of that woman's child would be served. So the poor child, the child on welfare, that is to say, gets no protection of the child's interest, and the child who is not on welfare is insured by the procedural mechanism by which the proceedings are brought that the proceedings will be brought if and only if those interests are served and will be pursued only insofar as those interests are served.

Mr. Cochran has alluded to the harm that may come to the children I represent as a result of bringing disclosure proceedings where the interests of the child might not be served. Those harms are very serious, and they are set out in the record.

In the short time remaining I won't give you too many examples of them, but, for example, a mother may be establishing a relationship with a prospective stepfather or adoptive father which might be interrupted by bringing the proceedings. A woman who gave an affidavit below was the named plaintiff in a companion case risked disfellowship from her church should the fact that she was the mother of an illegitimate child become known. In those cases a guardian or guardian ad litem

of the child might have decided that bringing the action would not serve the child's interest and would not have brought the action. But the Commissioner of Welfare will bring the action because the Commissioner of Welfare has determined to bring action in each and every case.

Now, the justification offered by the State for the distinction -- first, there is the obvious distinction between children on welfare and children not on welfare that the State argues a more substantial recoupment interest in the case of children on welfare.

As to that, let me say first that that distinction has no rational relationship to the precise discrimination worked by the statute, because the precise discrimination worked by the statute deprives the child on welfare of any representation as a matter of right in the proceedings which will determine whether or not the mother has to make disclosure. The child who is not on welfare has that protection and has a guardian ad litem under the statutory procedure, and the proceeding cannot be brought without it. So that the child who is on welfare doesn't have a spokesman, doesn't have a representative of his interest, while a child who is not on welfare does. Whatever balance the Court may strike between the interest of the State in recoupment, the interest of the mother in privacy, the interests of the child and protection of the child's interests is not related

at all to the question as to whether the child's interests are entitled to have a voice at that proceeding when the child is poor, if they are given a voice when the child is not on welfare. And that's the discrimination worked by the statute.

Now, in addition, we talk in our brief, and I won't belabor the point here, about the importance of the child's rights, and our position there is simply that the State's financial interest cannot in any event justify abandoning the child's rights and interests in the case of children who are on welfare when those interests are pursued and protected when the child is not on welfare.

The State's primary justification for the statutory scheme is that disclosure serves the interests of all children, on welfare and not on welfare, and the compulsion is good for the child. To this the reply is so it may be in some cases, but it is frequently not the case. The evidence in the record below was powerful that it is not in many cases. Unrebutted expert testimony we produced from very distinguished experts was that it was quite frequently not the case, that compelling the mother in instances in which she didn't want to make disclosure might hurt the child.

In any event, when seen from the perspective of what we consider to be a rationality of the other State interest, the recoupment interest, this claim that the best interests of the child are what is advanced amounts to an irrebuttable

presumption contrary to fact, an irrebuttable presumption that the interests of the child will be served although the child is denied in the hearing a guardian or guardian ad litem if the child is on welfare to attempt to show that those interests will not be served. It's an irrebuttable presumption that the child's interests will be served which is belied by the record below. It is in short an irrebuttable presumption which the State applies selectively. It applies it selectively to children who are on welfare, but it does not apply the irrebuttable presumption that disclosure and compulsion always serves the child's interests in the case of children who are not on welfare.

In short, this is a statute which in the name of the best interests of the child, which has been the State's claim all the way through as to the point of the statute, in fact deprives a subclass of those children, those illegitimate children,of an opportunity to have their best interests voiced and have their best interests be determinative.

QUESTION: You think the interests of children generally in Connecticut are implicated in the necessity for keeping this fund solvent and keeping Connecticut in a position to pay these benefits?

MR. ROSEN: Certainly children in general have such an interest. With respect to how that interest is served in this case, it seems to me first that the interests of an

individual child where that interest is threatened and endangered should not be forced to give way to a speculative interest on behalf of children in general and the State's financial solvency.

QUESTION: You say speculative interest.

MR. ROSEN: Well, I say it's speculative interest because the record below indicates that Connecticut Welfare Department has made no study of the amount of money that they recoup under this statute.

QUESTION: Would you need to make any studies to know that if you pay this money out without recoupment, it's going to have an impact on the funds?

MR. ROSEN: Yes, but the thing that you might have to study is how much money you will get back by pursuing the small class of women who resist disclosure of the name of the putative father even when told by the Welfare Department the possible benefits which might come up. That's the money that's being lost, and the record indicates that the money that is going to be recouped by the State of Connecticut is rather small, in fact, it's extremely small because of the fact that fathers may be absent, fathers may not be available, fathers may be impecunious, and all those factors, by the way, are factors which the mother or the guardian of the child can attempt to elicit in determining whether the interests of the child will be served by going after the father. If there is

a father who has money, who has resources, the interest of the child may be served by pursuing that father. If there is a father whose whereabouts are unknown or who is incarcerated or if he is impecunious, the guardian may make the same determination that the interests of the child, if there are important countervailing interests suggesting that the mother's decision not to disclose ought to be respected, the financial interests also would not be strong.

QUESTION: Congress probably thought different.

MR. ROSEN: I think not, your Honor. Congress --

QUESTION: Well, they went to an awful lot of trouble to require the State to have some plans in this area.

MR. ROSEN: Yes, they did. The reason that I --

QUESTION: Not for a negligible reason, I hope.

MR. ROSEN: No, I think not. But the plans, first of all apply to that large class of women, the record indicates is somewhere around 70 percent that make disclosure voluntarily without any suggestion, much less compulsion, and the thrust of the congressional plan, as I understand it, is to improve the enforcement mechanism. The Senate Finance Committee which drafted the new congressional enactment said that the committee feels the mechanism should be provided to ascertain the child's paternity whenever it seems that this would be both possible and in the child's best interests. That's on page 6 of Mr. Cochran's supplemental brief.

QUESTION: Well, if you should succeed in removing all the compulsion and coercion to the disclosure of the name of the father, maybe there wouldn't be 70 percent who would voluntarily or apparently voluntarily submit. Maybe there would only be 10 percent or 2 percent.

MR. ROSEN: Well, except, Mr. Chief Justice, that as I read the record that is a figure, the 70 percent makes disclosure before the fact of compulsion is brought home to the women. And also, I am not opposing compulsion, that's not my position. My position is that compulsion is warranted in the interests of the child, and I have a position even more cautious than that which is that the statute is unconstitutional because it provides not even a voice for the poor child so that those interests may be brought home to the Connecticut judge who has to determine whether to enforce the compulsion, while for the child who is not on welfare, those interests are represented and are dispositive.

QUESTION: If the Connecticut court reads this statute in order to say that from the constitutional attack that you suggest, reads this statute so as to require the appointment of a guardian ad litem, then your point is gone, isn't it? They haven't got around to that issue yet.

MR. ROSEN: Well, that's true.

QUESTION: And you haven't -- I shouldn't say "you" -- your colleague hasn't let the Connecticut court get around to

that issue.

MR. ROSEN: Well, except that there is still an important distinction, even were the guardian to be appointed in the case of all children, the distinction is still that rich children who are not on welfare, the guardian not only appears for the child, but controls the proceeding, institutes the proceeding, and may withdraw the proceedings when and only when the interests of the child dictates. And it's that discrimination which seems to me to violate the rights of a subclass of illegitimate children, namely, those illegitimate children who are on welfare.

Thank you.

QUESTION: Mr. Rosen, before you sit down, you earlier in your argument volunteered to submit a brief supplementary memorandum on this whole question of the Younger question and including the practice of the inferior courts in Connecticut never to decide or to avoid deciding constitutional issues, and so on. That would be very helpful from my point of view, so with the approval of the Chief Justice, I would appreciate the submission of such a memorandum within a brief period if you can conveniently do so.

MR. ROSEN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rosen, will you do so within -- will five days be enough, or do you want ten?

MR. ROSEN: I would like ten, your Honor.

QUESTION: Mr. Rosen, suppose the Attorney General of Connecticut gets up and says, "I waive all my rights under Younger," you are offering to do a lot of work for nothing.

MR. ROSEN: Well, in that case I would address myself to what this Court's role should be --

QUESTION: In that case, you are ..

MR. ROSEN: That's right.

QUESTION: On the other hand, what if he says, "I didn't urge it in the district court, but I certainly urge it here."

MR. ROSEN: Then I would write a slightly different memorandum.

QUESTION: What would you say then?

MR. ROSEN: What I would say then is that where my clients' rights, the children's rights are jeopardized by what I refer to as a silent extinguishment of their rights, an --

QUESTION: You are going to say that Younger doesn't apply then.

MR. ROSEN: That's right.

QUESTION: You wouldn't say that he has already waived it.

MR. ROSEN: Well, I would also say he has already waived it because you gave that suggestion to me.

(Laughter.)

QUESTION: There is a further factor that this might

lead the court to reexamine its views about whether this is waivable, the abstention question may be waived by the State. So in any event, you submit whatever memorandum you like, and your friends will have an opportunity to respond. You can respond within eight days, will you?

MR. ROSEN: Thank you, your Honor. It's apparent that I will need every day.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Arcari.

ORAL ARGUMENT OF MICHAEL ANTHONY ARCARI

ON BEHALF OF APPELLEE

QUESTION: Did you waive it, Mr. Arcari?

MR. ARCARI: No.

QUESTION: Beg pardon?

MR. ARCARI: No, your Honor.

QUESTION: Did you?

MR. ARCARI: I'm sorry, your Honor.

QUESTION: Did you in the lower court?

MR. ARCARI: Would your Honor repeat the question?

QUESTION: Did you waive the Younger --

MR. ARCARI: If your Honor please, I was not -- you are talking about the State courts?

QUESTION: Yes.

MR. ARCARI: I was not part of those proceedings.

QUESTION: No, in the Federal court, the Federal

district court. Did you urge the Federal district court to hold its hand while, or to dismiss the case?

MR. ARCARI: To the best of my knowledge, your Honor, no.

QUESTION: Did you ask them affirmatively to go ahead and adjudicate it?

MR. ARCARI: I at that time was not in charge of this case, but I don't believe we did. It is my understanding, your Honor, that I believe the Federal district court went ahead because the constitutional issues were not raised by our opponents in the State court.

QUESTION: That doesn't -- You are talking about a waiver, maybe it has to be a knowing waiver.

MR. ARCARI: Mr. Chief Justice, and may it please the Court: The root of the problem in this matter, of course, is the identity of the putative father. In Shirley v. Lavine, that's in 365 F. Supp. 818, this case is very much unlike that case in the sense that Shirley v. Lavine, the mothers involved in that particular case were asked to go beyond to identify the putative father and take further actions against the putative father, to institute a paternity action. We don't have that problem here. All the Connecticut statute is interested in is learning the identity of the putative father and that's all. The State is equipped to take its own independent action against the putative father to establish

paternity and call the mother in as a witness, as provided by law.

Also not involved in this matter is the reduction of AFDC benefits. That's clearly not involved in our case.

Of course, the first step is utilizing section 52-440b in order to learn the identity of the putative father if the mother voluntarily refuses to disclose the name.

We maintain that in Connecticut our paternity laws, including section 52-440b, are civil, including the contempt provision.

Now, the paternity laws in our State do provide fifth amendment immunity and therefore the mothers' rights in this matter are not jeopardized in that sense. The primary purpose of Connecticut's comprehensive scheme here is the protection of children. Collection of money from putative fathers is an important interest, it's a substantial interest. Nevertheless, that is not the primary purpose of our laws in relation to paternity, and that includes 52-440b.

Of course, we recite in our brief that there has been a trend to create a balance between illegitimate children and legitimate children so that rights equal out here. In other words, we have some cases declaring that the Social Security benefits should be awarded to children under -- illegitimate children under the Social Security Act as well as their BA benefits that they are entitled to today, and of course their

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rights protected under the wrongful debt statutes of illegitimate children, and the list goes on.

But there is also something else, too, of significance here, that there has been a trend, at least I think it's a trend, greater rights to the putative father. And this, of course, is just beginning in my opinion, that there have been State court cases in this area where the putative father, for instance, is given the right of custody over his child, especially if the mother has committed neglect or has become deceased, and, of course, if the father can provide a home and so forth.

Also, there is a case where it was decided that the putative father, his consent must be obtained as far as adoption is concerned. So it's not a question of only support. There are other rights. The primary rights involved here are of course the children's, but there is the putative father's rights as well as the mother's.

We also point out in our brief there are some practical problems here. For instance, applications. Shouldn't certainly the illegitimate child have the same right as a legitimate child to fill in blank spaces on an application where it says "father"? And this is the whole, probably one of the most practical problems we can point out to this Court. We also have in Connecticut inheritance laws and we have section 45-274 which in effect says that an illegitimate child

may inherit from its natural mother with all the rights and benefits as the legitimate child. Again, this points up the comprehensive -- part of the comprehensive plan in Connecticut to protect the rights and further the rights of illegitimate children along with legitimate children.

Now, we say the specific purpose of section 52-440b, of course, is to, yes, learn the identity of the putative father for the object of eventually obtaining support on behalf of the child. Again, we emphasize that's an important purpose, but not the primary purpose. The primary purpose, of course, gets into the comprehensive scheme to protect the children. This is just one phase of it.

Now, the statute that we are talking about includes all mothers with illegitimate children, contrary to our opponents' view here. Now, we do have some statistics cited in our briefs, and I don't believe that I will waste time covering that, but I think we must understand that what it boils down to is this: That I think just as well as anyone else's rights are subject to control, constitutional rights or any rights, the mother must have, there must be some control of the mother's rights in this type of a problem as it bears on her child or children's rights. And this is where section 52-440b comes in.

Now, we have claimed by the appellants here that the statute, Connecticut statute, is in conflict

with the Social Security Act. It was pointed out in the lower court that quite to the contrary, the Social Security Act, specifically 42 U.S.Code 602(a)(17)(a)(1) and (2) give a frank recognition of the importance of establishing the paternity of an illegitimate child not only for financial reasons, but for the primary purpose of the Social Security Act to ensure that the child was brought up in an environment, in a family-type life, family-type setting.

Now, our statute is merely drawn to carry out the purposes of the Social Security Act, as I just related. On February 18 we received a copy of the typewritten supplemental brief discussing Public Law 93-647, part (b). Again contrary to our opponents in this matter, I don't believe that the amendments by Congress in relation to the Social Security Act favor our opponents in any way whatsoever. Quite to the contrary, I think they enhance the State's position here in this respect: First of all, looking at the amendments, the amendments still incorporate the provision of the old social security law, in other words, section 602(a)(17), that is the State plan must have provision in it to establish the paternity of an illegitimate child.

What the amendments actually did, in my opinion, is to add provisions to the Social Security Act, adding these two provisions: That the mother, as a condition of eligibility, the mother must cooperate with the welfare authorities in

establishing paternity and helping to secure support for the children. Of course, cooperation must be construed the identity of the father, the need to get over that basic threshold.

Now, I read a clear intent in Congress saying that if the mother elects not to disclose the name of the putative father under the most recent amendments, that she can be cut from welfare assistance. I think what Congress is saying is, all right, if she wants to exercise that right, she is off assistance, she is out of the protection of the Social Security Act. Her children remain under the protection of the Social Security Act.

Now, as I understand, trying to analyze my opponents' view on this thing, if the mother is removed from the protection of the Social Security Act, then certainly I don't think Congress intended that the State may not act under section 52-440b and apply it against the mother here who is no longer under assistance. After all, the State still has an obligation to protect the children that are left on welfare assistance under the Social Security Act.

In short, I don't think we have a statutory conflict because of that reason.

If I may move on to the right of privacy, our position is there is no fundamental rights involved here. Our opponents discuss that if the mother is forced to disclose

the name of the putative father, this gets into an area that's embarrassing to her, it interferes with the most intimate details of her life. We maintain no, that, first of all from the practical side, when the mother has an illegitimate child, these facts become known, partially anyway, to the community around her. And I don't care if she goes out of State to have her child, when she comes back to the community, the community, her neighbors, no doubt will find out that she had an illegitimate child through one process or another.

So if there is any harm here, it has been done. It doesn't certainly involve the State.

We say also that the inquiry does not go into so-called the intrusion into the home. It does not interfere with interpersonal decision on the part of the mother or anyone else she knows, nor does it judge -- nor are we setting ourselves up through the statute to judge the mother's misconduct if it is misconduct. We are not forbidding the mother to have a man in the house or in the bedroom, for that matter. Again, it's very limited in the sense that all we want is the identity of the father and no more. She doesn't have to testify beyond that point. That is,as far as the contempt proceedings are concerned.

Now, even if we recognize that the mother does have some rights here --

QUESTION: Under the statute, if then paternity

proceedings are brought, she would have to testify if she was subpoenaed, wouldn't she?

MR. ARCARI: That's correct, your Honor.

QUESTION: And again under sanction of a possible contempt if she didn't.

MR. ARCARI: That's correct, she is subject to the same laws as any other witness, your Honor. But she does have the right of immunity of the fifth amendment immunity and so forth.

QUESTION: As any other witness would.

MR. ARCARI: That's correct, your Honor.

Now, as I say, the mother does have some rights in this matter. We point to Roe v. Wade, and I think the significant thing in Roe v. Wade, this Court, of course, recognized that at some point in time the unborn child, the unborn fetus, acquires rights. And at that point the mother's rights, rights to personal privacy, or what have you are not full, that her rights have some bearing on her unborn child's rights. Certainly if we can use that principle, certainly children that have been born have at least the same rights.

Now, what we are trying to persuade this Court on is we must look at not only the rights individually from the children's or the mothers', let's put everyone's rights in a collective sense. Going back a little bit into Connecticut's history, Connecticut under the doctrine of parens patriae

of course recognized the protection of children. But it has gone much further than that. Connecticut courts have made the children's interests paramount, and it has even gone farther than that by saying that we will protect children's rights in every way possible, and that includes illegitimate children, of course.

Now, Connecticut has also even gone so far as to alter the family relationship when one or both parents have caused neglect. And, of course, that is a proceeding usually in the juvenile court, the probate court, and this is well-defined cases.

Of course, I might point out that Connecticut never adopted the law of England which recognized the illegitimate child to be the child of no one. Right from the beginning Connecticut recognized that the child is the child of its natural mother with all the rights and benefits that legitimate children have.

Now, as I said, I pointed out to this Court that support is an important function here, but it is not the primary reason. I can't emphasize that too much.

QUESTION: Mr. Attorney General.

MR. ARCARI: Yes, your Honor.

QUESTION: In that connection let's assume you have a mother who is quite wealthy and has always supported her own child. If I understand your position, the State would

proceed against her in the same way. Is that correct?

MR. ARCARI: It is my opinion that the State should. Let me point out, your Honor, that our department is concerned with welfare matters, so if we didn't have a welfare interest, that is, a child was not on assistance, our division of the Attorney General's office would not proceed against her. Possibly some other division could.

QUESTION: The statute by its terms provides for three subclasses, and one of the subclasses is not conditioned on receipt of welfare at all. Do you agree with that?

MR. ARCARI: I agree with that, your Honor, and I --

QUESTION: So the statute would apply in the situation I described, would it not?

MR. ARCARI: Yes, it would, your Honor.

QUESTION: It would apply.

Now, suppose in this case that one of the mothers had relinquished all rights to future welfare for the child in question and had offered to repay whatever she had received. Would the State continue to have prosecuted her under this contempt proceeding, or would it have withdrawn the prosecution?

MR. ARCARI: No, if she refuses to disclose the name of the putative father under the circumstances.

QUESTION: In other words, if she refused to disclose the name of the father, she would be prosecuted.

MR. ARCARI: I believe, yes, the statute still would apply to her, your Honor.

QUESTION: Thank you.

MR. ARCARI: What we maintain is involved as far as the appellant mothers is that, yes, they may suffer from shock, so forth. Of course, they do this at their own hand. They are the ones forcing the issue here as far as being brought into court. The appellant mothers bring up the question of strains and stresses upon their children. In fact, that's their principal argument here.

This argument gives little recognition to the stresses and strains on the children who are not able to find out or identify their fathers. There is some testimony on the way of cross-examination, I believe it's part of the record and it can speak for itself. Let's keep one thing in mind, that the illegitimate child must function in the community just as well as the legitimate cild. That child, any child, has a long way to go in our society. And I think the State can't do enough to bring the illegitimate child's rights in balance with the legitimate child's rights.

QUESTION: Mr. Arcari, are there statute of limitations in Connecticut on a paternity suit?

MR. ARCARI: Are there statute of limitations? Yes, your Honor. First of all, there is a three-year statute of limitations and also I believe it's one year if the putative

father ceases supporting the child, and also under the marriage and divorce laws or dissolution of marriages, there is a one-year provision, one-year statute of limitations if a child is found not to be issue of the marriage during the dissolution of the marriage.

QUESTION: If the statute had run in a particular case, would the State still insist on divulgence of identity?

MR. ARCARI: I don't believe so because we have -- I think that's somewhat of a practical problem, too. I don't believe so because you may have a situation where the child is 17, 15 years old and the statute of limitations all the way across the board have run, and if there is no welfare involved we are trying to collect back or something of this nature, I don't believe the State would press the matter. I think the guardian ad litem may have an interest, but that's up to the guardian ad litem to represent the child.

QUESTION: Well, suppose the child were six or five or four.

MR. ARCARI: And is welfare involved in it?

QUESTION: Yes. And you spoke of a three-year period.

MR. ARCARI: If the statute of limitations has run, your Honor, we cannot. That would be part of the defense and in my opinion it would be, from what I know about paternity matters, that would be a good defense.

QUESTION: I am just suggesting that might be a case where clearly the rights of privacy would outweigh any interests on the part of the State.

MR. ARCARI: That may very well be, but I'm going to get to this a little bit further on. The mother involved I assume is in a position to bring up those rights, and I think she may very well persuade the court that she happens to be dealing with at that time.

We also have a claim on violation of due process of law. We talked somewhat of the substantive part of it, I think, of section 52-440b in relation to due process. In other words, we maintain it is rationally related to carry out the purposes of protecting the child and in gaining support, and so forth. But the procedure involved certainly the object, as I pointed out before, of the Connecticut statute is to learn the identity to eventually obtain support. That certainly is within the Government's scope to compel testimony, and my understanding, the only constitutional restriction of the scope of the Government's power to compel testimony is the fifth amendment. And we did make provision in other parts of our law for that.

What the opponents bring up are these four things, that the statute creates an irrebuttable presumption and that there is no individualized hearing -- I take that to mean a trial type hearing -- also, there are not sufficient standards

under due process of law and the statute is too broad.

First of all, looking at section 52-440b, the statute says when disclosure is to be made, under what circumstances, and to whom, and the subject matter is quite restricted, if the mother fails or refuses to disclose the name of the putative father of such child under oath. That is the subject matter of the Act involved here.

Now, once the court, the court of common pleas, now, gets by that first set of standards, then under the contempt proceedings in Connecticut it must eventually apply these standards: Who is making the demand here, under what circumstances, whether there is a refusal to be sworn or to refuse to disclose, whether the refusal is justified in law, whether it is a question that is proper, and whether the proper question is reasonably related to the subject matter inquiry. And, of course, the court of common pleas in a contempt proceeding has the power to hear witnesses and even undertake -- or hear defenses on behalf of the mother.

Now, also through the contempt hearing itself, obviously due process of law applies here. In other words, the mother will be protected as far as any excessive means, in other words, of the State to extract evidence from her. In other words, what I am getting at is this will take care of the appellants' fourth amendment argument here.

Also, under the statute, legal process also applies.

In other words, no one can just drag the mother off the street here. A citation must be issued, and she is ordered to show cause why she should not be held in contempt as far as disclosing the name of the putative father. She has the right of counsel just like anyone else. There is no -- in other words, the Connecticut laws do not prevent her from having her own counsel. If she doesn't have sufficient funds, again the State law or State policy, or within the State court's discretion, to see that she does get counsel.

Also, in a contempt proceedings, the judgment that is handed down is a final order and reviewable by the State supreme court and the subject of review goes into the jurisdiction as to the court's right to punish. Also, into the area could the acts involved constitute contempt. So there is a full and complete review concluding any constitutional claims that may arise out of the contempt proceedings.

QUESTION: This has always been handled in the court of common pleas initially, or has that been a recent step?

MR. ARCARI: It is my understanding that the cases involved in this particular case have been pending for about a year or so. In other words, the procedure as taken place in the court of common pleas is not too old. And I think all the cases are pending. I don't think they are going forward; they are waiting to see what happens to this case.

QUESTION: And that's your court of general trial

jurisdiction in Connecticut.

MR. ARCARI: No, your Honor. Right now our judicial system is split up between the superior court and court of common pleas. Both are trial courts, and it's well defined as to which one has jurisdiction in certain cases.

QUESTION: Does the court of common pleas have a misdemeanor type of court?

MR. ARCARI: I believe, yes, your Honor. Now, under the new reorganization they do handle misdemeanors such as traffic matters.

QUESTION: It's inferior, then, to the superior court.

MR. ARCARI: I believe you could still classify it that way, your Honor.

QUESTION: And then does appeal from the court of common pleas go to the Supreme Court of Connecticut or to the superior court?

MR. ARCARI: Well, again, that provision of appeal, I'm not quite sure where the appeal would lie. I believe the appeal would still lie under the present Act, your Honor, under the new Act, I should say, to the Supreme Court . It's my understanding that the contempt provisions you would still go up to the State supreme court on that.

QUESTION: Your brother on the other side said there was some special statutory provision to review contempt, he thought.

MR. ARCARI: Well, if I may answer that question this way: It is my understanding there are two types of contempt. If an act of contempt is committed before a court, statutory standards apply. Here we are having a mother brought in, which means that common law standards apply.

Now, as far as appealing from the court of common pleas to the State supreme court, I believe the statute would control the appeal, and I believe that is, in other words, the statute would dictate the procedure involved.

Now, an important matter in this of significance is that the court of common pleas has the power under the statute to exercise sound judicial discretion, and this was pointed out in the trial court here.

What do I mean by that? There are three phases of it. First of all, the court has the sound discretion to decide whether to order contempt or not. Two, even if it finds the mother in contempt, it still has the discretion whether to enforce penalty or not, to order penalty. And also, about this business about bringing, forcing the mother to bring, prosecute a paternity action, the court of common pleas still has discretionary powers to do that. We point out in our brief that since we have other laws in the paternity sections of our laws that allow the town or the State to bring a paternity action, obviously, the court will exercise discretion and suggest to the State that they bring independent actions rather

than trying to force a mother who is perhaps trying to resist at that point to bring this action, because obviously this will have an effect on the tryor of fact.

Also, I want to go to -- discussing all these standards I pointed out to the Court, I don't see how we can come to the conclusion that in any way possible there is cruel and unusual punishment under the eighth amendment of the United States Constitution. Individualized hearing. I don't believe, my understanding from reading some cases anyway, that due process of law requires a trial type hearing in these proceedings as far as the contempt under section 52-440b. You have to keep in mind appellants are not on trial for their conduct. All they are being brought into court for is a limited inquiry with sufficient safeguards under due process of law or what have you. This is not a prosecution type situation where again their conduct comes into focus here and the court is going to go beyond getting the identity of the putative father.

The appellants bring up the first amendment rights. They claim that they have a right not to divulge this information under the first amendment. Of course, a first amendment type argument, we have perhaps a high standard being applied here. I would like to point out to the Court that the first amendment doesn't prohibit the State again its power to compel testimony here, but it does obviously

restrict the States here. And it is my understanding that if the State's interest involved is cogent to justify abridging the right of association or what have you, then in this case the State's position should be upheld.

Now, again, I want to emphasize that we believe our position in this matter is compelling. I think it's overwhelming in the sense of protecting the rights of the illegitimate children. Certainly I point out before that in regard to the appellant's argument that they have a right under the first amendment not to resort to a court, and what they mean by that is again going back to the court of common pleas possibly forcing the mother to bring a paternity action. I gave a little bit of background about that. Certainly, the paternity aspect of it, the prosecution of paternity suit, is not compulsory under 52-440b. Also, the contempt provisions are not mandatory, and certainly our act does not force the mother or any mother to adopt beliefs or attitudes anything different from what they actually believe.

To come down to the equal protection claim here, and of course, the lower court applied the rational standard here which I think is a correct standard to apply. We pointed out in the beginning of this argument that the State's position was that we have a comprehensive scheme and at the core that comprehensive scheme is to protect and further the rights of illegitimate children. The means under section 52-440b to

protect those rights, learning the identity of the father is certainly rationally related to carry out the provisions of that comprehensive scheme and also any provisions under the Social Security Act.

But commenting just a moment that I think we also under that same argument have a compelling interest, as I noted before, but talking about the classifications themselves, our opponents bring up that there is a sex classification. You have to keep in mind that men yet do not bear children. Women carry on that function. And the point here is that we have a very unique situation. So I don't think in any serious sense of the word you can take women in this type context and say we have a suspect classification.

Also our opponents point out to this Court that they believe there is a suspect classification as to poverty. Again we pointed out before that our statute does not apply simply to poverty or to women receiving AFDC benefits or the family as such, they apply to, as I pointed out to Justice Powell, that it applies to people not receiving AFDC benefits or any State welfare assistance. I don't think you can say that poverty is a suspect classification.

It was brought up by Judge Blumenfeld in the lower court that at that time the appellants claim that children, illegitimate children, were a suspect classification, and Judge Blumenfeld quickly stated this is taking the classification and

standing it on its head, in the sense that section 52-440b is designed to help the children not to detract from their rights or benefits and therefore it fits in accordance with the Social Security Act and also it is certainly rationally related and not in violation of the equal protection of the laws.

If I may point out something, I emphasize again that we do not have a criminal contempt involved as far as section 52-440b. It's my understanding of the law that children in our State are not unrepresented by guardian ad litem at certain times, but also it is customary to appoint attorneys to represent children. I suppose unless there is a conflict of interest, the guardian ad litem could be the attorney representing the child, but they don't necessarily have to be.

The attorney representing the children involved in this matter made a statement which says that as far as they were concerned the Welfare Department, the welfare policy is to bring an action, and I underscored those words, bring an action, against the mothers involved in order to get them to disclose. The State Welfare Department does not bring an action against any mother receiving welfare assistance here. They take the information, the policy provides they take the information, they review it, and if there is a problem involving the identity of the father, we refer it over to outside counsel. In short, they refer it to the court. And everything that goes on from that point on is under the supervision of the court

of common pleas under the statute itself. And, of course, the statute itself, as I point out in our argument, heavily controls the court of common pleas here with sufficient standards.

Of course, our opponents made quite a bit of the financial interests of the State. I can probably end my argument on this note: that certainly I admit to this tribunal that the financial interests of the State is very substantial here, but I still think that the primary interests involved are the welfare of the children, the illegitimate children, and so long as I'm a member of the Connecticut bar, I plan to work towards that effort, even though I may find myself collecting money from putative fathers. That still hasn't deterred me from keeping that principle uppermost in my mind as far as the protection and welfare of the children.

Thank you very much for your --

QUESTION: Mr. Attorney General, may I ask a question? Does Connecticut have laws that apply to married women where, for example, the father has left the home and his location may be unknown. What happens then?

MR. ARCARI: If the mother leaves the home?

QUESTION: You have a married mother. The father has left the home, his whereabouts may or may not be known, he's not providing support for the children. What is the procedure in Connecticut?

MR. ARCARI: I believe the Welfare Department has

a policy where they will attempt to locate the father in the best way possible.

QUESTION: Is there any statute that compels the married mother to disclose the whereabouts of the father?

MR. ARCARI: I don't believe so, your Honor. Usually, for instance, we find that problem very much in divorce matters and the dissolution of a marriage, and the courts will rely on their equity powers to see if they can obtain the information.

Of course, before we get into the courts, the Welfare Department and the Department of Finance Control have a location unit, and we work with other States using the Social Security number to trace down fathers involved as far as support. We do have this going all over the nation, and our only problem involved is we don't have enough manpower. But it seems to work out quite successfully.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:22 p.m., the oral argument in the above-entitled matter was concluded.)