The Burger Court Opinion Writing Database

Stanley v. Illinois

405 U.S. 645 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 1, 1971

Re: No. 70-5014 - Stanley v. Illinois

Dear Bill:

I concur.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 23, 1971

Re: No. 70-5014 - Stanley v. Illinois

Dear Byron:

I will file a dissent in this case as soon as I can put it together.

I believe that when the whole record is sorted out it can be made clear that Stanley has not only failed but has affirmatively refused to use state remedies pointed out to him by the Illinois judge.

This is really a ridiculous case to be absorbing our time and, paradoxically, I will spend a little more time trying to demonstrate that.

Cordially,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1971

MEMORANDUM TO THE CONFERENCE:

Re: No. 70-5014 -- Stanley v. Illinois

Enclosed is a draft of dissent in the above.

I cannot escape a feeling that we are getting into a "quicksand" area by the proposed opinion.

My thanks to Mr. Justice Douglas for my unacknowledged plagiarizing of portions of the excellent opinion he wrote.

Regards,

WEB

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: DEC 2 1971

Recirculated: _____

No. 70-5014

STANLEY
v.
ILLINOIS

MR. CHIEF JUSTICE BURGER, dissenting.

The issue presented by this case is, simply stated, whether Illinois violates the United States Constitution when it gives full recognition to a father-child relationship only if it arises in the context of a traditional family unit bound together in a legal obligation such as marriage.

Stanley alleges that he had been living with the mother of the two infant children involved in this case for 18 years prior to her death and that he is the natural father of those children. Shortly after the mother's death, Stanley turned the children over to the care of a Mr. and Mrs. Ness, who took the children into their home. When it eventually came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children, the judicial proceeding here challenged was initiated. In the course of that proceeding, the children were declared wards of the court and

Changes on pp. 5, 8, 9, 11, 12
Other minor changes throughout

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

SECOND DRAFT

Circulated: _____

Recirculated: JAN 24 1972

No. 70-5014 -- Stanley v. Illinois

MR. CHIEF JUSTICE BURGER, dissenting.

The issue presented by this case is, simply stated, whether Illinois violates the United States Constitution when it gives full recognition to a father-child relationship only in the context of a traditional family unit bound together by legal obligations, such as those arising from marriage or an adoption proceeding.

Stanley asserts rights relating to illegitimate children he claims to have fathered. He alleges that he had been living with the mother of the two infant children involved in this case for 18 years prior to her death and that he is the natural father of those children, although this has not been established in any judicial proceeding. Shortly after the mother's death, Stanley turned the children over to the care of a Mr. and Mrs. Ness, who took the children into their home. When it eventually came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children under Illinois law, the judicial proceeding here under review was initiated. In the course

Substantially rewritten

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____

Recirculated: MAR 7 1972

No. 70-5014 - Stanley v. Illinois

MR. CHIEF JUSTICE BURGER, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute which omits unwed fathers from the definition of "parents" violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As Mr. Justice Douglas said for this Court in State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160 (1945), "Since the [state] Supreme Court did not pass on the question, we may not do so." We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U.S.C. § 1257 when we decided Hill v. California, 401 U.S. 797 (1971). Having rejected the claim that Chimel v. California, 395 U.S. 752 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1972

PERSONAL

No. 70-5014 -- Stanley v. Illinois

Dear Harry:

I am adopting your suggestions as you will see when the new print comes around.

I had dropped the "hit and run" driver analogy because of some possibly dubious connotations. I agree it is graphic but the Vanderbilt dictum is sound: when you have a phrase or aphorism that's great, take the blue pencil firmly in hand and strike it out!

I take it you join me now and will show it that way unless I hear otherwise.

Regards,

WEB

Mr. Justice Blackmun

(B)
1
MAR 3,4,6

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-5014

Recirculated: MAR 13 1972

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[March —, 1972]

MR. CHIEF JUSTICE BURGER, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute which omits unwed fathers from the definition of "parents" violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As MR. JUSTICE DOUGLAS said for this Court in *State Farm Mutual Automobile Ins. Co.* v. *Duel,* 324 U. S. 154, 160 (1945), "Since the [state] Supreme Court did not pass on the question, we may not do so." We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U. S. C. § 1257 when we decided *Hill* v. *California,* 401 U. S. 797 (1971). Having rejected the claim that *Chimel* v. *California,* 395 U. S. 752 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly extensive in scope, the Court noted Hill's additional contention that his personal diary, which was one of the items of evidence seized in that search, should have been excluded on Fifth Amendment grounds as well. MR. JUSTICE WHITE, in his opinion for the Court, concluded that

S/M
pp 1, 4-5

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[March —, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN concurs, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute which omits unwed fathers from the definition of "parents" violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue when it unanimously upheld the statute against petitioner Stanley's attack.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As MR. JUSTICE DOUGLAS said for this Court in *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945), "Since the [state] Supreme Court did not pass on the question, we may not do so." We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U. S. C. § 1257 when we decided *Hill* v. *California*, 401 U. S. 797 (1971). Having rejected the claim that *Chimel* v. *California*, 395 U. S. 752 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly extensive in scope, the Court noted Hill's additional contention that his personal diary, which was one of the items of evidence seized in that search, should have been excluded on Fifth Amendment grounds as well. MR. JUS-

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

Circulated: 11/4/71

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 70–5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

On May 6, 1969, the Juvenile Division of the Circuit Court of Cook County, Illinois, entered an order stating that Peter Stanley, Jr., and Kimberly Stanley, ages 2½ and 1½ years respectively, were without parents and that the children's unwed mother had died and that under Illinos law their natural father who had not married their deceased mother was not regarded as a "parent."[1] Because the children were without parents the court placed them under the care of a guardian. Petitioner, their natural father, did not request to be their guardian but testified that he had previously arranged for a Mr. and Mrs. Ness to look after their children and that the Ness' should be appointed guardians. Although the court accepted this recommendation, the judge also stated that it would entertain a future motion by the petitioner to be appointed guardian. Nonetheless, the judge emphasized that Stanley had no right to custody and that in order to obtain such an appointment he would have to demonstrate a suitable plan for the proper care of the children. Shortly thereafter the petitioner evidently de-

[1] In Illinois "parents" means "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law." Ill. Rev. Stat., 1969, c. 37, § 701–14.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 10, 1971

MEMORANDUM TO THE CONFERENCE:

I withdraw my earlier opinion in No. 70-5014 - Stanley v. Illinois, and institute the enclosure in its place.

William O. Douglas

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

On May 6, 1969, the Juvenile Division of the Circuit Court of Cook County, Illinois, entered an order stating that Peter Stanley, Jr., and Kimberly Stanley, ages 2½ and 1½ years respectively, were without parents and that the children's unwed mother had died and that under Illinos law their natural father who had not married their deceased mother was not regarded as a "parent." [1] Because the children were without parents the court placed them under the care of a guardian. Petitioner, their natural father, did not request to be their guardian but testified that he had previously arranged for a Mr. and Mrs. Ness to look after their children and that the Ness' should be appointed guardians. Although the court accepted this recommendation, the judge also stated that it would entertain a future motion by the petitioner to be appointed guardian. Nonetheless, the judge emphasized that Stanley had no right to custody and that in order to obtain such an appointment he would have to demonstrate a suitable plan for the proper care of the children. Shortly thereafter the petitioner evidently de-

[1] In Illinois "parents" means "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law." Ill. Rev. Stat., 1969, c. 37, § 701–14.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Douglas, J.

Circulated: 11-10

SUPREME COURT OF THE UNITED STATES

Recirculated:

No. 70-5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE WHITE that the presumption which Illinois employs against Stanley is not consonant with procedural due process.

Stanley was allowed to participate in the proceeding only to the extent of attempting to show that he had been lawfully married (which he failed to show). He was not allowed to show that he had not been a neglectful father, because under the Illinois scheme that issue is not cognizable in a *dependency* proceeding, though it is the central issue in an Illinois *neglect proceeding*. Illinois, by excluding that issue from the *dependency* hearing fragments the family unit without giving Stanley a chance to disprove the inference. It is for me no answer that he can *later* apply for custody because (a) ~~the~~ harm done by the interim separation, and (b) no reason is supplied for not allowing Stanley to present his case during the dependency hearing.

November 18, 1971

Dear Byron:

In No. 70-5014 - Stanley v. Illinois, please note that I join Parts I and II of your opinion of this date.

W. O. D.

Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 7, 1972

Dear Byron:

In No. 70-5014 - Stanley v. Illinois, please join me Parts I and II of your opinion.

William O. Douglas

Mr. Justice White

P.S. I have made a suggestion on Page 8.

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 9, 1972

Dear Byron:

I have your recirculation of March eighth in No. 70-5014 - Stanley v. Illinois.

As I wrote you on February seventh, please join me in Parts I and II of your opinion.

William O. Douglas

Mr. Justice White

CC: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

Brennan, J.

Circulated: 11/28/71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

PER CURIAM.

Illinois law grants an unwed mother rights to control and custody of her illegitimate minor children that are not granted to an unwed father. We granted certiorari to consider whether certain sections of the Illinois Juvenile Court Act and the Illinois Paternity Act alleged to make this distinction, Ill. Rev. Stat., c. 37, §§ 701–14 and 702–5 (1969), Ill. Rev. Stat. 1967, c. 106 3/4, par. 62, denied petitioner, an unwed father, equal protection of the laws. 400 U. S. 1020 (1971). It appears, however, that the trial court held that petitioner would be afforded the opportunity to apply for rights of custody and control, although § 12 of the Paternity Act provides that an unwed father "shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose." Petitioner did not apply for custody and control and in that circumstance the Illinois Supreme Court held that he would not be heard to argue that application of § 12 to deny him custody would constitute a denial of equal protection of the laws. 45 Ill. 2d 132, 256 N. E. 2d 814 (1970). Without the benefit of a fuller state court definition of the rights of an unwed father to control and custody of his illegitimate

Minor changes

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
~~Mr. Justice Harlan~~
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Brennan, J.

2nd DRAFT

Circulated: _____

Recirculated: 11-3-71

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

PER CURIAM.

Illinois law grants the mother of illegitimate minor children rights to their control and custody that are not granted to their father. We granted certiorari to consider whether certain sections of the Illinois Juvenile Court Act and the Illinois Paternity Act alleged to make this distinction, Ill. Rev. Stat., c. 37, §§ 701–14 and 702–5 (1969), Ill. Rev. Stat., c. 106 3/4, ¶ 62 (1969), denied petitioner, the natural father of illegitimate children, equal protection of the laws. 400 U. S. 1020 (1971). It appears, however, that the trial court held that petitioner would be afforded the opportunity to apply for rights of custody and control, although § 62 of the Paternity Act provides that "the father of a child born out of wedlock . . . shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose." Petitioner did not apply for custody and control and in that circumstance the Illinois Supreme Court held that he would not be heard to argue that application of § 62 to deny him custody would constitute a denial of equal protection of the laws. 45 Ill. 2d 132, 256 N. E. 2d 814 (1970). Without the benefit of a fuller state court definition of the rights of natural fathers to control and custody of their illegitimate

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 10, 1971

MEMORANDUM TO THE CONFERENCE

RE: No. 70-5014 - Stanley v. Illinois

This will confirm that I withdraw my vote for the Per Curiam dismissing the case as improvidently granted and will vote to reverse.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 19, 1971

RE: No. 70-5014 - Stanley v. Illinois

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J. BRENNAN, JR.

February 4, 1972

RE: No. 70-5014 - Stanley v. Illinois

Dear Byron:

Your revision is completely persuasive and certainly should dissipate any doubts raised by the dissent. I am happy to join.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 30, 1972

No. 70-5014 -- Stanley v. Illinois

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 11-8-71

No. 70–5014

Recirculated: _____

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

MR. JUSTICE WHITE, dissenting.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her, but also his children. Upon her death, in a dependency proceeding instituted by the State, his children were declared wards of the State and placed with state-appointed guardians. That result automatically followed from proof of the single fact that Peter Stanley and the now dead mother had not been married. Under Illinois law Stanley's fitness as a father was irrelevant; the children of both fit and unfit, unwed fathers became wards of the State upon the death of the mother.

Illinois justifies the taking by saying that unwed fathers are presumed to be unfit to raise their children and that it would be too troublesome to permit the presumption to be rebutted in the dependency proceeding. We granted certiorari to determine whether this presumption should be allowed to stand, particularly in light of the fact that Illinois allows married fathers—whether divorced, widowed or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.

The Court now sets aside considerations of logic as well as humanity when it promulgates the following syllogism: Illinois has not made it clear how petitioner

BR changes throughout from dissent previously circulated

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 11/18/71

No. 70–5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her, but also his children. Upon her death, in a dependency proceeding instituted by the State of Illinois, his children were declared wards of the State and placed with court appointed guardians. Stanley appealed arguing that he had never been shown to be an unfit parent. The Illinois Supreme Court accepted that this was so, but held that the separation of Stanley and his children properly and automatically followed from proof of the single fact that Peter Stanley and the now dead mother had not been married. *In re Stanley,* 45 Ill. 2d 132, 256 N. E. 2d 814 (1970). Under Illinois law the children of both fit and unfit unwed fathers became wards of the State upon the death of the mother. Ill. Rev. Stat., c. 37, §§ 702–5, 701–14 (1969). Stanley's fitness as a father was irrelevant.

Now, on review in this Court, Illinois reiterates its position that unwed fathers are presumed to be unfit to raise their children and that it is unnecessary to hold an individualized hearing to determine whether a particular father is in fact an unfit parent before he is separated from his children. We granted certiorari to determine whether this method of procedure by presumption could be allowed to stand, particularly in light of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 3, 1971

MEMORANDUM TO THE CONFERENCE

No. 70-5014 - Stanley v. Illinois

On the merits, I remain convinced that both the due process and equal protection grounds are sound bases for decision in this case. However, the Chief Justice doubts our right and power to invoke the Due Process Clause. He may be right. I am considering the matter.

B.R.W.

You have my concurrence out. Substantially rewritten

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: ____________

Recirculated: 2-3-72

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, v. State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of equal protention of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could be properly separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley,* 45 Ill. 2d 132, 256 N. E. 814 (1970).

[1] Uncontradicted testimony of Peter Stanley, Petitioner's Appendix, p. 22.

[2] Only two children are involved in this litigation.

pp 8-11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 2-8-72

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, v. State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley*, 45 Ill. 2d 132, 256 N. E. 814 (1970).

[1] Uncontradicted testimony of Peter Stanley, Petitioner's Appendix, p. 22.

[2] Only two children are involved in this litigation.

3 — 19

pp 5, 8-11

You have joined

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

6th DRAFT

Circulated: _____

Recirculated: 3-8-72

SUPREME COURT OF THE UNITED STATES

No. 70–5014

Peter Stanley, Sr., Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[January —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley*, 45 Ill. 2d 132, 256 N. E. 814 (1970).

[1] Uncontradicted testimony of Peter Stanley, Petitioner's Appendix, p. 22.

[2] Only two children are involved in this litigation.

B

pp 9, 11, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

7th DRAFT

From: White, J.

Circulated: _____

Recirculated: 3-30-72

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, v. State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois.

[April —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley*, 45 Ill. 2d 132, 256 N. E. 814 (1970).

[1] Uncontradicted testimony of Peter Stanley, Petitioner's Appendix, p. 22.

[2] Only two children are involved in this litigation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 28, 1971

No replies from PS + BRW
BRW + WOD dissenting

Re: No. 70-5014 - Stanley v. Illinois

Dear Bill:

I shall try my hand at a short dissent to your per curiam.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

11/18/71

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5014

Peter Stanley, Sr., Petitioner, v. State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[November —, 1971]

Opinion of

MR. JUSTICE MARSHALL.

I am convinced that the Illinois statutory scheme before us denies to the fathers of illegitimate children the equal protection of the laws.

I

In my view that question is squarely presented by the record in this case, and I would reverse the judgment of the court below. It is suggested that petitioner's deprivation is *de minimis,* because the law of Illinois permits him to petition for adoption of the children, and thereby acquire the legal status that he seeks.[1] It is reasonable, so the argument runs, to single out the father of illegitimate children for this burden, because he alone among biological parents is frequently unknown and unavailable; to require him to come forward and seek adoption is merely a procedural device that requires him to acknowledge paternity and subject himself to the duties of parenthood as well as its rights. That argument might will be persuasive if Illinois law placed only a routine administrative step between the father and his parental

[1] It cannot seriously be argued that petitioner's claim is barred by his failure to petition for adoption, since he challenges here precisely the fact that he must pursue that course while no other parent must do so.

TM draft

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–5014

Peter Stanley, Sr., Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[February —, 1972]

MR. JUSTICE MARSHALL, concurring.

I concur in the judgment of the Court, because I am convinced that the Illinois statutory scheme before us denies to the fathers of illegitimate children the equal protection of the laws.

I

It is suggested that petitioner's deprivation is *de minimis,* because the law of Illinois permits him to petition for adoption of the children, and thereby acquire the legal status that he seeks.[1] It is reasonable, so the argument runs, to single out the father of illegitimate children for this burden, because he alone among biological parents is frequently unknown and unavailable; to require him to come forward and seek adoption is merely a procedural device that requires him to acknowledge paternity and subject himself to the duties of parenthood as well as its rights. That argument might well be persuasive if Illinois law placed between the father and his parental rights and responsibilities a procedural step designed merely to establish the fact

[1] It cannot seriously be argued that petitioner's claim is not ripe because of his failure to petition for adoption, since he challenges here precisely the fact that he must pursue that course while no other parent must do so.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 7, 1972

Re: No. 70-5014 - Stanley v. Illinois

Dear Byron:

In view of your recirculation of February 3 I have decided to withdraw my concurring opinion and to join your opinion in toto.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 2, 1971

Re: No. 70-5014 - Stanley v. Illinois

Dear Bill:

Subject to what Thurgood may have to say, please join me in your proposed Per Curiam.

Sincerely,

HAB.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 18, 1971

Re: No. 70-5014 - Stanley v. Illinois

Dear Byron:

I am assuming that you will be converting your dissent circulation of November 8 into a majority opinion. This is just to let you know that I shall probably join you now in a vote for reversal.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 19, 1971

Re: No. 70-5014 - Stanley v. Illinois

Dear Byron:

Please join me in your circulation of November 18.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

March 13, 1972

Re: No. 70-5014 - Stanley v. Illinois

Dear Byron:

As you can see from the enclosure, I am slipping away from you in this case. This has been a difficult one for me. I fell off at footnote 9 and am now not convinced that due process can be brought into the case.

Sincerely,

HAB

Mr. Justice White

March 13, 1972

Re: No. 70-5014 - Stanley v. Illinois

Dear Chief:

This case proved to be a difficult one for me, but I am now persuaded by your dissent. I fell off the wagon, so far as the Court's opinion is concerned, with its footnote 9 in the circulation of March 8. That footnote presents, for me, a bootstrapping argument to bring due process into the case. Due process may lurk in the background, but certainly the Illinois courts are entitled to the first crack at it.

The following are mere passing impressions, and I submit them to you for what they may be worth:

1. The opinion of the Illinois Supreme Court issued with a unanimous vote. Should this be mentioned? I make this suggestion only because some of the Brethren feel that Walter Schaefer is never wrong.

2. Mr. and Mrs. Ness, who were appointed guardians of Stanley's two children, were not a married couple that the State or the social welfare agency dug up. They were Stanley's own selection. He testified, Appendix 22, that he "brought them into the home of Mr. and Mrs. Ness." You mention this fact on page 10 of your March 7 recirculation. In an earlier draft you mention it on the very first page. I personally think it is a fact of some importance and tends to nullify the Court's inference of coldness when it says, page 1, that the children were "placed with court-appointed guardians."

3. I miss the "hit and run" reference. I thought it was a good one for use in the context of this case.

Sincerely,

HAB

The Chief Justice

B M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1972

Re: No. 70-5014 - Stanley v. Illinois

Dear Chief:

Please join me in the dissent you have recirculated in this case on March 13.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference